

No. 47246-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

vs.

ADAM RAMBUR,

Appellant/Cross-Respondent.

Appeal from the Superior Court of Washington for Lewis County

Respondent/Cross-Appellant's Brief

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to find that Rambur's current Assault in the Fourth Degree – Domestic Violence conviction counted as one point when calculating Rambur's offender score for Count II: Unlawful Imprisonment.
2. The trial court erred when it found Rambur's offender score was one for Count II: Unlawful Imprisonment.

II. ISSUES

- A. Did the trial court err when it refused to allow Rambur's trial counsel to elicit Rambur's statements he made to law enforcement through testimony of one of the deputies?
- B. Did Rambur receive effective assistance from his trial counsel when his attorney failed to endorse a claim of self-defense on the Unlawful Imprisonment charge?
- C. Did the prosecutor commit prosecutorial error in her rebuttal closing by expressing her personal opinion as to the credibility of a witness and thereby denied Rambur the right to a fair trial?
- D. Did the trial court erroneously impose legal financial obligations on Rambur without first assessing his ability to pay?
- E. Did the trial court err when it calculated Rambur's offender score for Count II: Unlawful Imprisonment?

III. STATEMENT OF THE CASE

Sara Cypher and Adam Rambur were in a dating relationship for approximately a year and a half and lived together in Lewis County, Washington. RP 55-57. On September 7, 2014

there was incident that occurred at Ms. Cypher's and Rambur's residence that caused Ms. Cypher to call 911. RP 57; Ex. 8, 10. Ms. Cypher called 911 to report that Rambur had hurt her, threatened to kill her, then left the house on foot and walked into the woods. Ex. 8, 10 (page 1). When Ms. Cypher began speaking to the 911 operator she sounded upset, as if she had been crying, and fearful. Ex. 8. Ms. Cypher told the 911 operator that she has locked the doors. Ex. 8; 10 (page 1). Ms. Cypher told the 911 operator Rambur said he was going to come out of the woods in the night and hit her in the head with a hammer. Ex. 8, 10 (page 2). Ms. Cypher explained she and Rambur had been fighting for three hours, he had choked her and he broke her phone. Ex. 8, 10 (page 5). Ms. Cypher said Rambur hit her in the face. *Id.* Ms. Cypher states Rambur threatened to hurt her dog and that she could not breathe. Ex. 8, 10 (page 6). Ms. Cypher also told the 911 operator there were bruises all over her arms and chest from Rambur's hands. Ex. 8, 10 (page 5-6).

Lewis County Sheriff's Deputy Sue Shannon was the first officer to arrive on the scene but she waited for back up to arrive before contacting Ms. Cypher due to the nature of the call. RP 145-47. Deputy Humphrey arrived on the scene approximately a half

hour later. RP 147. Deputy Humphrey went to the house to contact Ms. Cypher while Deputy Shannon went to the edge of the woods and called out loudly for Rambur to come out. RP 147. Deputy Shannon received no response from Rambur. RP 147.

Deputy Humphrey and Deputy Shannon spoke to Ms. Cypher on her front porch. RP 147. Ms. Cypher appeared frantic and scared, her hands were shaking, she was talking quickly, she wanted to go back into the house where she felt safe and she looked as though she had been crying. RP 148, 165. According to Deputy Shannon, Ms. Cypher told her,

[T]hat she and Adam, her boyfriend, had been in a verbal altercation for approximately three hours, and that ended with Adam getting on top of her, pinning her down with his knees, grabbing her forearms and wrists, pinning those over her forehead. She stated she had been slapped across the face, and then at one point Adam leaned forward with his forearm, placing the forearm on the throat, restricting her airway.

RP 155.

Deputy Humphrey saw bruises on Ms. Cypher's upper arms, some fingerprint marks and redness around her forearms and wrists. RP 168. Deputy Shannon also saw, what she believed to be from her training and experience, fingerprint marks or finger pressure marks around Ms. Cypher's forearms and wrists. RP 149.

Deputy Shannon did not observe any marks on Ms. Cypher's face or neck. RP 149. Ms. Cypher also related that Rambur threatened to come out of the woods at night and hit her with a hammer and threatened to hurt her dog. RP 155-56. Ms. Cypher indicated she wanted Rambur removed from the residence. RP 168. Ms. Cypher refused to give the deputies a taped statement or let them take any photographs of her injuries. RP 156.

