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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 30198-2-III

STATE OF WASHINGTON, Respondent,

v.

URIEL ORTIZ, Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

Uriel Ortiz was convicted of multiple counts of assault with a deadly weapon and felony harassment, arising of a series of incidents that culminated in Ortiz confronting his wife and his mistress with a bb gun. Despite the fact that the bb gun entered into evidence by the State was clearly not a “firearm” within the meaning of the deadly weapon definitional statute, the trial court denied Ortiz’s motion to dismiss the assault charges based solely on the State’s speculative argument that Ortiz used a different firearm than the one it recovered and introduced into evidence. The trial court also denied Ortiz’s motion to dismiss the harassment charge pertaining to his mistress, Sarah Humphries, even though she did not testify at trial and consequently, the State lacked evidence that she was fearful that Ortiz actually intended to kill her.

The State bolstered its speculative case by presenting testimony about numerous prior incidents of domestic violence for no apparent purpose but to suggest that Ortiz likely committed the present crimes. Despite the lack of 404(b) balancing conducted on the record, the State emphasized the prior incidents in its closing argument in an apparent effort to inflame the jury, without offering any explanation as to how the prior incidents were relevant and instead, using them to argue that Ortiz lacked credibility. Finally, although the State presented evidence of

multiple acts that could have constituted the crime charged, neither party requested and no instruction was given on unanimity pursuant to *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

These errors permeated the trial such that the entire proceeding was rendered unfair to Ortiz. Moreover, the errors cannot be presumed harmless. Accordingly, the conviction should be reversed and the case remanded for a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Ortiz's motion to dismiss the assault charges, because there was no evidence that the bb gun used in the commission of the crime was a "firearm" or a "deadly weapon."
2. The trial court erred when it denied Ortiz's motion to dismiss the felony assault charge against Humphries, because there was no testimony establishing that Humphries was placed in fear that Ortiz intended to carry out his threat to kill her.
3. The trial court erred when it failed to conduct ER 404(b) balancing on the record prior to admitting testimony about numerous prior incidents of domestic violence between Ortiz and one of the victims.

4. The prosecuting attorney committed misconduct in its closing argument when it repeatedly emphasized prior incidents of domestic violence to inflame the jury and to offer commentary on Ortiz's credibility.
5. The trial court erred when it failed to instruct the jury that it must unanimously agree which of the acts about which the State presented evidence constituted the alleged crime.
6. Cumulative error denied Ortiz a fair trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the State introduced into evidence a bb gun that was allegedly used to threaten the victims and presented no evidence that any other item was used, but pointed to the victim's inability to identify the bb gun as the weapon that was used, were there sufficient, non-speculative grounds that an actual firearm *other than* the one recovered by the State to overcome Ortiz's motion to dismiss the assault charges on the grounds that there was insufficient evidence that he used a deadly weapon? **No.**
2. When the alleged victim Humphries did not testify at trial, did the State lack sufficient evidence of the felony harassment charge because there was no evidence that Humphries was

placed in fear by Ortiz's words or conduct that he intended to actually kill her? **Yes.**

3. Was it erroneous for the trial court to permit the State to introduce evidence of a number of incidents of domestic violence between Ortiz and his wife, one of the victims, without conducting 404(b) analysis on the record, when the only asserted probative value of the incidents was to provide "context," and when the State repeatedly emphasized the prior incidents in closing to inflame the jury? **Yes.**
4. Was it misconduct for the prosecuting attorney to repeatedly emphasize the prior incidents of domestic violence in its closing argument in a plainly inflammatory manner, while suggesting that the prior incidents bore on Ortiz's credibility? **Yes.**
5. When evidence was presented of multiple acts that could have constituted assault or harassment against Ortiz's wife, was Ortiz denied his constitutional right to a unanimous jury verdict when the jury was never instructed that it had to agree unanimously as to which act constituted the crime charged? **Yes.**

6. Did multiple errors so permeate the proceedings as to deny Ortiz a fair trial? **Yes.**

IV. STATEMENT OF THE CASE

Ortiz was charged with two counts of second degree assault – deadly weapon and two counts of felony harassment. CP 152-54. The alleged victims of the crimes were Ortiz’s wife, Patricia Rivera, and his mistress, Sarah Humphries. CP 149-50.

