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

STATE OF WASHINGTON, Respondent

v.

DAVID ROCAEL LOPEZ-SANCHEZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-00323-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

- I. The trial court properly denied the motion for a mistrial. 1
- II. No error occurred during sentencing..... 1
- III. The record contains sufficient evidence to support Lopez-Sanchez’s convictions. 1

STATEMENT OF THE CASE..... 1

ARGUMENT..... 9

- I. The trial court properly denied a motion for a mistrial. 9
- II. No error occurred during sentencing..... 17
- III. The record contains sufficient evidence to support Lopez-Sanchez’s convictions. 20

CONCLUSION..... 24

TABLE OF AUTHORITIES

Cases

<i>State v. Babcock</i> , 145 Wn.App. 157, 185 P.3d 1213 (2008)	13
<i>State v. Barnes</i> , 117 Wn.2d 701, 818 P.2d 1088 (1991).....	18
<i>State v. Cantu</i> , 156 Wn.2d 819, 132 P.3d 725 (2006)	23
<i>State v. Carreno-Maldonado</i> , 135 Wn.App. 77, 143 P.3d 343 (2006).....	19
<i>State v. Condon</i> , 72 Wn.App. 638, 865 P.2d 521 (1993).....	12, 14, 15
<i>State v. Cordero</i> , 170 Wn. App. 351, 284 P.3d 773 (2012).....	23
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	21
<i>State v. Embry</i> , 171 Wn.App. 714, 287 P.3d 648 (2012).....	20
<i>State v. Escalona</i> , 49 Wn.App. 251, 742 P.2d 190 (1987) 12, 13, 14, 15, 16	
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	11
<i>State v. Hammock</i> , 154 Wn.App. 630, 226 P.3d 154 (2010).....	13
<i>State v. Hopson</i> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	11
<i>State v. Lewis</i> , 130 Wn.2d 700, 927 P.2d 235 (1996).....	13
<i>State v. MacDonald</i> , 183 Wn.2d 1, 436 P.3d 748 (2015).....	19
<i>State v. Mak</i> , 105 Wn.2d 692, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).....	12
<i>State v. Raleigh</i> , 157 Wn.App. 728, 238 P.3d 1211 (2010).....	21
<i>State v. Randoll</i> , 111 Wn. App. 578, 45 P.3d 1137 (2002).....	17
<i>State v. Riles</i> , 86 Wn. App. 10, 936 P.2d 11 (1997)	17
<i>State v. Rodriguez</i> , 146 Wn.2d 260, 45 P.3d 541 (2002).....	12
<i>State v. Salinas</i> , 119 Wn.2d 192, 928 P.2d 1068 (1992)	20
<i>State v. Studd</i> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	10
<i>State v. Sullivan</i> , 69 Wn. App. 167, 847 P.2d 953 (1993)	11
<i>State v. Taitt</i> , 93 Wn. App. 783, 970 P.2d 785 (1999).....	18

Rules

ER 404(b).....	10
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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly denied the motion for a mistrial.**
- II. No error occurred during sentencing.**
- III. The record contains sufficient evidence to support Lopez-Sanchez's convictions.**

STATEMENT OF THE CASE

On May 4, 2016 the State charged David Rocael Lopez-Sanchez (hereafter 'Lopez-Sanchez') with residential burglary, fourth degree assault, and third degree malicious mischief for his actions against Beatriz Evangelista Jimenez on November 20, 2015. CP 1 – 2. A domestic violence designation was attached to all three counts. *Id.* On March 3, 2016 Lopez-Sanchez was additionally charged with one count of felony bail jumping.¹

Lopez-Sanchez went to trial on the charges on March 27, 2017. RP 12. Prior to trial, the defense moved in limine to exclude evidence of previous instances of domestic violence or of bad acts. RP 27. The trial court granted the motion. RP 28. During the trial court's opening remarks to the jury, it instructed that the jury "will disregard any evidence which is either not admitted or which may be stricken by" the court. RP 74.

¹ Appellant assigns no error to his conviction for felony bail jumping.