The deputies called a K-9 unit and when it arrived, the dog began to bark excitedly. RP 157. At that time, Deputy Shannon heard a voice and saw a man walk out of the woods in pajama bottoms. RP 157. The man identified himself as Rambur, he cooperated with deputies, and after being read his rights gave a statement. RP 158.

According to Deputy Shannon, Rambur concurred with everything Ms. Cypher had related to the deputies with the exception of the choking, threatening to kill or face slapping. RP 158. Rambur explained that he and Ms. Cypher were having a dispute, he had put Ms. Cypher on the ground, sat on top of her with his knees on her shoulders and he grabbed her forearms and wrists and held them over Ms. Cypher's head. RP 158. Rambur

explained to Deputy Shannon that he did this because Ms. Cypher was threatening to throw, break and burn items. RP 159.

On September 8, 2014 the State charged Rambur with Count I: Unlawful Imprisonment – Domestic Violence, Count II: Harassment – Threat to Kill – Domestic Violence, and Count III: Assault in the Fourth Degree – Domestic Violence. CP 1-4. On November 6, 2014 and November 11, 2014 Rambur failed to appear for scheduled court hearings and a bench warrant was issued for his arrest. CP 13-15. The State filed a third amended information prior to trial charging, Count I: Assault in the Second Degree – Domestic Violence, Count II: Unlawful Imprisonment – Domestic Violence, Count III: Harassment – Threat to Kill – Domestic Violence, and Count IV: Bail Jumping. CP 32-34.

Rambur elected to have his case tried to a jury. See RP. The morning of trial Rambur's trial counsel argued a motion in limine to redact portions of the 911 call. RP 9-26; CP 53-72. The trial court ruled that several redactions would be made. RP 9-26.

Prior to testimony commencing the State informed the trial court that it had provided Rambur's trial counsel a copy of the redacted transcript of the 911 call in accordance to the trial court's pretrial rulings. RP 42. The State was seeking permission to

provide the jurors copies of the transcript for illustrative purposes while the 911 recording was played. RP 42. Rambur's counsel objected. RP 42. The objection was ultimately overruled. RP 54.

Ms. Cypher's testimony at trial was markedly different than her statements to the 911 operator and her statements to the deputies the night of the incident. See RP 62-69, 93-117, 155-56, 166; Ex. 8, 10. Ms. Cypher testified that she had falsely told the 911 operator that Rambur threatened to kill her because she thought the police would make him leave. RP 99. Ms. Cypher denied telling the deputies that Rambur had choked her, threatened to kill her, or slapped her. RP 94-95. Ms. Cypher denied that Rambur had assaulted her. RP 100. Ms. Cypher explained that she could not breathe because she was crying and panicking, not because Rambur had been choking her. RP 102. Ms. Cypher further stated that Rambur had not been hurting her, but calming her down, because she was out of control, breaking things, walking on broken glass and he did not want her to get hurt. RP 102-03. Ms. Cypher also apparently wrote a letter to the court, but never sent it, apologizing for lying and making false allegations against Rambur. RP 117; Ex. 12.

Rambur was found guilty of the lesser included crime of Assault in the Fourth Degree, Count II: Unlawful Imprisonment, and Count IV: Bail Jumping. CP 154-56, 158. Rambur was found not guilty of Count III: Harassment – Threat to Kill. CP 157. On Counts I and II the jury found the special allegation that Rambur and Ms. Cypher were members of the same family or household. CP 160-61.

At the sentencing hearing the State argued that Rambur's current Assault in the Fourth Degree conviction should count as a point for scoring purposes in his offender score of his Unlawful Imprisonment count because it was a repetitive domestic violence offense. RP 269-70. The trial court rejected the State's argument and found the Assault in the Fourth Degree did not count as a point towards the offender score. RP 277-78. Rambur was sentenced to five months. RP 278; CP 168. Rambur timely appeals his conviction. CP 8. The State timely cross-appeals the calculation of the offender score. Supp. CP Notice of Cross-Appeal.¹

The State will supplement the facts as necessary throughout its argument below.

¹ The State will be filing a supplemental designation of Clerk's papers to include its Notice of Cross-Appeal.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT LIMITED RAMBUR'S TRIAL COUNSEL'S CROSS-EXAMINATION OF DEPUTY SHANNON.

