

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 39173-2-II
Cowlitz Co. Cause NO. 08-1-01130-2

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

STATE OF WASHINGTON,

Respondent,

v.

ZACHARIAH EUGENE GARRISON,

Appellant.

BRIEF OF RESPONDENT

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I. PROCEDURAL HISTORY

The appellant was charged by information with burglary in the first degree, attempted residential burglary, felony harassment, and assault in the fourth degree. These crimes were all alleged to be domestic violence. The appellant proceeded to jury trial on December 17, 2008 before the Honorable Judge James Warne. A mistrial was declared at the appellant's request after the 2008 snow storm forced the closure of the Cowlitz County Superior Court. On February 10, 2009, the appellant's second trial commenced. The next day, the jury returned guilty verdicts for the charges of burglary in the first degree, assault in the fourth degree, and felony harassment. The appellant was acquitted of attempted residential burglary. The appellant was subsequently sentenced to one-hundred and eleven months in prison, twenty four months of this sentence representing a deadly weapon enhancement. The instant appeal timely followed.

II. STATEMENT OF THE CASE

In general, the State agrees with the statement of the case provided by the appellant. Where appropriate, the State cites to further pertinent facts in the record.

III. ISSUES PRESENTED

1. Did the Trial Court Abuse Its Discretion by Admitting the Former Testimony of Jesse Guizzotti?

2. Was the Appellant's Conviction for Felony Harassment Unsupported by Substantial Evidence?
3. Did the State Engage in Prosecutorial Misconduct That Prejudiced the Appellant's Right to a Fair Trial?
4. Do Sentencing Enhancements Under RCW 9.94A.533 Violate Double Jeopardy?

IV. SHORT ANSWERS

1. No.
2. No.
3. No.
4. No.

V. ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion by Admitting Ms. Guizzotti's Prior Testimony.

The appellant argues the trial court abused its discretion by admitting the testimony Ms. Guizzotti gave in the first trial, which was aborted due to inclement weather. Ms. Guizzotti could not be located for the second trial, despite reasonable efforts to locate her. The trial court carefully weighed the matter and decided that Ms. Guizzotti was in fact unavailable to testify. This was an appropriate exercise of discretion by the trial court and the appellant's arguments otherwise are unavailing.

On appeal, this Court reviews the admission of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d

1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001).

Under ER 804(b)(1), former testimony of a witness may be admitted into evidence if the witness is "unavailable" to testify. A witness is "unavailable" if the witness is absent and the proponent of the statement has been unable to procure the person's attendance by process or other reasonable means. The appellant alleges that the State failed to use reasonable means to secure Ms. Guizzotti for the second trial.

In State v. DeSantiago, 149 Wn.2d 402, 68 P.3d 1065 (2003), the Supreme Court addressed the question of what constituted "reasonable means" to locate witness. There, three witnesses testified against the defendant in a trial that ended with a hung jury. Prior to the second trial, the three witnesses could not be located by the State. The witnesses' family stated they had moved to Mexico, but refused to reveal their location. 149 Wn.2d at 408-409. The defendant argued on appeal that the State should have attempted to personally serve the witnesses with subpoenas and should have used the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, chapter 10.55 RCW, to compel their attendance. The Supreme Court rejected this argument, finding these efforts would have been pointless

because the State was unaware of the witnesses' location. The court instead found the prior testimony had been properly admitted. Id. at 412-413.

In State v. Hobson, 61 Wn.App. 330, 810 P.2d 70 (1991), the trial court admitted a videotaped deposition of witness who, despite being served with a subpoena, failed to appear at trial because he had left town for a hunting trip. The defendant argued on appeal that the State did not use reasonable means to secure the witness for trial because had not obtained a material witness warrant. This argument was rejected by the court, which found that there was no black letter rule requiring the State to seek a warrant for a witness in order to admit prior testimony. 61 Wn.App. at 338.

In State v. Davis, 116 Wn.App. 81, 64 P.3d 661 (2003), the court addressed the issue of whether the State had used reasonable means to find a witness to determine if the defense was entitled to a missing witness instruction. The defendant argued the State failed to use reasonable means because it had not obtained a warrant to arrest the witness. However, the State had no way to locate or contact the witness, and the court found that obtaining a warrant would have been futile. 116 Wn.App. at 89-90.