The State presented testimony from seven witnesses in its case-in-chief. RP 77 – 300.²

Ms. Jimenez testified that she had been in a romantic relationship with Lopez-Sanchez for about four years when she asked him to move out around June or July of 2015. RP 79 – 80. Lopez-Sanchez was a heavy drinker and had relationships outside of the one with victim. RP 80 – 82. When asked what issues were in the relationship, Ms. Jimenez testified that there was

[c]onstant aggression against myself. He was constantly – it was frustrating for me to be the one to carry with all the financial responsibility and my side of the relationship, it was just a lot for me to handle.

RP 81. Defense counsel made no objection to this statement. RP 81, 83, 87.

The relationship ended on November 20, 2015. RP 82. When asked why the relationship ended, the victim stated:

[b]ecause a situation came up where I thought I won't tolerate any more abuse or any more aggression, no more.

RP 82 – 83. After this statement, defense counsel objected to the reference to prior bad acts outside of the presence of the jury. RP 83 – 84. During

² Three of the witnesses related only to the bail jumping charge. As such, their testimony will not be laid out in the statement of the case because it is irrelevant to the issues to be decided by this Court.

argument, the State informed that trial court that the victim had been instructed not to go into any prior abuse. RP 84. The court instructed the State to again inform Ms. Jimenez that she cannot mention any form of domestic violence or prior bad acts. RP 85. When asked by the court, defense counsel requested a limiting instruction regarding reference to any prior bad acts. RP 86. The prosecutor for the State then stepped out of the courtroom to advise Ms. Jimenez, again, that she was not to talk about a history of domestic violence or prior bad acts. RP 88 – 89.

Once the jury had filed back into the courtroom, and before continuing with testimony, the trial court informed the jury that

while you were out, there was an objection to the answer that was provided by Ms. Evangelista, indicating, quote, “I would not tolerate the abuse anymore.” I’m going to provide you what I refer to as a curative instruction. You are to disregard that reference or statement by Ms. Evangelista. It is stricken from the record.

RP 88 – 89.

When testimony resumed, Ms. Jimenez testified that, Lopez-Sanchez had called her on the phone saying that he planned to come to her apartment. RP 90 – 91. She was going to be out, so she told Lopez-Sanchez that the door would be unlocked and that he could come in. *Id.* When Ms. Jimenez returned home, Lopez-Sanchez was at the apartment drinking. RP 92. The victim told him that she wanted to end their

relationship and asked Lopez-Sanchez to leave the apartment when another woman that Lopez-Sanchez was in a relationship with called his phone. RP 92 – 93.

Lopez-Sanchez became very upset and began an argument. RP 94 – 95. He then began to look around for his car keys but was unable to find them. RP 96 – 97. Because Lopez-Sanchez was saying such hurtful things, the victim called him a “bad name” and then closed the door because she was afraid of how he would react. RP 97. When asked what she did after Lopez-Sanchez left the apartment, Ms. Jimenez stated

[a]t the moment that I told him that bad word, I knew his reaction was going to be very aggressive, and I knew that he would assault me.

Id. The trial court sustained defense counsel’s objection as to speculation and instructed the jury to disregard the statement. RP 98.

Testimony continued and Ms. Jimenez stated that after Lopez-Sanchez left the apartment she closed and locked the door. RP 98 – 99, 167. Shortly afterward, Lopez-Sanchez began knocking on the door very loudly asking about his keys. RP 99. When asked if she wanted him to come back into her home, the victim stated “[n]ot after I told him what I told him because I knew he would hit me.” RP 100. After a request from defense counsel, the jury was excused and defense counsel moved for a

mistrial. *Id.* In its ruling denying a mistrial, the trial court indicated that the testimony was right on the threshold of crossing the line but that the court did not believe this statement related to any prior bad acts because Ms. Jimenez had just testified that she was afraid after calling Lopez-Sanchez a bad name. RP 102. Defense counsel then asked for a limiting instruction that the statement “I knew he would hit me” referred back to the bad name used by the victim. RP 103 – 104. When the jury returned, the court presented the limiting instruction. RP 105.

Testimony continued on March 28, 2017. RP 146. Ms. Jimenez’s testimony established that after she locked the door, Lopez-Sanchez began banging on the door very hard for about two minutes saying that he wanted his keys. RP 146 – 47, 169 – 70. When she would not open the door, Lopez-Sanchez started to kick it until he broke the lock and kicked the door in. *Id.* Lopez-Sanchez ran after the victim with an angry look on his face and his hand in a fist. RP 147. He then hit the victim with a closed fist on the left side of her head and her ear. RP 148. As she fell over the couch, Lopez-Sanchez kicked her hip. RP 149 – 50.