Rambur argues the trial court erred by limiting his cross-examination of Deputy Shannon when he was attempting to elicit statements he had made to Deputy Shannon. Brief of Appellant 14-20. Rambur asserts the trial court erred in the following ways, (1) by failing to recognize the question was not hearsay because it was proper impeachment of a prior inconsistent statement, and (2) that while hearsay, the statement Rambur sought to admit was admissible under the completeness doctrine. *Id.* The trial court did not abuse its discretion when it ruled Rambur's hearsay statements were not admissible through Deputy Shannon's testimony.

1. Standard Of Review.

A trial court's ruling regarding the scope of cross-examination will not be reversed absent a manifest abuse of discretion. *State v. McDaniel*, 83 Wn. App. 179, 184, 920 P.2d 1218 (1996) (citation omitted). This court reviews alleged violations of the confrontation clause de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citations omitted).

2. Rambur's Attempt To Elicit His Own Statements Through Deputy Shannon's Testimony Was Not Proper Impeachment With A Prior Inconsistent Statement.

The Fourteenth Amendment to the United States Constitution guarantees that the State will not deprive a person of their liberty without due process of law. The Fourteenth Amendment guarantees that a person accused of a crime has the right to a fair trial. *State v. Statler*, 160 Wn. App. 622, 637, 248 P.3d 165 (2011), *review denied*, 172 Wn.2d 1002 (2011), *citing State v. Davis*, 141 Wn.2d 798, 824–25, 10 P.3d 977 (2000). “[T]he right to due process provides heightened protection against government interference with certain fundamental rights.” *Id.* (citations and internal quotations omitted). To satisfy the right to a fair trial, the trial court is not required to ensure the defendant has a perfect trial. *Id.*, *citing In re Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

The due process right, in its essence, is the right for a criminal defendant to have a fair opportunity to defend him or herself against the State's accusations. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *citing Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973) (quotations omitted). A defendant is guaranteed the right to confront and cross-examine witnesses who testify against him or her and the right to

compel a witness to testify. U.S. Const. amend. VI. “A defendant’s right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence.” *Jones*, 168 Wn.2d at 720. Unlike other rights guaranteed under the Sixth Amendment, the Compulsory Process Clause requires an affirmative act by a defendant and is not automatically set into play by the initiation of an adversarial process. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). “The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct. *Taylor v. Illinois*, 484 U.S. at 410.

A defendant does not have an absolute right to present evidence. *Jones*, 168 Wn.2d at 720. Without adherence to the rules of evidence and other procedural limitations the adversary process would not function effectively because it is imperative that each party be given a fair opportunity, within the rules, “to assemble and submit evidence to contradict or explain the opponent’s case.” *Taylor v. Illinois*, 484 U.S. at 410-11.

A person accused of a crime has the right to confront and cross-examine his or her accuser. U.S. Const. amend VI; U.S. Const. amend XIV; Const. art. I § 22. A defendant, however, does

not have an absolute right to unlimited cross-examination. *State v. Darden*, 145 Wn.2d 616, 620, 41 P.3d 1189 (2002). It is within the sound discretion of the trial court to make determinations that limit the scope of cross-examination, particularly if the sought after evidence is speculative, vague or argumentative. *Id.* at 620-621. Cross-examination is also limited to relevant evidence. *Id.* at 621, *citing* ER 401; ER 403; *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

"The credibility of a witness may be attacked by any party, including the party calling the witness." ER 607. "In general, a witness's prior statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony." *State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999). "[A] witness's in-court testimony need not directly contradict the witness's prior statement." *Id.* at 294, *citing* 5A Karl B. Tegland, *Washington Practice, Evidence Section 256*, at 307 (3rd ed. 1989).

Rather, inconsistency is to be determined, not by individual words or phrases alone, but the whole impression or effect of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the expressions appear to have been produced by inconsistent beliefs?

Id., quoting *Sterling v. Radford*, 126 Wn. 372, 218 P. 205 (1923) (quoting 2 Wigmore on Evidence, sec. 1040, p. 1208).