Here, Ms. Guizzotti was served with a subpoena but failed to appear at the first trial. She was then arrested as a material witness and

brought to court. After the first trial, Ms. Guizzotti moved from the address the State had previously been able to find her at. Also, the State contacted friends and family members of Ms. Guizzotti, but was not able to obtain an address or location for her. RP 8, 23-28.

After hearing testimony from the police officer who had attempted to locate Ms. Guizzotti, and the representations of the prosecutor who had made similar attempts, the trial court ruled as follows:

Okay. Ms. Guizzotti did not respond to a subpoena last time. She didn't show up. The Court issued a warrant and we knew where she was and we went and got her. And, she testified. She was excused. The testimony was done. And, then we had a mistrial.

So, she came, she testified and then left. We got a new trial date and about three weeks prior to trial subpoenas were issued. Officer Conner went to apparently her last known address. She wasn't there. Prosecutor made some efforts to contact her. She had been evicted. No forwarding address. The prosecutor made some efforts to contact her through relatives. They have been successful before. He was unable to. Officer Conner again today made some efforts to find her through relatives. The State issues the subpoena. They try and get the subpoena served. They can't find her. They try and round up the usual suspects, check the usual places. They can't find her. And, they don't ask for a bench warrant. They made reasonable inquiry. They made reasonable inquiry to find her. Does the failure to ask for a bench warrant indicate a lack of proper diligence?

I don't think so where there is no indication that they know where she might be and you are going to put a warrant into the system. We have thousands of warrants in the system and unless there is some reasonable basis on which to follow up on them they just sit there and you hope they are going to get served someday when there is a traffic stop. That's how most of them get served. Is

the failure to do that two weeks before trial a lack of due diligence when they really don't have much prospect she is going to be found? I don't think so. I think it addresses the issue, State v. Hobson. Well, the State must obtain a material witness warrant. I don't know if they must. If they knew where she was, I would say they must. But, not knowing where – where she is I think it then becomes discretionary. It is not an abuse of discretion not to when they don't know where she is and they have made their efforts to find her.

So, I'm going to find that she is unavailable. And, the State has used reasonably available means to locate her. So, her former testimony will be admissible.

RP 32-34.

It is apparent from this record that the learned trial judge carefully weighed the issue before him, ruling that the State was not required to make futile or pointless efforts to secure a witness for trial. This decision is supported by Desantiago and Hobbs, as well as common sense. It cannot be said the trial judge's decision was "manifestly unreasonable or based on untenable grounds" as would be required for reversal. See Neal, 144 Wn.2d at 609.

The question before this Court is not whether it would make the same decision as the trial judge, but whether the trial judge's decision is so blatantly unreasonable and irrational that it cannot be upheld. As the record does not bear out the appellant's argument, the Court should find the trial court did not abuse its discretion by admitting Ms. Guizzotti's prior testimony.

II. There Was Sufficient Evidence to Support the Appellant's Conviction for Felony Harassment.

The appellant argues the State failed to present sufficient evidence to support a conviction for felony harassment, arguing the evidence was only sufficient to support the crime of misdemeanor harassment. See State v. G.C., 150 Wn.2d 604, 80 P.3d 594 (2003). However, as will be seen, the appellant has omitted certain key facts from his recitation to the Court.

The appellant argues that the following exchange was the sole testimony on the issue of whether Ms. Guizzotti believed the appellant's threat to kill:

STATE: Jesse, did you believe that he would kill you?

MS. GUIZZOTTI: Maybe not kill me, but I sure believed that he would hurt me after that. He'd never acted like he could hurt me at all and he said he wouldn't.

RP 74. While this testimony may initially appear problematic for the State, this is only because the appellant has removed this statement from its context in a larger colloquy. Specifically, Ms. Guizzotti testified that:

STATE: Okay. Now Jesse, when he threatened to kill you did you believe he would do that?

MS. GUIZZOTTI: At that point, I believed anything he said that was bad.

JUROR: I'm sorry. I can't hear her.

STATE: I'm sorry. Did you believe he would kill you, Jesse?

