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Division II
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NO. 48214-2-II

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

STATE OF WASHINGTON,
Respondent,

v.

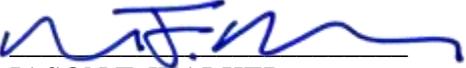
GARY LEE BROWN, JR.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MACCAULEY, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

1. **The Defendant agreed to instruct the jury that a knife with a blade longer than three inches was a deadly weapon, but any error was not prejudicial because the victim could not say how long the blade held to her throat was.**
2. **The Defendant did not object to the prosecutor's question, which did not misstate the law, shift the burden of proof, and concerned only a collateral issue, why his testimony contradicted that of the victim.**
3. **The Defendant did not object when the prosecutor asked him why he did not report to the police that someone pointed a rifle at him, which did not implicate his right to remain silent.**
4. **There is no cumulative error.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State is satisfied with the Defendant's statement of the relevant facts, with the exception of the portions of the record set forth below.

ARGUMENT

1. **The Defendant failed to object to the jury instruction in question, so that instruction is now the law of the case.**

The Defendant first assigns error to a jury instruction that included a knife with a blade longer than three inches as a deadly weapon.

However, the Defendant agreed to this instruction below. The Defendant

has failed to assert any manifest error, and prejudice is unlikely, given the size of the knife was never definitively established.

The Defendant agreed to instruct the jury that a knife with a blade longer than three inches is a deadly weapon.

The trial court raised the question of jury instructions early in the trial, at which time the State indicated the parties had already discussed instructions. RP at 80.

After the conclusion of testimony, the trial court again asked the parties about instructions. RP at 118-19. The defense asked that an instruction regarding strangulation be removed, as the State had failed to elicit testimony of strangulation from the victim.¹ RP at 132-33. The trial court agreed and ruled the instruction not be given. RP at 133.

The next morning, the parties presented the court with a set of jury instructions that both sides said they had come up with jointly. RP at 136. The trial court asked both sides if they had any objections or exceptions to the instructions, and both parties replied in the negative. RP at 136.

Again, after the final set of jury instructions were prepared, the trial court again asked both sides if there were any objections or exceptions, and both sides said there were none. RP at 141. Now, for the

¹ During this discussion, the parties paused to question a juror who disclosed during the trial she was familiar with one of the locations mentioned in testimony.

first time on appeal, the Defendant claims one of those instructions was erroneous.

A criminal defendant waives any claim of instructional error that is not made to the trial court, “unless the claimed error constitutes a manifest error affecting a constitutional right.” *State v. Morgan*, 163 Wn. App. 341, 349, 261 P.3d 167, 171 (2011) (citing RAP 2.5(a).) “[A]ppellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *Id.* (citing *State v. Scott*, 110 Wash.2d 682, 685, 757 P.2d 492 (1988).) The reason for this rule is to encourage the efficient use of judicial resources. *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756, 760 (2009).

State v. Lynn, 67 Wn.App 339, 835 P.2d 251 (1992) sets forth a four-part test for whether an appellate court will consider an asserted error when a defendant has failed to object.

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third,

if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.

Lynn at 345.

In applying the *Lynn* case, the Defendant has not asserted that this is a constitutional issue, and it is not. This is simply a question of statute. RCW 9.94A.825 defines a deadly weapon as a knife with a blade longer than three inches, and that definition applies to a deadly weapon verdict. *See* RCW 9.94A.825. The definition applicable to the Defendant is the definition in RCW 9A.04.110, which does not include a knife with a blade longer than three inches. Rather, that definition is, in relevant part, “any other weapon, device, instrument, article, or substance... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” RCW 9A.04.110(6).

Second, any error is not “manifest.” Errors are “manifest” when a defendant demonstrates that he was prejudiced. *O’Hara* at 99. To demonstrate prejudice, “there must be a ‘plausible showing by the [appellant] that the asserted error had practical and identifiable

consequences in the trial of the case.” *Id.* (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007), alteration in original.)