Ms. Jimenez ran out of the apartment toward the management office and asked for help from two of the maintenance workers. RP 150 –

51. She then called the police. RP 151. The next business day, she applied for a protection order. RP 182.

The apartment complex manager, Emily McGuire, testified that on November 20th, the victim came into the office with a maintenance worker. RP 203. She was hysterical, shaking, and was crying so hard that she was having a hard time communicating. RP 203 – 04. Francisco Vazquez, who works for maintenance at the complex, testified that the victim was scared and hysterical when he contacted her on November 20th. RP 213 – 14.

Vancouver Police Detective Ripp corroborated that the victim was very upset, was crying, and seemed afraid and distressed. RP 219, 226. Beyond her demeanor, Detective Ripp noticed marks on the left side of her face and ear. RP 219 – 20. He testified that the victim's apartment looked disheveled as if things had been thrown about. RP 225.

Ms. Jimenez, Ms. McGuire, Mr. Vazquez, and Detective Ripp, all testified that the door was damaged. RP 152, 204 - 06, 215, 221 – 26. The State admitted photographs of the door into evidence as well as documents proving the cost to fix the door. RP 206 – 09, 215, 221 - 26. The State also admitted photographs of the victim's injuries. RP 222, 225 – 26. Ms. Jimenez testified that later in the day on November 20, 2015 Lopez-

Sanchez sent her a threatening text message. RP 155. She stated that she lives in a different apartment because she does not want him to know where she is. RP 158.

Later in the day on March 28th, during argument surrounding whether specific content of Lopez-Sanchez's text messages was admissible, the trial court included a discussion about the purpose of motions in limine. RP 240. While noting other pretrial rulings, it noted that there had been violations by the victim regarding evidence rule 404(b) evidence. *Id.*

Lopez-Sanchez presented testimony from two witnesses. RP 345, 380. Maria Avalos testified that she and Lopez-Sanchez were in a close romantic relationship on November 20, 2015. RP 347. She stated that she spent roughly the entire day with Lopez-Sanchez on that day from around 9:00 in the morning until after dinner. RP 347 – 48. Her testimony was inconsistent with statements she had made during an interview with officers on January 18, 2017. RP 356 – 64, 421 – 39. Maria Saquic-Saquic testified that she saw the victim with Lopez-Sanchez on November 21st. RP 382 – 83.

Lopez-Sanchez also testified in his defense. RP 387. He stated that he had been in a romantic relationship with the victim but that he moved

out in April of 2015. RP 388. He testified that he did not go to the victim's apartment on November 20th, but that he saw her the next day when she came to his residence on a surprise visit. RP 391.

Before closing arguments, the jury was instructed that “[i]f evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.” RP 449. The trial court also instructed the jury that

[i]f I've ruled that any evidence is inadmissible or if I've asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching a verdict.

RP 450.

On March 30, 2017, the jury found Lopez-Sanchez guilty of all counts and found the Lopez-Sanchez and Ms. Jimenez were members of the same family or household. CP 46 – 50, RP 511 – 12. Sentencing was held on April 14, 2017. RP 529. Lopez-Sanchez was given an opportunity to speak. RP 532.

The victim was not present at the hearing. RP 531. When asked if she had provided the prosecutor's office with information about what she felt would be an appropriate punishment, the State responded

[s]he did not. As the Court probably could intuit to some extent, she was on board with the prosecution. She felt

disrespected by the defendant during times in trial. Apparently he was making faces at her, shaking his head. I didn't view any of that. ... So I do know that this was something that was a great burden on her. And so I do know that she was happy with the result of this trial. I don't have her specific information from her as to what particular type of amount of time she would like to see. I do know that the no contact order has always been a very important piece for her.

RP 533. During the State's response, the trial court acknowledged that it had not seen Lopez-Sanchez making faces either. *Id.*

Because the trial court merged the burglary and assault charges, Lopez-Sanchez's standard range was 21 to 27 months. RP 534. The trial court sentenced him to 21 months, the low end of the range following the defense counsel's recommendation. *Id.*, CP 63 - 85. Sentences on the other convictions were run concurrent to that time. RP 534, CP 63 - 85. The trial court also imposed a 100-year no contact order in favor of Ms. Jimenez. RP 535, CP 59 – 60, 67, 83. Neither Lopez-Sanchez nor his counsel argued against the imposition of the no contact order. RP 531 – 32. Lopez-Sanchez subsequently filed a notice of appeal on May 2, 2017. CP 90.