To be received as a prior inconsistent statement, the contradiction need not be in explicit terms. It is enough if the "proffered testimony, taken as a whole, either by what it says or by what it omits to say" affords some indication that the fact was different from the testimony of the witness whom it sought to contradict. *Id.*

"[T]he purpose of using prior inconsistent testimony to impeach is to allow an adverse party to show that the witness tells different stories at different times" and "[f]rom this, the jury may disbelieve the witness's trial testimony." *Id.* at 293. A jury is better able to determine the weight and value to give a witness's trial testimony "if it knows that the witness expressed contrary views while the event was still fresh in the witness's memory and before the passage of time created opportunities for outside influence to distort the statement." *Id.* at 295. The prior inconsistent statement, used in this matter, to cast doubt on a witness's credibility is not hearsay because it is not being offered to prove the matter asserted. *State v. Williams*, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995).

"If a witness does not testify at trial about the incident, whether from lack of memory or another reason, there is no

testimony to impeach," but "even if a witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable remains compelling." *Newbern*, 95 Wn. App. at 293 (internal citations omitted).

Rambur argues that Deputy Shannon's written statement was at odds with her testimony that was elicited by the State and therefore, "the trial court erred when it sustained the state's hearsay exception." Brief of Appellant 17. Nowhere in the three page impeachment argument put forth by Rambur does he actually cite to the question asked by his trial counsel, the objection made by the State or the trial court's ruling. Brief of Appellant 15-17. Rambur only cites to the State's elicitation of testimony of Deputy Shannon. Brief of Appellant 16-17. Therefore, this Court should not entertain this argument without proper citation to the record. *State v. Manion*, 173 Wn. App. 610, 636, 295 P.3d 270 (2013).

If this Court were to entertain the argument, as Rambur does cite to a question by his counsel in the facts portion of his briefing, which the State raised a hearsay objection and the trial court sustained, the State will assume for the sake of argument this is the

exchange Rambur is discussing in this section of the briefing. See Brief of Appellant 10-11, citing RP 160-61.²

The State on direct examination asked Deputy Shannon what Mr. Rambur told her had occurred. RP 158-59. Deputy Shannon explained,

The gentleman came forward. He was identified as -- identified himself as Adam. He came over peaceably, came to the car. I detained him, which means putting the handcuffs on. There was no problem there. I read him Miranda from the card I carry in my pocket in front of Deputy Humphrey. When asked if he understood, he stated, "Yeah." And then I asked him what happened. He concurred with everything except for the choking, face slapping, or threats to kill.

Q. So basically he admitted to holding her down on her wrists, sitting on top of her?

A. Yes.

MR. BAUM: Objection. Leading.

THE COURT: I'll sustain that.

Q. Can you please clarify to what he agreed to then?

A. Mr. Adam Rambur stated that he was in a domestic dispute with Sara Cypher, that he had put her on the ground, that he was sitting on top of her with the knees on her shoulders, and that he had grabbed her forearms and wrists and held them over her head.

Q. Did he indicate whether they had been throwing anything?

² This citation is incorrect, this question and objection occurred on RP 159-60.

A. He said that Ms. Cypher was threatening to break items, throw items, and burn items.

Q. So she had been threatening to do that, but she hadn't quite done that yet?

A. Right. I asked him specifically, "Well, did she break anything?" And his response was, "No, she was just threatening to do so."

RP 158-59. Rambur's trial counsel opened his cross-examination of Deputy Shannon with the following question, "Deputy, in your report you indicate that Mr. Rambur stated that Ms. Cypher was acting crazy and he was just trying to keep her from attacking him?" RP 159. The State objected, citing hearsay, and the trial court sustained the objection. RP 159-60. Rambur's trial counsel did not attempt to persuade the trial court to allow him to elicit the testimony from Deputy Shannon, he simply moved on to the next question. RP 160.

Rambur never asserted to the trial court he was attempting to impeach Deputy Shannon with a prior inconsistent statement. RP 159-60. Rambur's trial counsel was attempting to get substantive evidence, his client's statements, into evidence, through the deputy, which is clearly hearsay. ER 801(c). If Rambur's trial counsel was truly trying to impeach Deputy Shannon, to show that there were inaccuracies, which the State is not conceding is the case, in her

testimony versus her written report, he would have said that to the trial court.

The purpose of impeachment is to show the jury that a person is changing their story, that perhaps they should not be believed. It is about credibility. The substance of the statement is actually immaterial because the prior statements are not admitted as substantive evidence. That is not what was occurring during Rambur's trial counsel's question of Deputy Shannon.