Here, the Defendant fails to establish prejudice. The victim, Edna Ferry, was unable to estimate the size of the knife. RP at 29. The Defendant concedes this in his brief. Brief of Appellant at 5. Further, Ms. Ferry testified the Defendant held the knife to her throat. RP at 27. Even a knife with a blade shorter than three inches is a deadly weapon when it is held to the neck. *See State v. Thompson*, 88 Wn.2d 546, 550, 564 P.2d 323, 325 (1977). The knife itself was never entered into evidence.

Because the Defendant agreed to the instruction he now complains of, and because the evidence indicates that he used the knife in a manner which makes it a deadly weapon, his first assignment of error fails.

***Gotcher* is inapposite.**

The Defendant’s reliance on *State v. Gotcher* is misplaced. In that case, Division 1 of this Court simply decided that a knife in a waistband, is not “used, or attempted or threatened to be used,” and therefore cannot be a deadly weapon. This is clearly distinct from the instant case, where the knife was held to the throat of the victim.

In *Gotcher*, the defendant had been convicted of Burglary in the First Degree, RCW 9A.52.020(1),² with a deadly weapon enhancement under Chapter 9.94A RCW. *State v. Gotcher*, 52 Wn. App. 350, 350, 759 P.2d 1216 (1988). When arrested, the defendant had a partially opened switchblade knife with a 4 ½ inch blade in his possession. *Gotcher* at 350-51. It was undisputed that the knife had been recovered from the defendant’s pocket. *Id.* at 356. The jury were given two instructions defining “deadly weapon;” one for the element of Burglary in the First Degree, and another for the sentencing enhancement. *Id.* at 351.

At trial, the defendant’s counsel conceded that the defendant had burglarized the building, but disputed whether the defendant was *armed* with the knife. *Id.* at 351. In closing, the State argued, “the mere fact of possession [of the switchblade] alone ... is what makes burglary in the first degree different from burglary in the second degree.” *Id.* at 355 (alteration in original.)

The defendant did not assign error to the instructions, but claimed that the State misstated the law by equating possession with being armed, for the purposes of the deadly weapon as an element of Burglary in the

² Both Burglary in the First Degree and Assault in the Second Degree, RCW 9A.36.021(1)(c), the charge the Defendant was convicted of, are located in Title 9A RCW and share the same definition of “deadly weapon.”

First Degree. *Id.* at 353. In reversing the conviction, Division 1 of this Court said, “there must be some manifestation of willingness to use the knife before it can be found to be a deadly weapon,” (for the purposes of the knife as an element of Burglary in the First Degree) and held that the argument that mere possession was sufficient to find the defendant was armed mischaracterized the law. *Id.* at 355.

In the instant case, since the evidence was that the Defendant drew his knife and held it against Edna Ferry’s throat, it is unquestionable that he “used, or attempted or threatened to be used” the knife. *Gotcher* is inapposite.

Because the Defendant agreed to the instruction that he now complains of, but demonstrates no prejudice, this Court should uphold the Defendant’s conviction.

2. The Defendant did not object to the State’s question about whether the victim was lying about breaking up with him, which was not an issue central to the ultimate question and not prejudicial.

The victim, Edna Ferry, testified that she broke up with the Defendant in January. RP at 18. The Defendant testified in his own defense and testified that Ms. Ferry had not broken up with him in January. RP at 102. The State asked the Defendant if Ms. Ferry was lying

about breaking up with him, and the Defendant said she was. *Id.* The Defendant did not object, but now claims that this question constitutes prosecutorial misconduct. However, the question did not ask for a comment on Ms. Ferry's veracity, misstate the burden of proof, or state a personal opinion of the prosecutor.

The Defendant failed to object to the question, so this Court should not consider the assignment of error.

“Cross examination intended to compel a defendant to call police witnesses liars constitutes prosecutorial misconduct.” *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426, 431 (1994) (citing *State v. Padilla*, 69 Wn.App. 295, 299, 846 P.2d 564 (1993), emphasis added.) A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995). However, where there is no objection to the State's questioning, misconduct is reversible error only if it is material to the trial's outcome and could not have been remedied. *State v. Jerrels*, 83 Wn. App. 503, 508, 925 P.2d 209 (1996) (citing *Suarez-Bravo*.) “[R]eversal is not required unless the misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice.”

Suarez-Bravo at 367 (citing *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).)