ARGUMENT

I. The trial court properly denied a motion for a mistrial.

Lopez-Sanchez claims that the trial court improperly denied his motion for a mistrial. In doing so, he makes multiple misrepresentations of

the record. Lopez-Sanchez suggests that the trial court admonished the State for intentionally violating its pretrial ruling regarding ER 404(b) evidence during argument on the request for a mistrial. In actuality, that discussion occurred the next day while the trial court was explaining the purposes of motions in limine during argument surrounding the admissibility of the content of a text message. He also finds error in the fact that the trial court repeated one of the statements to the jury when telling the jury to disregard it but leaves out the fact that defense counsel requested the curative instruction causing, at most, invited error. See *State v. Studd*, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999) (stating that a defendant is precluded from arguing an error is reversible on appeal if the error was committed by his invitation). Further, during argument on the motion for a mistrial, Lopez-Sanchez represents to this Court that the trial court stated the State was “right on the threshold of crossing this one more time,” but fails to mention that the trial court continued its analysis by stating it wasn’t going to grant a mistrial because it seemed that the victim’s comment that she knew Lopez-Sanchez would hit her was in relation to her calling him a bad name and not in reference to prior bad acts. The court then gave a limiting instruction after defense counsel requested one.

Contrary to Lopez-Sanchez's assertions, the trial court did not abuse its discretion when it denied the motion for a mistrial. This claim is only properly based on two comments by the victim during her testimony.³ Those comments are that the victim ended the relationship because she would not "tolerate any more abuse or any more aggression" and that the victim did not want Lopez-Sanchez to come back into her home after she called him a bad word because she "knew he would hit" her. Given the overwhelming evidence in this case, these comments did not deprive Lopez-Sanchez of a fair trial. Additionally, both statements were followed by a curative or limiting instruction to the jury.

Appellate courts review a trial court's denial of a mistrial for abuse of discretion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). An abuse of discretion exists only when "no reasonable judge would have reached the same conclusion." *Id.* (citation omitted). "A trial court's denial of a motion for mistrial will only be overturned when there is a substantial likelihood that the error prompting the mistrial affected the jury's verdict."

³ Prior to these statements, the victim referred to Lopez-Sanchez's "constant aggression." Defense counsel made no objection to this testimony so any claim regarding that phrase has not been preserved for appeal based on *State v. Finch* and *State v. Sullivan*. In *State v. Finch*, the Washington Supreme Court stated in dicta that when evidence is admitted in violation of a pretrial order, the objecting party must renew the objection. *State v. Finch*, 137 Wn.2d 792, 819 – 20, 975 P.2d 967 (1999). In *State v. Sullivan*, this Court reasoned that a party waives error by failing to object evidence determined to be inadmissible at trial because if the rule were otherwise that party "could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." *State v. Sullivan*, 69 Wn. App. 167, 172, 847 P.2d 953 (1993).

State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (citations omitted). “Further, [the Washington Supreme Court] has held that trial courts ‘should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.’” *Id.* (quoting *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986))

“An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives that defendant of a fair trial.” *State v. Condon*, 72 Wn.App. 638, 647, 865 P.2d 521 (1993) (citation omitted). In determining whether a defendant has been deprived of a fair trial, appellate courts examine

(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

State v. Escalona, 49 Wn.App. 251, 254, 742 P.2d 190 (1987) (citation omitted).

Strong evidence of guilt helps to mitigate the seriousness of an irregularity. *Escalona*, 49 Wn.App. at 255, (stating “[f]urthermore, the reference to Escalona’s record becomes particularly serious considering the paucity of credible evidence against Escalona.”); see also *State v.*

Hammock, 154 Wn.App. 630, 226 P.3d 154 (2010) (determining that the amount of credible evidence in the case holds references to the defendant's criminal history as minor). The trial court is in the best position to determine the prejudice of a statement. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996); *State v. Babcock*, 145 Wn.App. 157, 163, 185 P.3d 1213 (2008).