The trial court did not abuse its discretion when it sustained the State's hearsay objection to Rambur's attempt to elicit Rambur's statements via Deputy Shannon's testimony. This was a proper ruling and a proper limitation of cross-examination.

3. The Completeness Doctrine Does Not Apply To Oral Statements.

Rambur next attempts to argue that even if the hearsay objection was properly sustained Rambur's statements to Deputy Shannon were admissible under the complete doctrine recognized in ER 106. Brief of Appellant. RP 18-20. Rambur's argument fails for one simple reason, the completeness doctrine does not apply to non-recorded oral statement. ER 106; *State v. Perez*, 139 Wn. App. 522, 531, 161 P.3d 461 (2007).

The completeness doctrine provides that:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at the time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

ER 106. In *Perez* the defendant argued that the trial court should have admitted his hearsay statement, elicited by his attorney; that Perez told the officer that the victim had swung at Perez. *Perez*, 139 Wn. App. At 530-31. Perez argued this statement was admissible under the rule of completeness. *Id.* At 531. The court in *Perez* stated,

The State is correct that ER 106 is limited to a writing or recorded statement and does not apply to *Perez*. The rule of completeness does not require that Perez's statement to Officer Brand be admitted to the jury. Instead, ER 801 provides the proper framework.

Id.

Just as in *Perez*, Rambur's trial counsel was attempting to elicit oral statements Rambur gave to Deputy Shannon on the night of the incident. These type of statements do not fall under the completeness doctrine as they are not recorded or written. Rambur's argument fails, the statements were inadmissible hearsay and the trial court did not abuse its discretion when it

sustained the State's hearsay objection. This Court should affirm Rambur's convictions.

B. RAMBUR RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Rambur's attorney provided competent and effective legal counsel throughout the course of his representation. Rambur asserts his trial counsel was ineffective for failing to endorse a claim of self-defense on the charge of Unlawful Imprisonment. Brief of Appellant 20-24. Rambur's attorney was not ineffective in any of the areas of his representation of Rambur.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Rambur's Attorney Was Not Ineffective During His Representation Of Rambur Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Rambur must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Rambur claims his trial counsel was ineffective for failing to propose a self-defense instruction for the Unlawful Imprisonment

count only. Brief of Appellant 20-24. According to Rambur, his trial counsel's failure to seek such an instruction was deficient because the evidence, as testified by Ms. Cypher, supported the instruction, and he was prejudiced because there is a likelihood the jury would have acquitted him of the charge of Unlawful Imprisonment if the instruction had been given. Brief of Appellant 23-24. Rambur fails to cite to the record regarding his trial counsel's proposed jury instructions and the instruction conference in the argument portion of his briefing.³

Rambur's statement to Deputy Shannon was that Ms. Cypher had not broken any items in the house but was threatening to do so. RP 158-59. The State acknowledges that Ms. Cypher did testify that,

He wasn't hurting me. He was just trying to calm me down because he knew I was going to break more things, and I was going through the glass. But he was calm when he was on top of me when he was talking to me. He was telling me, 'Babe, calm down. You're going to get hurt. There's glass all over the hallway.' He wasn't, like yelling at me and calling me names.

RP 102-03. This testimony contradicted the statements Ms. Cypher gave to the 911 dispatcher and the deputies. RP 155, 169; Ex. 8, 10. Ms. Cypher also testified that she had broken things in the

³ The defense proposed jury instruction can be found at CP 73-89, the jury instructions were discussed at RP 182-201.

house. RP 63, 69. But Ms. Cypher also testified that Rambur also broke items in the home, such as throwing pottery at the floor and the walls. RP 62-63.

To prove Unlawful Imprisonment the State was required to prove that Rambur knowingly restrained Ms. Cypher. RCW 9A.40.040(1). "Restraining means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty. Restraint is 'without consent' if it is accomplished by (a) physical force, intimidation, or deception..." RCW 9A.40.010(6).

Rambur now argues that his counsel was deficient because he had legal authority to restrain Ms. Cypher's movements under the following three theories, (1) to protect Ms. Cypher from physical harm, (2) to protect himself from physical harm, and (3) to protect his property from physical damage. Brief of Appellant 23.