JUDGE WARME: Hold on just a minute. Can you move the chair forward? I think that – okay. Thank you.

STATE: Jessee, did you believe that he would kill you?

MS. GUIZZOTTI: Maybe not kill me, but I sure believed that he would hurt me after that. He'd never acted like he could hurt me at all and he said he wouldn't.

STATE: Did you just say that you believed any – before that did you say that you believed anything he would say at that point?

MS. GUIZZOTTI: Before that point I didn't think that he would ever lay a hand on me but after the living room incident, I believed everything he said.

STATE: You believed he would do what he said?

MS. GUIZZOTTI: (witness nods.)

RP 73-74. From this exchange, it is apparent that Ms. Guizzotti initially did not believe the appellant's threats, but that this changed after he picked her up and threw her to the floor in the "living room incident." RP 55-57, 59-60. After that point, Ms. Guizzotti's testimony was that she believed all of his threats.

To the extent her testimony may have been equivocal, the jury was free to find she believed the appellant would kill her, or merely that she believed he would hurt her. However, the jury, through its verdict, clearly found that Ms. Guizzotti believed the appellant would carry out his threats to kill her. Such credibility determinations are the exclusive province of the jury, and are not subject to review on appeal. State v. Camarillo, 115

Wn.2d 60, 71, 794 P.2d 850 (1990). As there was sufficient evidence to support the appellant's conviction, the Court should deny this claim.

III. The State Did Not Engage in Prosecutorial Misconduct That Prejudiced the Appellant's Right to a Fair Trial.

The appellant claims that the State engaged in prosecutorial misconduct by allegedly (1) arguing he had a propensity to commit the crimes charged and (2) commenting on his right to remain silent. When the full record is reviewed, it is apparent that the State did not commit any misconduct at all in this case. Moreover, even if the Court should find there was misconduct, the appellant failed to preserve this issue for appeal.

a. The State Did Not Argue the Jury Should Convict Based On Propensity Evidence.

In closing, the deputy prosecutor made the following argument to the jury:

Now, what is that when you say I want to kill you and you burst into somebody's home and you are waving a knife in their face? Is that a threat? Is a reasonable person going to think that is a threat? Of course. Somebody does that, you better believe they are serious because they are in your house. They've got a knife. And, what do you know about them? Well, what does – does Jesse say, "well this is just some guy." Is he a Boy Scout? Well, that's not what he has told Ms. Guizzotti. He has Ms. Guizzotti that he has had these 26 felonies, these 13 misdemeanors. He showed her the statements that the other girlfriends had written. The ones that apparently wrote statements to the police before. And, what does he tell her about those other girls? You know what? These are the girls that snitched on me. They ratted me out to the cops and they got what was theirs. Are we seeing a pattern – seeing a pattern here? *What does he call Roskoe Rye when he comes back? "You're*

a cop caller.” You are – lots of unpleasant word. You are a cop caller. You snitched me out, too. You ratted me out.

RP 211.¹ The appellant argues this argument was an attempt by the prosecutor to convince the jury to find the appellant guilty based on his propensity to commit similar acts. However, this argument loses whatever validity it may have once possessed when the final six italicized sentences are considered. The State is allowed to argue that prior misdeeds support a victim’s reasonable fear in an assault or harassment case, making the first part of the argument completely acceptable. State v. Magers, 142 Wn.2d 174, 181-184, 189 P.3d 126 (2008). Also, in the full context, the “seeing a pattern” comment is clearly a segue into the fact the appellant referred to Roskoe Rye as a “cop caller” soon after the incident. While the prosecutor’s choice of words may have been inartful, this is not grounds for a new trial. Instead, the comment at issue is, at best for the appellant, ambiguous. The appellant has therefore failed to meet his burden of showing the State’s conduct was improper. See State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997).

¹ The appellant conspicuously failed to include the italicized portion of the State’s argument in his quotation from the record.

b. The State Did Not Comment on the Appellant's Right to Remain Silent.

The appellant next argues that the State commented on his right to remain silent by stating there was “no explanation” for the threatening text messages he sent to Ms. Guizzotti. Again, when the full context of this statement is considered, it becomes apparent there was no misconduct. Given this, this Court should reject this claim.