The defendant in *Escalona* was charged with assault in the second degree while armed with a knife. *Escalona*, 49 Wn.App. at 252. The trial court granted a pretrial ruling to exclude any mention or reference to his prior conviction for the exact same crime. *Id.* During trial, the victim testified that the defendant grabbed a knife and threatened to kill him during an argument. *Id.* The victim was unable to identify the knife at trial but stated that the defendant had been holding a knife. *Id.* The victim later testified that the defendant had a gun. *Id.* at 253. During cross examination, the victim testified that the defendant already had a record and had stabbed someone. *Id.*

Using the analysis laid out above, Division 1 of the Court of Appeals determined that the violation was “extremely serious” because of our evidence rules that generally exclude prior crimes. *Id.* at 255. The Court further stated that the reference was “particularly serious considering the paucity of credible evidence against” the defendant – the

only witness's testimony contained many inconsistencies. *Id.* The Court also determined that the evidence was not merely cumulative. *Id.* It stated that "the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect." *Id.* at 256.

In contrast to *Escalona*, the Court in *State v. Condon* found that statements that a defendant had been to jail do not require a mistrial. *Condon*, 72 Wn.App. at 649 – 50. In *Condon*, a trial for first degree murder, the trial court granted a pretrial motion excluding reference to the fact that the defendant had spent some time in jail. *Id.* at 639, 648. On direct examination during the State's case, a witness testified that the defendant called her when he was "getting out of jail" and that he had asked her to pick him up from jail. *Id.* at 648. The trial court denied the defense's motion for a mistrial and gave the jury a cautionary instruction. *Id.* Later, during cross examination and in response to a question about whether the witness had told someone she would pick up the defendant, the same witness testified "Yeah. I didn't tell her where I was picking him up. I'm not allowed to say that, but he was in a desperate situation that night." *Id.*

In ruling that the trial court did not abuse its discretion in denying a mistrial, the Court held that the facts of *Condon* are distinguishable from *Escalona*. *Id.* at 649. It noted that the improper statements in *Escalona* were extremely prejudicial because they related to a crime identical to the crime that the defendant was standing trial for. *Id.* References to jail, on the other hand, are more ambiguous and do not show a propensity to commit murder or even that the defendant had been convicted of a crime. *Id.* For this reasoning, the Court found that while the remarks had the potential for prejudice, they were not so serious as to warrant a mistrial. *Id.* at 649 – 50.

As in *Condon*, the facts here are distinguishable from *Escalona*. The victim did not testify that Lopez-Sanchez had a record or that he had been convicted of prior crimes. Instead, her statements more closely resembled the ambiguous statements on *Condon*. Stating that the victim would not take any more abuse or aggression and that after she called the defendant a bad word she knew he would hit her, while they may have the potential for prejudice, are no so serious as to warrant a mistrial because they do not relate to specific conduct or specific convictions. When viewed in context with the overwhelming evidence proving Lopez-Sanchez guilty of burglary, assault, and malicious mischief, any irregularity is far less serious than the one present in *Escalona*. As

discussed more fully below, this overwhelming evidence includes the victim's testimony of Lopez-Sanchez's behavior, combined with the photographs of the victim's injuries and the damage to the door, as well as the other witness' statements regarding the victim's behavior after the assault. This evidence is far more prevalent and persuasive than the evidence present in *Escalona*. Given the lack of seriousness of the irregularity, the curative instructions given by the trial court were sufficient to cure any prejudicial effect of the testimony.

Lopez-Sanchez argues the opposite, however he provides only basic conclusory statements and fails to actually analyze the issue. Furthermore, Lopez-Sanchez claims that the violations of the pretrial ruling resulted in a "clear 'trial irregularity'" but makes no claim as to the seriousness level of the irregularity as required by *Escalona*. Lopez-Sanchez has not shown that his right to a fair trial has been violated.

As stated above, the trial court is in the best position to determine whether prejudice has occurred. Given the statements made by the court that the victim was afraid she would be hit was relating to her calling Lopez-Sanchez a bad word, the curative instructions provided by the court and requested by the defense, and the beginning and concluding instructions to the jury that it must disregard evidence stricken from the record, it was not an abuse of discretion for the trial court to deny the

motion for a mistrial. The State thus requests this Court deny Lopez-Sanchez's request to vacate the convictions and remand the case for a new trial.