At trial, the State sought to admit evidence of a prior incident that allegedly occurred a few months earlier, in which Ortiz assaulted Rivera. RP 79-81. The State also sought to introduce an incident that occurred a day before, when police officers had responded to the house to conduct a welfare check on Rivera. RP 84. The trial court did not conduct any weighing of the proffered evidence,¹ but held:

Okay. There – there’s no grounds to exclude testimony about the incidents on May 22nd and May 21st, in that neighborhood, or the general background. She can also testify as to the details on March 11th, the – you have this protection order procedure that apparently was available for everybody to check but wasn’t located because people were looking in the wrong spot. The Court doesn’t see the necessity of introducing the evidence of the protection

¹ The trial court refers to having “been down in the other courtroom handling pretrial matters,” and the record suggests that the parties had previously discussed the admissibility of the prior incidents. RP 62; 76 (defense counsel stating that he would “just be repeating what I said this morning.”). But there is no docket entry for any such pretrial hearing, and it is not evident that any record was made.

order procedure in – in the situation and will grant the motion in limine as far – to eliminate the paperwork, the petition, the testimony concerning actually coming to court to get a protection order unless the defense chooses to raise it on cross-examination. But she can testify about the incident. The alleged incident. Excuse me.

RP 85.

Accordingly, at trial, the State elicited testimony about prior incidents involving a fight between Ortiz and Rivera when Rivera called the police, Rivera's application for a protective order, and an altercation the day before the charged incident when Rivera did not come home and Ortiz beat her up. RP 136-39; 202-06; 210-11. No effort was made to explain what possible relevance those incidents had to any fact at issue in the case.

On the day at issue, testimony was elicited that Ortiz had taken his son out with a friend when Ortiz's mistress, Humphries, showed up at his house. RP 116-18; 212-13. Rivera and Humphries left the house to go on a walk, at which point Humphries confessed to Rivera that Humphries had been having an affair with Ortiz. RP 215-16. When Ortiz got home and found Rivera gone, he became angry. RP 122. When he saw two people down the street, he sent his son, Abraham, to go see who they were. RP 123; 216-17. Ortiz confronted them as they walked back. RP 124. At that point, he took out a gun and pointed it towards Humphries' feet. RP

124; 218-19. Abraham testified that Rivera pushed the gun away. RP 124. Rivera testified that Ortiz said he was going to shoot Humphries, and she got in front of Humphries. RP 219.

Eventually, Rivera and Ortiz both came back into the house. RP 128-30; 221-22. At this point, the testimony diverges. Abraham testified that Ortiz told Rivera not to hang out with Humphries because she's "a druggie." When Rivera tried to leave the room, Ortiz pushed her into the doorway and knocked her down. Then Ortiz left the house, saying that he was going to go find Humphries and kill her. RP 130-31. Rivera testified that Ortiz dragged her back into the house, pulled out the gun and told her he was going to shoot her. RP 222. According to Rivera, Ortiz hit and kicked her and dragged her to her sons' room and said that he was going to kill her. RP 223. Then he left. RP 223.

After Ortiz left, Rivera called the police. RP 133; 224. Officer Joshua Petker testified that he took Rivera and Abraham to the police station, where they discussed what happened. RP 89; 97-99. During the interview, Ortiz called Abraham on his cell phone and Petker spoke with Ortiz over the phone. RP 100-01. Ortiz agreed to go back to the house to speak with the officers. RP 101. When the officers arrived at the house, Ortiz was not there yet, but arrived a few minutes later. RP 248. Ortiz

was detained and handcuffed, and directed the officers to the bb gun next to the porch.² RP 249. The officers retrieved the bb gun and introduced it into evidence. RP 105. Both Abraham and Rivera testified that the gun introduced into evidence by the State did not look like the same gun that they saw. RP 126-27; 219-20.

Petker interviewed Ortiz, who explained that he had taken the bb gun outside and acted as though he were going to slap Humphries with the pistol. RP 103. Neither Humphries nor Ortiz testified at trial.