In the instant case the Defendant did not object to the question he now assigns error to. *See* RP at 102. Therefore, he must prove that the question was material to the trial's outcome, and that a curative instruction would not have remedied the prejudice.

Here, the Defendant cannot make such a showing. The State did not ask the Defendant to pass on the credibility of police witnesses. The State's question was designed to compel the Defendant to explain the disparity in his testimony compared to that of his non-police victim, Edna Ferry. The State properly argues that a defendant is lying when his testimony is contradicted by other evidence. *See State v. Copeland*, 130 Wn.2d 244, 291, 922 P.2d 1304 (1996) and *see State v. Jefferson*, 11 Wn.App. 566, 569-70, 524 P.2d 248 (1974).

The Defendant argues that *State v. Fleming* holds a defendant need not object to an improper question for appeal purposes. However, the *Fleming* court ruled there was manifest constitutional error from an improper closing argument that shifted the burden of proof to the defendants, who did not testify.

Fleming was a rape case involving two defendants. *Fleming*, 83 Wn. App. 209, 210, 921 P.2d 1076, 1077 (1996) . The victim testified that she was raped, but neither defendant testified. *Id.* at 212.

In the State’s closing argument, the prosecutor said,

[F]or you to find the defendants, Derek Lee and Dwight Fleming, not guilty of the crime of rape in the second degree... you would have to find either that [the victim] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom...

[T]here is absolutely no evidence ... that [the victim] has fabricated any of this or that in any way she's confused about the fundamental acts that occurred upon her back in that bedroom. And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree.

[I]t's true that the burden is on the State. But you ... would expect and hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter].

Id. at 213-14 (alterations in original.)

Division 1 of this Court held that these arguments were improper because it “...misstated the law and misrepresented both the role of the jury and the burden of proof...” “...improperly shifted the burden to the

defendants to disprove the State's case..." and "...infringed on the defendants' election to remain silent". *Id.* The *Fleming* court found that the cumulative effect of these arguments was manifest constitutional error, and so reversed, despite the fact that the defense attorneys had not objected at trial. *Id.* at 216.

In the instant case the Defendant chose to testify, testified inconsistently with Edna Ferry, and so put his credibility at issue. The State is entitled to respond to the defense, including arguing that a defendant is lying. *See State v. McKenzie*, 157 Wn.2d 44, 59, 134 P.3d 221 (2006). The word "lie" is not a magical incantation that causes an automatic reversal of a conviction. The prosecutor's question may have been argumentative at worst, but it did not shift the burden or impinge on the Defendant's constitutional rights.

The Defendant has failed to establish a flagrant act that affected his constitutional rights. This Court should decline to address this assignment of error as unpreserved for appeal.

The cases cited by the Defendant are inapposite because the prosecutor's single question was not a misstatement of the law.

The Defendant cites to *State v. Casteneda-Perez*, 61 Wn.App. 354, 810 P.2d 74 (1991) for the proposition that asking a witness if another witness is lying constitutes *per se* prosecutorial misconduct. In that case

the conviction was upheld because the questions, although improper, did not rise to constitutional error..

In *Casteneda-Perez* the defendants were charged with delivering a controlled substance after they sold some cocaine to an undercover police officer in a controlled buy. *Casteneda-Perez* at 355. The buy money was found on Rodriguez, and he pled guilty prior to trial. *Id.* at 356. The involvement of the co-defendants Gonzalez and Casteneda-Perez was established by the testimony of police officers who had surveilled the incident. *Id.* at 356-57.

At trial, Rodriguez admitted selling cocaine to the undercover officer, but claimed he worked alone. *Id.* at 357. The prosecutor asked Rodriguez several times if the officers were lying about their testimony. *Id.*

Casteneda-Perez also testified in his defense and claimed he did not know the transaction was taking place, because he claimed he was facing the other way. *Id.* at 358. Again, the State asked Casteneda-Perez if the officers were lying several times. *Id.* at 358-59.

The State asked similar questions of Gonzales. *Id.* at 359.