II. No error occurred during sentencing.

Lopez-Sanchez argues that the trial court erred by letting the State communicate information it had from the victim at sentencing. This issue has not been preserved for appeal because defense counsel made no objection at sentencing. *State v. Riles*, 86 Wn.App. 10, 15, 936 P.2d 11 (1997) (stating “[g]enerally, a defendant must object to a sentencing error to preserve the issue for appeal.”). Therefore, the State requests that this Court deny to consider the merits of this claim.

Further, this Court should deny his request for resentencing because this issue is meritless and Lopez-Sanchez misunderstands the “real facts” doctrine.

Under the “real facts” doctrine, a trial court must base a defendant's sentence on his current conviction, criminal history, and the circumstances surrounding the crime. *State v. Randoll*, 111 Wn.App. 578, 582, 45 P.3d 1137 (2002) (citations omitted). Thus, a defendant “may not be sentenced for a crime the State could not or chose not to prove.” *Id.* at 584 (citation omitted). It “excludes consideration of either uncharged crimes or of crimes that were charged but later dismissed.” *State v.*

Barnes, 117 Wn.2d 701, 707, 818 P.2d 1088 (1991). “In essence, it is unjust to allow a prosecutor to prove a lesser crime beyond a reasonable doubt and then obtain a sentence in excess of the guidelines established for that crime based on facts establishing a higher degree crime but proven at a hearing by a mere preponderance.” *State v. Taitt*, 93 Wn. App. 783, 790, 970 P.2d 785 (1999) (citation omitted).

The “real facts” doctrine does not apply in this case. The State did not present, nor did the trial court rely on, facts about the commission of the crimes that were not proven during the trial. This doctrine does not apply in situations where, as here, the State responds to a court’s request regarding whether a victim communicated her desires for a sentence or a no-contact order.

Further, there is no evidence in the record that the trial court relied on the information provided by the State to make its sentencing determination. Because the court merged the assault charge into the burglary charge, the standard range for that charge was 21 to 27 months. The court sentenced Lopez-Sanchez to the bottom of the range, 21 months, and ran any time on the other convictions concurrently. The sentence exactly aligns with the sentence requested by Lopez-Sanchez at the hearing.

Additionally, neither he nor his attorney objected to the imposition of the no contact order that Lopez-Sanchez now claims was levied against him with no input from the defense. This claim is simply untrue. At the sentencing hearing, both Lopez-Sanchez and his attorney were given a chance to speak after the State requested the 100-year no contact order. Neither individual commented on the State's request. Lopez-Sanchez's argument on appeal that he had no opportunity to present mitigating evidence regarding the imposition of the no contact order is disingenuous.

Lopez-Sanchez also cites to *State v. MacDonald* and *State v. Carreno-Maldonado* to argue that the State does not have the right to speak for victims when they have not requested assistance communicating with the trial court. These cases are wholly irrelevant to the issue at hand. The issue present in both cases is whether the State violated a plea agreement when a state actor advocated for a sentence that was contrary to entered plea agreements. *State v. MacDonald*, 183 Wn.2d 1, 436 P.3d 748 (2015); *State v. Carreno-Maldonado*, 135 Wn.App. 77, 143 P.3d 343 (2006). The quote argued by Lopez-Sanchez from *Carreno-Maldonado*, was actually an analysis of whether the prosecutor was speaking for the victim to determine whether he was speaking as a state actor or a proxy for the purposes of deciding whether a plea agreement was breached. 135 Wn.App. at 86.

Because Lopez-Sanchez's issue regarding sentencing was not preserved for appeal and his claim regarding the "real facts" doctrine is without merit, this Court should deny his request to remand the case for resentencing.