At the close of the State's case, Ortiz moved to dismiss the assault charges on the grounds that the State failed to make a prima facie case that a deadly weapon was used. RP 270. The State argued that the bb gun could be a deadly weapon based on Ortiz's admission that he pretended he was going to strike Humphries with it. RP 288. Alternatively, the State argued that because the witnesses didn't recognize the bb gun, Ortiz must have used a different gun (presumably, a real one). RP 288-89. The trial court found that the bb gun was not a deadly weapon, but found there was sufficient evidence that Ortiz had actually used a different gun and the bb gun was just a substitute. RP 297. Accordingly, the trial court denied the motion to dismiss the assault charges. RP 298.

² In the probable cause affidavit, Petker swore that Officer Bjur said he had observed Ortiz throw the gun into the bushes. CP 150.

Similarly, Ortiz moved to dismiss the felony harassment charges on the grounds that the State had failed to prove the victim was placed in reasonable fear that the threat to kill would be carried out. RP 274.

Similarly, the trial court held that the testimony about the events themselves was sufficient to prove, circumstantially, that Humphries was placed in reasonable fear of the threat being carried out. The trial court likewise denied the motion to dismiss the felony harassment charge. RP 300.

The trial court instructed the jury on the elements of second degree assault and felony harassment, as well as misdemeanor assault and harassment as lesser included offenses. CP 50-80. Despite the fact that the State elicited evidence of multiple acts that could constitute an assault or harassment, the trial court gave no instruction requiring that the jury unanimously agree which act constituted the crime charged, nor did it give any limiting instruction for the evidence of prior domestic violence incidents. CP 50-80.

During closing argument, the prosecuting attorney repeatedly emphasized the prior domestic violence incidents for no apparent reason but to inflame the jury. First, while relating the testimony about the altercation between Ortiz, Rivera and Humphries, the prosecutor

highlighted Abraham's statement that Ortiz had threatened Rivera in front of Abraham, suggesting that Ortiz had done such things in the past:

And sad, the telling part was Abraham basically saying that yes, that kind of language happened frequently. To give you some insight I'm going to talk about that a little bit later, to give some insight to what this situation in this home was like. And you heard a little bit of the background.

RP 345. Later, the prosecutor elaborated, stating:

You heard some history. A little bit of insight into what – you know, like in the month or two before this happened, and even a day or so before this happened. Why is that information – why did you hear about that? It gives you some sense of the context of what was going on here.

You heard about the March incident where the defendant, who for some time had basically been coming and going as he pleased, staying away from the home, his wife at some point learned, yeah, he had an affair, he controlled where she went what she drove, the phone that she used, but he could come and go as he pleased.

Okay. Back in March. You heard testimony from both Abraham and his mom. He comes in early morning hours. She had torn him out of a picture, probably for good reason. He saw that and became very upset, tore up her documents, threw the computer at her, monitor and keyboard. Abraham saw that. The police were contacted about that.

Then you heard her say “Well, he said things were going to change, going to get better. He was going to stay at home more.” It didn't happen.

So on – On May 20th, at first he urges her to take his friends, the girl, Amber, to the store. She goes and they stay out for a while. Again, that's not within his control.

She decides without his permission to go out. What happens? She comes home, he begins yelling at her, beating on her in front of the kids, accusing her of having an affair. Comments such as – you heard this maybe a couple of times. Comments in front of the boys. “She deserves this.”

That’s what’s going on in the background year before this. It finally escalates to the point of the crimes that he’s charged with today.

Are those other incidents, the assaults, crimes? Yes, they meet the definition of crimes. Did police show up after that? Yes. But not because Patricia called it in but because somebody else was concerned. They hadn’t heard from her. She was supposed to be at work. They were concerned enough to have somebody come by. Things escalated.

Finally, the defendant’s mistress he learns is there and – pardon me – all hell breaks loose at that point.

RP 350-51.