First, Rambur cites to no place in the record to support that Ms. Cypher was a threat to Rambur's person. See Brief of Appellant 23-24. Therefore, the theory that he restricted her movements to protect himself from physical harm should not be considered by this Court. *Manion*, 173 Wn. App. 610, 636, 295 P.3d 270 (2013).

Second, there was testimony that both parties were destroying property, therefore it is highly unlikely the trial court would accept a self-defense instruction based upon a claim of defense of property when Rambur was also destroying their mutual property.

Third, in regards of defense of others, presumably, Rambur is alleging that he was somehow holding Ms. Cypher down to protect her from self-harm. Again, Rambur does not cite to the record to support his position and this Court should not consider his argument. Arguendo, if this Court were to consider this argument, Rambur argues that he was entitled to the following self defense theory:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.020(3). Under this theory, Rambur is entitled to use force to protect a third party from an intentional act of force, such as

an assault. An offense is necessary under RCW 9A.16.020(3).⁴ The fact that Ms. Cypher may accidentally harm herself by walking on some broken glass does not meet the statutory requirement for a self-defense claim under RCW 9A.16.020(3). Therefore, Rambur's trial counsel was not deficient for failing to request such an instruction and his claim of ineffective assistance of counsel fails. This Court should affirm his convictions.

C. RAMBUR HAS NOT MET HIS BURDEN TO SHOW HE WAS PREJUDICED BY THE DEPUTY PROSECUTOR'S ERROR.

Rambur claims the deputy prosecutor committed prosecutorial error (misconduct)⁵ by expressing her personal belief

⁴ There is an exception for restraint of a mentally ill, mentally incompetent, or mentally disabled person to stop them committing a dangerous act, but Rambur does not argue this use of force exception found under RCW 9A.16.020(6).

⁵ "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf> (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. See, e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State

that Deputy Shannon's version of events was correct. Brief of Appellant 25-28. While the deputy prosecutor did make a comment, it was taken out of context, as her sentence was cut off by an objection, which was immediately sustained and the comment was struck. Any error that occurred is harmless.

1. Standard Of Review.

The standard for review of claims of prosecutorial error is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

2. Rambur Has Not Met His Burden To Show He Was Prejudiced By The Deputy Prosecutor's Error.

A claim of prosecutorial error is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by admonition to the jury." *State v. Thorgerson*, 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State*

will use the phrase "prosecutorial error." The State will be using this phrase and urges this Court to use the same phrase in its opinions.

v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted).

To prove prosecutorial error, it is the defendant's burden to show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), citing *State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011), citing *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007(1998).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156

Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

It is improper for a prosecutor to vouch for a witness. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Vouching occurs when a prosecutor supports a witness's testimony with facts not in evidence or when the prosecutor expresses their personal belief regarding the truthfulness of the witness. *Id.* (citations omitted). It is prosecutorial error "for a prosecutor to state a personal belief as to the credibility of a witness." *Id.*, *citing State v. Warren*, 165 Wn.2d, 17, 30, 195 P.3d 940 (2008).

The deputy prosecutor stated in her rebuttal closing:

Counsel said, "Well, see, all you have is Sara Cypher. That's all she said." That's not all you have. You have what she said in the 911 call. You have what she told law enforcement again when they appeared, and you have the physical marks on her arms.

Now, counsel makes a big deal about, well, the deputy didn't really describe the bruising and the marks. I leave it to you to decide whether testimony was there, because I believe Sue Shannon, Deputy Shannon.

RP 246. Rambur's trial counsel immediately objected. RP 246. The trial court sustained the objection, told the jury to disregard the

comment and ordered it to be stricken from the record. RP 246. The deputy prosecutor went on to state that she had not finished her statement, which she later explained, while inartful, that her statement would have been that she believed Sue Shannon's statement was "this", not that she believed Sue Shannon. RP 247, 255. Rambur's trial counsel moved for a mistrial, which was denied by the trial court because the trial court found the damage was minimal. RP 255-57.

Rambur has not met his burden to show that he was prejudiced by the deputy prosecutor's improper comment. While it is true that Ms. Cypher's testimony at trial was that Rambur only restrained her to calm her down and to stop her from breaking more things, there was also Ms. Cypher's 911 call to support the Unlawful Imprisonment conviction. There was also the bruising that both deputies testified to seeing on Ms. Cypher and Deputy Humphrey's testimony regarding Ms. Cypher's demeanor and statements which corroborated Deputy Shannon's testimony regarding Ms. Cypher's statements. RP 148-49, 155 165, 166, 168; Ex. 8, 10.