In the State's initial closing, the prosecutor referred to the threatening text messages, stating:

When you see the text messages that we heard from Deputy Shelton about, what's the explanation for these? Is this just how – what other explanation is there other than it confirms what Jessee has told us? It confirms what he has done?

RP 215. The appellant's trial counsel then argued in his closing that the jury should acquit because Ms. Guizzotti's claims were uncorroborated and she was a jealous ex-girlfriend. RP 217-226. Notably, trial counsel made no mention of the text messages. *Id.* In response to this, the prosecutor pointed out in rebuttal several pieces of evidence that did in fact corroborate Ms. Guizzotti's testimony, including the text messages. Specifically, the prosecutor argued:

When I first – in my first closing I said, there's no explanation for those. There is no good explanation for the text messages. Well, we never heard one. We never heard an explanation for the text

messages. And, that's because, as I said, there is no good explanation. Text messages are pretty damning.... Well, what they do is they corroborate [her testimony].

RP 227-228. The appellant claims this was a comment on his right to remain silent. In truth, this was a comment upon the fact his trial counsel had ignored a key and powerful piece of evidence.

It has long been the law that a prosecutor does not comment upon a defendant's right to remain silent by pointing out that certain evidence is undisputed. See State v. Ramirez, 49 Wn.App. 332, 336, 742 P.2d 726 (1987), citing State v. Ashby, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969); State v. Litzenberger, 140 Wn. 308, 311, 248 P. 799 (1926). In State v. Crawford, 21 Wn.App. 146, 152, 582 P.2d 442 (1978), the court held it was not misconduct for the prosecutor to observe that facts were not disputed, as such a statement did not "naturally and necessarily emphasize the defendant's testimonial silence." Most recently, this Court has held that a prosecutor does not comment on the right to remain silent by arguing "there was no real contradiction" of the State's evidence. State v. Morris, 150 Wn.App. 927, 930-932, 210 P.3d 1025 (2009).

Given this unbroken line of cases, the prosecutor's argument here that defense counsel has not addressed certain portions of the State's case does not amount to a comment on the right to remain silent. Instead, this argument was a rhetorical device meant to highlight the fact trial counsel

had chosen to overlook a particularly troublesome piece of evidence against his client. The Court should find the prosecutor's argument in the instant case was not misconduct.

c. If There Was Prosecutorial Misconduct, the Appellant Waived the Issue or the Misconduct Was Harmless.

Even if the Court should find the arguments improper, the appellant, by failing to object at trial, has waived this issue on appeal. A party may not "remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal." State v. Bebb, 44 Wn.App. 803, 806, 723 P.2d 512 (1986); see also Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) ("If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.") As there was no objection during the arguments, the appellant may not belatedly seize upon these claims to overturn the jury's verdict.

The appellant may argue that the statements at issue are so "flagrant and ill-intentioned" that no objection is necessary to preserve the claim for appeal. State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). However, the alleged misconduct at issue here is far from flagrant or ill-

intentioned, as it is comprised at best of ambiguous or impliedly improper remarks. Indeed, trial counsel's failure to object contemporaneously is the best evidence that these remarks were not truly offensive.

Similarly, where a defendant does moves for mistrial on the basis of alleged prosecutorial misconduct, an appellate court gives deference to the trial court's ruling on the matter. The Supreme Court has held that “[t]he trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial.” State v. Lord, 127 Wn.2d 117 Wn.2d 829, 887, 822 P.2d 177 (1991). Here, the appellant moved to dismiss or for a new trial, alleging the same misconduct complained of now. RP 239-240. The learned trial judge rejected this claim, and the Court should give great weight to this finding. RP 243.

Furthermore, even where there is prosecutorial misconduct, the appellant must still prove he was prejudiced. State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997). A recent Supreme Court case addressing prosecutorial misconduct, Warren, 165 Wn.2d 17, found outrageously improper remarks were harmless. There, the prosecutor's misconduct was to claim that the jury should not “give the defendant the benefit of the doubt.” While it is difficult to imagine a more blatant misrepresentation of the burden of proof, the Supreme Court found this remark was ultimately

harmless. Id. at 27-28; see also State v. Kroll, 87 Wn.2d 829, 558 P.2d 173 (1976) (Prosecutor's remark that if the jury acquitted the defendant of murder they should be ready to give a reason to the mother of the next girl dated by the defendant, while improper, was harmless.)