Subsequently, in attempting to rebut Ortiz’s suggestion that Humphries was a “risk taker” because she used drugs and conducted an affair with a married man, the prosecutor again returned to the prior incidents, stating:

He’s the one that is also having an affair. That’s what’s kind of laughable about the argument. She’s a risk taker. She’s a bad person. She’s a drug user. No evidence to that effect. It’s just the defendant – and the defendant who while beating his wife is telling his boys “She deserves this.” That’s the same guy saying “Oh this – this other woman, she’s a drug user, she shouldn’t be around you”, and “Are you friends with her?” That’s what’s going on

here. That's about as much credibility as it gets. It is not evidence. It is not testimony.

RP 380. Finally, the prosecuting attorney revisited the prior misconduct a final time while suggesting the victims didn't deserve what happened:

You got a little bit of taste of what the home life may be like. That is not okay

The defendant in his comments to his wife when he was beating her the time before and informing her she deserves that, nobody deserves that.

Sarah Humphries, the woman he's having an affair with, doesn't deserve that.

RP 384.

The jury returned guilty verdicts against Ortiz on both counts of second degree assault and both counts of felony harassment. CP 46-47. Ortiz moved for arrest of judgment or for a new trial, again arguing that the bb gun was not a deadly weapon as a matter of law and that the evidence was insufficient to convict him of felony harassment as to Sarah Humphries. CP 41-45. The trial court denied the motion and sentenced Ortiz to thirteen months' incarceration. RP 409, 411; CP 30. Ortiz appeals. CP 1.

V. ARGUMENT

Ortiz's trial was punctuated by testimony about prior bad acts that were introduced contrary to ER 404(b), without a limiting instruction, and which were then highlighted by the prosecuting attorney for the clearly impermissible purposes of garnering sympathy for the victims, commenting on the credibility of Ortiz's prior statement to police, and suggesting that since Ortiz beat his wife before, he probably beat her this time. Despite the lack of evidence that Ortiz used a real firearm during the incident or that the bb gun was capable of inflicting substantial bodily harm, the trial court allowed the State to speculate that Ortiz had really used a different gun besides the one the police recovered. Based on this unsubstantiated and tenuous allegation, the trial court refused to dismiss the second degree assault charges, which were predicated entirely on the allegation that Ortiz used a deadly weapon. Also lacking in evidence was any evidence that Humphries was placed in fear that Ortiz intended to carry out a threat to kill her; once again, the trial court effectively permitted the jury to speculate on the matter. And finally, even though the State presented evidence of multiple acts that could have constituted the charged assault crimes, at no point was the jury instructed that it had to unanimously agree which act constituted the crime.

These multiple egregious errors rendered the trial fundamentally unfair to Ortiz and denied him due process of law. The judgment and sentence should be reversed and the case remanded for a trial that presents the case against Ortiz on its merits, not on speculation and character assassination.

A. The introduction of “prior bad acts” evidence involving earlier domestic violence incidents violated ER 404(b).

Decisions admitting evidence are within the discretion of the trial court, and are reversible only if the trial court abuses its discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. Smith*, 115 Wn.2d 434, 444, 798 P.2d 1146 (1990). Discretion is abused if it is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *State v. Alexander*, 125 Wn.2d 717, 732, 888 P.2d 1169 (1995); *State v. Herzog*, 69 Wn. App. 521, 524–25, 849 P.2d 1235, *review denied*, 122 Wn.2d 1021, 863 P.2d 1353 (1993).

Under ER 404(b), admissibility of a defendant’s prior wrongdoing is limited. When determining whether evidence is admissible under ER 404(b), the trial court engages in a four-step analysis: it must (1) determine, by a preponderance of the evidence, whether the prior bad act occurred; (2) determine the purpose for admission; (3) determine whether

the evidence is relevant to prove an element of the crime charged or to rebut a defense; and (4) balance, on the record, the probative value of the evidence and its prejudicial effect. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The analysis must be performed on the record, and a limiting instruction must be given. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). If this balancing is not reflected in the record, reversal is not required if the trial court carefully set forth its reasons for admission. *State v. Hepton*, 113 Wn.App. 673, 688, 54 P.3d 233 (2002), *review denied*, 149 Wn.2d 1018, 72 P.3d 762 (2003).