"The trial judge is generally in the best position to determine whether the prosecutor's actions were improper and whether, under

the circumstances, they were prejudicial.” *Ish*, 170 Wn.2d at 195-96. In this matter, the trial court correctly decided the deputy prosecutor’s statement was improper and made the proper corrective action, sustaining the objection and instructing the jury to disregard. The trial court’s ruling, allowing the case to go forward to the jury, was the correct ruling, and not manifestly unreasonable or based on untenable grounds. This Court should find that Rambur has not met his burden to show that the deputy prosecutor’s error was prejudicial and therefore the error was harmless. Rambur’s convictions should be affirmed.

D. THERE WAS SUFFICIENT INFORMATION PROVIDED AT THE SENTENCING HEARING TO PROVIDE A BASIS FOR THE TRIAL COURT’S IMPOSITION OF THE LEGAL FINANCIAL OBLIGATIONS.

Rambur argues that the trial court imposed legal financial obligations without any meaningful consideration of his ability to pay. Brief of Appellant 28-31. The information shared by Rambur’s trial counsel at his sentencing hearing was sufficient for the trial court to conclude that Rambur had the ability to pay the imposed legal financial obligations at the rate of 30 dollars a month upon his release from custody. See CP 171. Further, Rambur did not object to the imposition of the legal financial obligations. RP 278-81. This court should affirm the imposition of the legal financial obligations.

A defendant who at the time of sentencing fails to object to the imposition of non-mandatory legal financial obligations is not automatically entitled to review. *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Unpreserved legal financial errors do not command review as a matter of right. *Blazina*, 182 Wn.2d at 833. The trial court is required to consider a defendant's current or future ability to pay the proposed legal financial obligations "based upon the particular facts of the defendant's case." *Id.* at 834.

There was no objection to the imposition of legal financial obligations at the sentencing hearing. RP 278-81. A timely objection would have made the clearest record on this question. Therefore, the absence of an objection is good cause to refuse to review this question. RAP 2.5(a) (the appellate court may refuse to review any claim of error not raised in the trial court); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (RAP 2.5(a) reflects a policy encouraging the efficient use of judicial resources and discouraging a late claim that could have been corrected with a timely objection); *State v. Danis*, 64 Wn. App. 814, 822, 826 P.2d 1015, *review denied*, 119 Wn.2d 1015, 833 P.2d 1389 (1992) (refusing to hear a challenge to the restitution order

when the defendant objected to the restitution amount for the first time on appeal).

Rambur's attorney stated Rambur was working doing home improvement. RP 273. Rambur's attorney requested Rambur be allowed to serve his sentence, or a portion of his sentence, on electronic home monitoring (EHM). RP 274. In Lewis County the only means of EHM is by a private home monitoring company. See CP 168. The trial court would have to know to take advantage of the request for EHM Rambur would have to have the ability to pay the private monitoring company a daily monitoring fee. If Rambur would have had the ability to afford five months of private EHM, he had the ability to pay the court imposed legal financial obligations.

The trial court's finding was supported by the record, this court should affirm the imposition of legal financial obligations. If this Court holds the trial court's findings are not sufficient the State respectfully requests this Court remand for a hearing whereas the trial court has the ability to do a full inquiry as to Rambur's ability to pay his legal financial obligations and enter findings based upon that inquiry.

E. THE TRIAL COURT MISCALCULATED RAMBUR'S OFFENDER SCORE FOR THE UNLAWFUL IMPRISONMENT COUNT.

The trial court erroneously calculated Rambur's offender score for Count II: Unlawful Imprisonment when it failed to count his current Assault in the Fourth Degree Domestic Violence conviction as a point towards his offender score. This Court should remand the case for resentencing with a correct offender score of two for the Unlawful Imprisonment count, with a standard range of 4-12 months.

1. Standard Of Review.

This Court reviews a trial courts calculation of an offender score de novo. *State v. Rodriguez*, 183 Wn. App. 947, 953, 335 P.3d 448 (2014). This court also conducts statutory interpretation de novo. *Rodriguez*, 183 Wn. App. at 953.