Here the misconduct the appellant alleges is at best implied and subtle. The evidence was strong, in particular the text messages and Ms. Rye's testimony. Also, the jury was instructed that the defendant was not required to testify, and that his choice not to testify could not be used to infer guilt or prejudice him. RP 195. The jury was also instructed that evidence of prior bad acts had been admitted for a limited purpose and should not be used to find the appellant had a propensity to commit the crimes charged. RP 199. The jury is presumed to follow these instructions, and the appellant offers nothing to overcome this presumption. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001); see also Morris, 150 Wn.App. at 932.

Given this record, if there was misconduct, it did not influence the jury's verdict. This conclusion becomes inescapable when it is remembered that the jury did not convict across the board, but instead acquitted on one felony count. It is clear the jury weighed the evidence carefully, and was not swept away by the prosecutor's purported

misconduct. The Court should find that, even if there was misconduct, it was harmless.

IV. Imposition of a Sentencing Enhancement Did Not Violate Double Jeopardy.

The appellant argues that the trial court violated double jeopardy by imposing a deadly weapon enhancement under RCW 9.94A.533. This enhancement added an additional twenty-four months onto the standard range for the burglary in the first degree conviction. However, the appellant's claim is contrary to long established case-law and should be rejected as without merit.

The appellant concedes that this issue has been decided against him previously. This admission is a wise one, as this argument has been perennially urged upon the appellate courts with no success. See State v. Claborn, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981); State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984); State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988); State v. Nguyen, 134 Wn.App. 863, 866, 142 P.3d 1117 (2006); State v. Tessema, 139 Wn.App. 483, 493, 162 P.3d 420 (2007); State v. Kelley, 146 Wn.App. 370, 189 P.3d 853 (2008); State v. Simms, 151 Wn.App. 677, 214 P.3d 919 (2009).

The appellant urges this Court to preemptively overrule these well established cases, based on an assumption that the Supreme Court may

decide this issue in his favor in a separate proceeding. Yet, *stare decisis* requires prior precedent be honored. As stated by the Supreme Court “once we have decided an issue of state law, that interpretation is binding until we overrule it.” In re LaChappelle, 153 Wn.2d 1, 5, 100 P.3d 805 (2004). As the Supreme Court decided this issue in any number of prior cases, this Court is bound by those decisions. This Court should find that the imposition of a deadly weapon enhancement in this case did not violate double jeopardy.

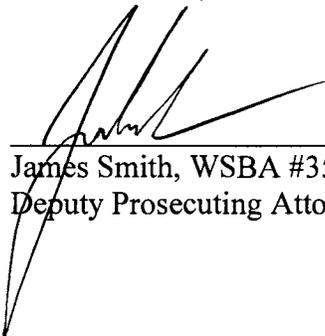
VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court deny the instant appeal. The issues asserted by the appellant are not well founded in either the record or the law. The appellant’s convictions should stand.

Respectfully submitted this 29th day of December, 2009.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
Respondent,)
v.) NO. 39173-2-II
) 08-1-01130-2
ZACHARIAH EUGENE GARRISON,) AFFIDAVIT OF MAILING
)
Appellant.)

MICHELLE SASSER, being first duly sworn, on oath deposes and says: That on December 30, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

JOHN A. HAYS
ATTORNEY AT LAW
1402 BROADWAY
LONGVIEW, WA 98632

CLERK, COURT OF APPEALS
950 BROADWAY, SUITE 300
TACOMA, WA 98402

10 JUN 4 2015
STATE OF WASHINGTON
BY: [Signature]
CLERK

each envelope containing a copy of the following documents:

- 1. BRIEF OF RESPONDENT
- 2. Affidavit of Mailing.

Michelle Sasser

SUBSCRIBED AND SWORN to before me this December 30 2009.

Julie J. DeSpain
Notary Public in and for the State
of Washington residing in Cowlitz
Co. My commission expires: 10-7-13