Evidence of prior acts of domestic violence can be admitted under certain circumstances, when the incidents are relevant to prove some fact at issue in the case. *See, e.g., State v. Cham*, ___ Wn. App. ___, 267 P.3d 528 (2011) (admissible to prove victims fear of defendant and defendant's knowledge of prior restraining order); *State v. Grant*, 83 Wn. App. 98, 920 P.2d 609 (1996) (evidence admissible to explain victim's inconsistent behavior); *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754, *review denied*, 117 Wn.2d 1010, 816 P.2d 1224 (1991) (evidence admissible to explain victim's delay in reporting abuse and to rebut implication that it did not occur). But in this case, there is no clearly identified purpose in furtherance of which the evidence was admitted, nor does the manner in

which it was introduced shed light on what disputed issue the evidence was relevant to clarify. Instead, the prosecuting attorney simply presented a laundry list of alleged violent acts committed by Ortiz and argued that the acts provided “context” in which the jury should evaluate the present claims. This was clearly improper.

Part of the reason for requiring the trial court to identify the purpose for which the prior bad acts evidence is introduced is so the jury can be instructed to consider the evidence only for that limited purpose. Here, no such instruction was given. Although the Washington Supreme Court has held that courts have no obligation to give a limiting instruction *sua sponte*, nothing in the case law interpreting the requirements of ER 404(b) suggests that a court may disregard the balancing test and permit highly prejudicial evidence of misconduct to the jury for any purpose at all. *See generally State v. Russell*, 171 Wn.2d 118, 249 P.3d 604 (2011). In fact, as argued below, the evidence was certainly used for the highly improper purposes of appealing to the sympathies of the jury, suggesting that the alleged incident was part of a larger pattern of wrongdoing, and otherwise contending that Ortiz was a bad person who was not credible. Here, the absence of a record of the trial court’s balancing of the ER 404(b) factors is fatal because the record simply does not reflect any appropriate purpose for admitting the evidence, and there is no basis for

evaluating the trial court's exercise of its discretion. In light of how the prosecuting attorney actually used the evidence, it should be presumed that no appropriate purpose existed.

B. The prosecuting attorney committed misconduct in closing argument when he repeatedly urged the jury to consider the ER 404(b) evidence for an improper purpose and used it to emphasize that Rivera and Humphries "didn't deserve" what happened.

Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497, 46 L.R.A. 641 (1899), *quoted in State v. Reed*, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). In this case, it was not sufficient for the prosecutor to simply argue that Ortiz threatened Rivera and Humphries with a gun, that multiple witnesses including his own son testified that he did it, and that he confessed to confronting them with a gun. Instead, the prosecutor

resorted to classic character assassination – first, painting Ortiz as a serial victimizer and abuser of women, then arguing that his character as a wife-beater rendered his version of events lacking in credibility, and finally imploring the jury to find that Rivera and Humphries “didn’t deserve” the things that Rivera accused Ortiz of doing. Such improper argument amounts to misconduct in that it aims to obtain a conviction based not on the facts of the case, but on the passions of the jury.

First, the prosecuting attorney raised the alleged prior bad acts to support his argument that because Ortiz was the kind of guy who committed such acts, his explanation that Humphries may not have feared that Ortiz would actually kill her because she was a “risk taker” was not credible. It is beyond dispute that a prosecuting attorney is not permitted to offer an opinion as to the credibility of the witnesses in the case. *State v. Papadopoulos*, 34 Wn. App. 397, 662 P.2d 59, *review denied*, 100 Wn.2d 1003 (1983); *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). In *Papadopoulos*, the court observed that prejudicial error does not occur until the prosecutor crosses the line between drawing reasonable inferences from the evidence to arguing his personal opinion. 34 Wn. App. at 400 (*citing State v. LaPorte*, 58 Wn.2d 816, 365 P.2d 24 (1961)). But here, the prosecuting attorney not only directly challenged Ortiz’s credibility, he did so not based on the evidence of the incident, but based

on his characterization of Ortiz as a wife-beater. The suggestion that Ortiz was not credible because he had a habit of beating his wife was highly improper.