Division 1 of this Court's analysis was predicated on the assumption that the tactic behind the questioning was to place the jury in a

position where they would have to find the police officers lied in order to acquit. *Id.* at 360. The court worried that jurors might believe that an acquittal would reflect adversely on the honesty and good faith of the officers. *Id.*

However, the court concluded that, “[w]hile the cross examination of the defendant and other witnesses was improper, the error is not of constitutional magnitude.” *Id.* at 363. Noting that there was very little chance the cross-examination affected the verdict, the convictions were affirmed. *Id.* at 364.

Unlike *Casteneda-Perez* the prosecutor’s question did not put the jury in a position where the jury might believe that an acquittal (or conviction) would reflect poorly on one witness or another’s credibility. The issue of whether Ms. Ferry had ended her relationship with the Defendant was collateral to whether the Defendant had threatened her life and assaulted her. For the same reason, what this case does have in common with *Casteneda-Perez* is there is very little chance that the question affected the verdict, because whether Ms. Ferry ended the relationship or not at most provided motive to the Defendant’s actions, but establishing such a dispute would also establish such a motive.

Like the vast majority of domestic violence cases there were only two people present for the incident in question: the Defendant and his victim, Edna Ferry. The Defendant chose to testify in his defense, and his testimony contradicted that of Ms. Ferry. The prosecutor's question did not ask him to pass on Ms. Ferry's veracity, it asked the Defendant to explain why his testimony was inconsistent with hers. His response, and his demeanor while giving that response, gave the jury the material they needed to evaluate the Defendant's testimony.

Conclusion.

Unlike the cases cited by the Defendant, the prosecutor's question here did not put the jurors in a position where they had to believe police witnesses lied in order to acquit. Neither did the prosecutor mis-state the law, shift the burden, or comment on the Defendant's right to remain silent. The Defendant saw fit to testify, and his testimony contradicted his victim on a collateral matter. The State asked the Defendant to explain the inconsistency by asking him if Edna Ferry's testimony was a lie. The jury was entitled to take the Defendant's response, and his demeanor while giving that response, into account when deciding who to believe about the real issue: whether the Defendant had threatened Edna Ferry's life and

assaulted her with a knife. *Falsus in uno, falsus in omnibus.*³ The State is entitled to respond to the defense and argue that a witness is lying from the facts. Asking such a question is no different.

Because the Defendant did not object below, this Court should not consider this assignment of error. If it does, it should hold that the prosecutor's question was not improper. But even if this Court considers this assignment of error, and finds the single question improper, it should uphold the Defendant's conviction because it cannot possibly be manifest constitutional error to ask what is at worst an argumentative question.

3. The prosecutor did not comment on the Defendant's pre- or post-arrest silence; the prosecutor asked why the Defendant did he not report having a rifle pointed at him to the police.

The Defendant next claims that the prosecutor commented on his right to remain silent during cross-examination. However, the prosecutor only asked the Defendant why he did not report having a hunting rifle pointed at him when the Defendant tried to dodge the prosecutor's question. The exchange in question is at pages 103-104 of the Verbatim Report of Proceedings, and is set forth below:

³ "False in one, false in all." See *State v. Garfield*, 185 Wn. App. 1030 (unpublished, 2015).

Q. But when she told you that it was over, you told her you were going to kill her, didn't you?

A. I have never in my life ever told Edna Ferry that I was going to kill her, never.

Q. You said that you've got a friend who's accurate how - to how many yards? 100?

A. I did not - no, I did not say that. Her - her boyfriend, Matt Sansom, held a hunting rifle on me. And I called my uncle, Gary Blackburn, and - I was at Lake Quinault working on the exhaust on my truck and her and her boyfriend - ex-boyfriend, her baby's dad, pulled in and he jumped out with a hunting rifle and held a hunting rifle on me.

Q. And Matt - and he got - he got prosecuted for --

A. He got in trouble --

Q. -- felon --

A. They arrested - they arrested him that day for it.

Q. But you didn't give a statement when the police came back to talk to you?

A. No, I didn't see the police. I wasn't there.

Q. So you didn't talk to the police, because talking to the police makes you a rat, right?

A. No. I - you're wrong. I had another appointment at a shake mill about picking up some money for some shingle blocks that I had sold and that's where I went to.

The Defendant failed to object to the question, so this Court should not consider the assignment of error.