2. The Trial Court Miscalculated Rambur's Offender Score On His Unlawful Imprisonment Count By Failing To Include A Point For His Current Assault In The Fourth Degree Domestic Violence Conviction.

Under RCW 9.94A.525(21)(c), a prior repetitive domestic violence conviction, which include under that definition, Assault in the Fourth Degree, counts as a point for scoring purposes towards a current felony domestic violence offense. See RCW

9.94A.030(41)(a)(i). While the statute does state “prior” and “repetitive” this Court has previously held that a current conviction for an offense that is a repetitive domestic violence offense should be included in the calculation of a defendant’s offender score for a felony domestic violence offense. *Rodriguez*, 183 Wn. App. at 957-58.

Rodriguez was charged with and convicted of one count of felony DV-VNCO and one count gross misdemeanor DV-VNCO. *Id.* 950. The incident occurred at the same time and place but involved separated victims. *Id.* Rodriguez pleaded guilty to both charges and was sentenced a week later. *Id.* Rodriguez had no criminal history and the court calculated her offender score for the felony count as one, counting the gross misdemeanor as one point. *Id.* 950-51.

This Court concluded that under the sentencing provisions of the SRA a current conviction for a repetitive domestic violence offense is included in the calculation of a defendant’s sentencing as a “prior conviction.” *Id.* At 956. This Court reasoned that “[a] conviction is an ‘adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of guilty.’” *Id.*, citing RCW 9.94A.030(9). Therefore, the finding of guilty, prior to sentencing is a prior conviction. This Court went on

to hold that even if it were not to find a current conviction to be a “prior conviction,” under RCW 9.94A.589(1)(a) the current conviction must still be counted as part of the offender score unless it is the same criminal conduct. *Id.* at 957.

Next, this Court looked at the statutory definition of “repetitive domestic violence offense.” *Id.* at 957-58. The statutory language is clear as to what constitutes a repetitive domestic violence offense, and the statute does not require a repetitive pattern for an offense to fall under this definition. RCW 9.94A.030(41).

Therefore, the trial court in this case miscalculated Rambur’s offender score by failing to count his current Assault in the Fourth Degree Domestic Violence conviction towards his offender score for his felony Unlawful Imprisonment count. See RP 277-78; CP 165-67. The State pled and proved the Assault in the Fourth Degree Domestic Violence charge as required by the statute. RCW 9.94A.525(21)(c); CP 155, 160. Assault in the Fourth Degree Domestic Violence is a repetitive domestic violence offense. RCW 9.94A.030(41)(a)(i). Under the sentencing provisions of the SRA, as interpreted by this Court, the Assault in the Fourth Degree Domestic Violence conviction, counts as one point towards the

offender score of his Unlawful Imprisonment conviction, a felony domestic violence conviction. RCW 9.94A.525(21)(c); *Rodriguez*, 183 Wn. App. at 958. Therefore, this Court should remand Rambur's case back to the trial court to correct his offender score and for resentencing.

V. CONCLUSION

The trial court did not abuse its discretion when it limited Rambur's trial counsel's cross-examination of Deputy Shannon. Rambur was not attempting to properly impeach Deputy Shannon and his attempt to elicit his own statements did not fall within the completeness doctrine. Rambur received effective assistance from his trial counsel throughout the proceedings. Rambur did not meet his burden to show he was prejudiced by the deputy prosecutor's error and therefore cannot prevail on a claim of prosecutorial error. This Court should affirm Rambur's convictions. There was sufficient information provided at the sentencing hearing for the trial court to impose the non-mandatory legal financial obligations. Finally, the trial court miscalculated Rambur's offender score and this Court

must remand this case back to the trial court to correct his offender score and for resentencing.

RESPECTFULLY submitted this 16th day of October, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'JLM', written over a horizontal line.

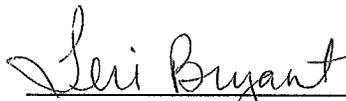
by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

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

STATE OF WASHINGTON, Respondent, vs. ADAM RAMBUR, Appellant.	No. 47246-5-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On October 16, 2015, the appellant was served with a copy of the **Respondent/Cross Appellant's Brief** by email via the COA electronic filing portal to John A. Hays, attorney for appellant, at the following email address: jahayslaw@comcast.net.

DATED this 16th day of October, 2015, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

October 16, 2015 - 11:26 AM

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