III. The record contains sufficient evidence to support Lopez-Sanchez's convictions.

Evidence that Lopez-Sanchez angrily kicked down Ms. Jimenez's door breaking the lock, ran after her, hit her with a closed fist, and punched her is sufficient to support Lopez-Sanchez's convictions for first degree burglary, fourth degree assault, and third degree malicious mischief.⁴

In a challenge for sufficiency of the evidence, "all reasonable inferences" are drawn in favor of the State and "interpreted most strongly against the defendant" to determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 928 P.2d 1068 (1992) (citation omitted); *State v. Embry*, 171 Wn.App. 714, 742, 287 P.3d 648 (2012) (citation omitted). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201 (citation omitted). Appellate courts defer to the

⁴ Because Appellant does not challenge the bail jumping conviction or the domestic violence designation, Respondent will not discuss these issues in its brief.

trial court on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Raleigh*, 157 Wn.App. 728, 736-37, 238 P.3d 1211 (2010) (citation omitted). Additionally, facts may be proved using either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

At trial, Ms. Jimenez testified that she told Lopez-Sanchez to leave after she said that another woman was calling his phone and that he left before he could find his keys. After an argument, the victim shut and locked her door. Shortly afterward, Lopez-Sanchez began banging on the door very hard and asking about his keys. When the victim would not open the door, he started to kick it until he broke the lock and kicked the door. He had an angry look on his face and his hand was in a fist. Lopez-Sanchez ran after Ms. Jimenez, hit her with a closed fist on the left side of her head and her ear, and kicked her in the hip. The victim escaped by running out of the apartment and toward the management office. Beyond the testimony of Ms. Jimenez, the State admitted photographs depicting the injuries to her face and ear and the damage that had been done to her door.

Lopez-Sanchez claims that no reasonable trier of fact could have concluded that he was at Ms. Jimenez's apartment on November 20, 2015 because the victim is the only one who testified that he was present. He

seemingly argues that the eye-witness testimony of the victim is insufficient to support a finding of guilt. His analysis ends without citing to any legal authority for this assertion. Further, he forgets that Ms. Jimenez's testimony regarding his identity is corroborated by testimony that he sent her a threatening text message the next day and that she sought a protection order the following business day.

Lopez-Sanchez also claims that even if a reasonable jury could have found that he was present, it could not have found that a burglary occurred because he was invited to the apartment, lawfully entered to retrieve his keys, and had no intent to commit a crime therein.

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor ... assaults any person.

RCW 9A.52.020.

Contrary to Lopez-Sanchez's assertion, the evidence present in the record is sufficient to support a finding that he both entered unlawfully and entered with the intent to commit a crime therein or assaulted Ms. Jimenez.

Lopez-Sanchez claims that he lawfully entered the apartment to retrieve his keys when he kicked down the door after the victim asked him to leave and locked him out of the apartment. Again, he cites to no case

law to support his claim that his entry was lawful. Once the victim asked Lopez-Sanchez to leave and shut and locked the door, he was no longer welcome in the apartment.

Kicking open a locked door is sufficient evidence to support a finding that an entry was unlawful. In *State v. Cantu*, the Washington Supreme Court held that evidence that the victim's teenage son had kicked open her locked bedroom door was sufficient to find an unlawful entry even where the teen had a license to enter the family home. 156 Wn.2d 819, 825, 132 P.3d 725 (2006).

Similarly, the record contains sufficient facts to support a finding that Lopez-Sanchez entered with intent to commit a crime therein or assaulted the victim. "The State is not required to prove the intent to commit a specific crime." *State v. Cordero*, 170 Wn. App. 351, 367, 284 P.3d 773 (2012). However, given the facts of this case, there is sufficient evidence that Lopez-Sanchez had the intent to commit assault and that he did commit assault. Testimony and photographic evidence established that he was banging on the door very loudly and began kicking the door when the victim refused to open in. After he kicked the door down, Lopez-Sanchez went directly for the victim with an angry look and a closed fist. He proceeded to hit her on the left side of the head and ear with a closed

fist and kick her in the hip. This is sufficient evidence both of an intent to assault the victim and an actual assault of the victim.

Viewed in the light most favorable to the State with all inferences interpreted most strongly against Lopez-Sanchez, there is sufficient evidence in the record to support convictions for first degree burglary, fourth degree assault, and third degree malicious mischief. This Court should deny his request to vacate these convictions.

CONCLUSION

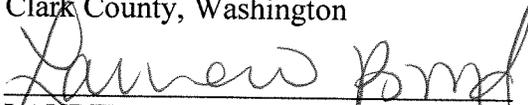
For the reasons stated above, the State respectfully asks this Court to affirm Lopez-Sanchez's convictions and sentence.

DATED this 22nd day of December, 2017.

Respectfully submitted:

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