The prosecutor then went further and repeatedly emphasized the prior bad acts evidence, not to establish any fact at issue in the case, but merely to garner sympathy for Rivera and Humphries. It is the prosecutor's duty to "seek a verdict free of prejudice and based on reason." *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). The prosecutor's duty to act impartially derives from his or her position as a quasi-judicial officer. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). Jurors can allow neither sympathy nor prejudice to affect their verdict, and prosecutors may not argue that jurors should convict on those grounds. *See, e.g., State v. Echevarria*, 71 Wn. App. 595, 869 P.2d 420 (1993); *State v. Belgarde*, 110 Wn.2d 504, 510, 755 P.2d 174 (1988); *State v. Powell*, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991).

Here, considering the context of the prosecuting attorney's argument as a whole, the comments emphasizing the alleged bad acts served no purpose but to inflame the jury and appeal to their sympathies.

This purpose was underscored by the prosecutor's statement that Rivera and Humphries "didn't deserve" what happened to them.

Ortiz's counsel did not object to the prosecutor's comments at trial.

The *Echevarria* court set forth the standard courts are to apply in evaluating claims of prosecutorial misconduct:

In considering allegations of prosecutorial misconduct, this court conducts a two-step evaluation. The court must first determine whether the comments are improper; then, if they are, the court must consider whether there was a substantial likelihood the comments affected the jury verdict. The defense bears the burden of establishing both the impropriety and the prejudicial effect. Absent a proper objection to the comments at trial, a request for a curative instruction, or a motion for a mistrial, the issue of misconduct cannot be raised on appeal unless the misconduct was so flagrant or ill-intentioned that the prejudice could not have been obviated by a curative instruction.

71 Wn. App. at 597 (internal citations omitted). Here, in the context of the case as a whole, it is evident that the case was permeated with improper implications based on the admission of the prior bad acts evidence. The prosecutor's comments in argument simply stated expressly the underlying theme of the case – that Ortiz was an abusive character who habitually treated women in ways they didn't deserve. Nor was the evidence of guilt overwhelming; Humphries did not testify at all, and Rivera's version of events differed in critical respects from Abraham's version. It is not at all

difficult to perceive how the jury would have been inclined to resolve those differences in favor of conviction had they been persuaded by the prosecutor's argument that Ortiz was a bad guy and Rivera deserving of their sympathy.

C. The evidence was insufficient as a matter of law to convict Ortiz of second degree assault because the bb gun did not constitute a deadly weapon and there was no evidence, only speculation, that Ortiz used another weapon.

The State charged Ortiz with second degree assault on the theory that he used a deadly weapon in the commission of the assault. RCW 9A.36.021(1)(c); CP 152-53. A deadly weapon is defined in RCW 9A.04.110(6) as:

[A]ny explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, 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.

Courts have construed this definition to establish two classes of deadly weapons; firearms, which are deadly weapons *per se*, and other objects that, under the circumstances, could be capable of causing death or substantial bodily harm. *State v. Carlson*, 65 Wn. App. 153, 158-59, 828

P.2d 30 (1992). In *Carlson*, the Court interpreted the “deadly weapon” requirement of second degree assault and concluded that the Legislature intended to reserve second degree assaults for those incidents involving weapons actually capable of producing bodily harm, while incidents involving weapons apparently, but not actually, capable of producing bodily harm, constituted misdemeanor assaults. 65 Wn. App. at 160-61.

In *Carlson*, the defendant admitted that he approached the victim with a bb gun and held it a few inches from his face. When the victim pushed it away, the defendant acted as though he was going to strike the victim with the bb gun, and then walked away. 65 Wn. App. at 154-55. The weapon was not in evidence, and the defendant testified that it was an inoperable bb gun. *Id.* at 154-55. The *Carlson* court held that in the absence of substantial evidence that the bb gun was operable and capable of inflicting harm, reasonable doubt existed as to whether the gun constituted a deadly weapon. *Id.* at 161. Consequently, the evidence only supported a verdict of fourth degree assault. *Id.* at 161-62.

In a more extreme circumstance, this court has previously held that a bb gun can constitute a dangerous weapon when the defendant uses it to hold young boys hostage on the ground for twenty to thirty minutes, pointing it at one boy’s head from one to two inches away, and the trial

court made a finding that nothing appeared to be wrong with the bb gun. *State v. Taylor*, 97 Wn. App. 123, 125, 982 P.2d 687 (1999). But in this case, Ortiz is alleged to have done nothing more than to point the bb gun generally in the direction of Humphries' feet. RP 218-19. There was no testimony as to whether the bb gun was loaded or operational, or what kind of injury it might have inflicted on a person's foot if it had been. Unlike *Taylor*, the circumstances in this case do not suggest that the manner in which the bb gun was used made it capable of inflicting substantial bodily harm.