As noted above, where a defendant fails to object to the State's questioning, misconduct is reversible error only if it is material to the trial's outcome and could not have been remedied. *Jerrels* at 508, *supra* (citing *Suarez-Bravo*.) A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *Gentry* at 640, *supra*.

The Defendant did not object to this line of questioning, so this Court should decline to address this assignment of error as unpreserved for appeal and uphold the Defendant's conviction. The Defendant did not object, in all likelihood, because the question was not improper as it did not comment on the Defendant's pre- or post-arrest silence, only why, if this incident had actually occurred, he did not report it to the police.

The prosecutor did not comment on the Defendant's pre- or post-arrest silence.

A Defendant's prearrest silence, can be used to impeach a defendant's testimony, but cannot be used as substantive evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 206, 181 P.3d 1, 3 (2008) (citing *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001).) "It is settled that the State may not, consistent with due process, use post-arrest silence following

Miranda warnings to impeach a defendant's testimony at trial.” *State v. Belgarde*, 110 Wn.2d 504, 511, 755 P.2d 174, 177 (1988) (citing *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).)

Here, the State was not asking about the Defendant’s silence in regards to the incident at bar. The State asked the Defendant why he did not report having a hunting rifle pointed at him, and the Defendant simply claimed he was elsewhere when the police arrived. There is nothing to suggest that the Defendant had been arrested or read the *Miranda* warning, or that the police were even investigating the Defendant concerning the charges that the Defendant was on trial for.

Rather, as was typical during his testimony, the Defendant was unresponsive and attempted to redirect the examination to an intricate story that deflected his own culpability and changed the subject. The prosecutor’s question involving the term “rat,” was not without relevance. The Defendant had denied sending Edna Ferry most of the messages in which he threatened her with death. RP 101-102. But the prosecutor was able to get the Defendant to admit that he sent the text message in which she was called a “rat.” RP at 101. Clearly, the prosecutor was drawing the jury’s attention to the Defendant’s use of language. He used the term

“rat” to disparage people who talk to the police, just as he called Edna Ferry a “rat” for speaking to the police about the incident. RP at 101.

The prosecutor did not comment of the Defendant’s right to remain silent, which is probably why the Defendant’s trial counsel did not object. There was no improper questioning. The question did not involve any crime in which the Defendant was a suspect. This Court should decline to reach the issue because there was no objection below. But if this Court does reach the issue, it should hold there was no misconduct and affirm the conviction.

4. There was no cumulative error.

Since the State does not agree that the Defendant’s assignments of error were errors, the State does not agree that there was cumulative error.

CONCLUSION

The Defendant and the State jointly produced a set of instructions that the Defendant now complains are erroneous. The instruction in question included a knife with a blade longer than three inches as a *per se* deadly weapon. However, in this case there was little testimony about the size of the blade. Rather, the testimony was that the knife was held to the

victim's throat. Even if the Defendant had not agreed to this instruction, there would be no prejudice.

The Defendant testified in his own defense. His testimony consisted of long, convoluted, self-serving stories. On cross-examination, his responses were frequently non-responsive, and meandered into incidents whose relation to the instant offense were not always clear. However, he directly contradicted the testimony of Edna Ferry, the victim, on the minor point of whether she had broken up with him. The State pointed out the inconsistency, and the Defendant responded that Ms. Ferry was lying. This question did not misstate the law, shift the State's burden, or express the prosecutor's personal opinion.

In another of the Defendant's responses in which he attempted to redirect the question, the State asked the Defendant if he had reported having a hunting rifle pointed at him. That question did not implicate the Defendant's right to remain silent about any charges he was facing, and was not improper. Nor did the Defendant object to the question.

There was no cumulative error here, because these three assignments of error are not errors.

This Court should reject all assignments of error and uphold the Defendant's conviction for Assault in the Second Degree – Domestic

Violence, Felony Harassment – Domestic Violence, as well as the Assault
in the Fourth Degree – Domestic Violence charge that the Defendant
admitted to committing.

DATED this 2nd day of August, 2019.

Respectfully Submitted,

BY



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JFW /

GRAYS HARBOR PROSECUTING ATTORNEY

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