Due process requires that the State present substantial evidence of each and every element of the crime charged in order to convict. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982). Substantial evidence exists when there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Here, after the State failed to present any evidence that the bb gun, as Ortiz was alleged to have used it, was capable of inflicting bodily injury, the State argued instead that because Rivera and Abraham did not recognize the bb gun as the one Ortiz used, Ortiz must have had another gun, a real gun, that he used and then traded with the bb gun. RP 288-89. This argument so plainly exceeds the credible inferences that can be drawn from the

witnesses' inability to recognize the gun months after the incident as to defy reason. Only by the most generous speculation could any jury conclude that the State's position was even possible, let alone that it had been proven beyond a reasonable doubt. Because the State offered no evidence whatsoever that Ortiz used a different gun that was not a bb gun, such a theory was purely speculative and did not constitute substantial evidence that Ortiz used a deadly weapon sufficient to present that question to the jury. Consequently, the trial court erred in denying Ortiz's motion to dismiss the second degree assault charges on the grounds that there was insufficient evidence that he used a deadly weapon.

D. The evidence was insufficient as a matter of law to convict Ortiz of felony harassment against Humphries because the jury was required to speculate whether she was placed in reasonable fear that Ortiz intended to carry out a threat to kill her.

Similarly, the State failed to prove each and every element of the felony harassment charge pertaining to Humphries because it did not present evidence that Humphries was fearful that Ortiz would actually kill her.

To convict a defendant of felony harassment, the State must prove that the victim was placed in reasonable fear that the threat to kill would be carried out, and not merely that the victim feared some bodily harm. *State v. C.G.*, 150 Wn.2d 604, 607-08, 80 P.3d 594 (2003). In *C.G.*, the Washington Supreme Court held that the victim's testimony that the defendant's threat "caused him concern" and that he feared the defendant might try to harm him or someone else was insufficient to establish the elements of felony harassment. 150 Wn.2d at 607, 610.

Likewise, in *State v. Kiehl*, 128 Wn. App. 88, 113 P.3d 528 (2005), this court reversed a felony harassment conviction based on threats the defendant made to kill a Superior Court judge when the judge did not testify at trial, and there was no evidence that the judge heard the threat or feared that it would be carried out.

While this case is slightly different from *Kiehl* in that the threat to kill was made in person to Humphries, the case is analogous in that in the absence of testimony from Humphries, the State failed to present evidence as to whether she believed the threat would be carried out. Although the State argued that such a finding could be supported by circumstantial evidence, in the absence of testimony from Humphries, or words or conduct on her part evidencing a real fear that Ortiz would kill her, the

jury was literally expected to read Humphries' mind. Under the facts presented, there was simply no way that a rational jury could have found that Humphries feared that Ortiz would kill her without resorting to sheer speculation, and the trial court should have granted Ortiz's motion to dismiss.

E. Ortiz was denied his constitutional right to a unanimous jury verdict because, despite admitting evidence of multiple acts that could constitute assault, the trial court did not give a unanimity instruction as required by *State v. Petrich*.

When the State presents evidence of multiple acts that could form the basis of the charge alleged in the information, it must elect which offense it is relying on to convict or the jury must be instructed that it must agree that the same underlying criminal act has been proven beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). In the absence of an election or a *Petrich* instruction, the error is only deemed harmless if no rational trier of fact could have entertained a reasonable doubt as to each incident. *State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988).

Here, the State presented evidence of multiple acts that could have constituted the charged assault against Rivera. First, Rivera testified about

an incident within a day of the incident with Humphries when Ortiz allegedly beat her up. RP 204-06. Next, the State presented evidence of the confrontation between Ortiz and Rivera and Humphries, when he angrily raised the gun and Rivera stepped in front of Humphries. RP 218-19. Lastly, Rivera testified that after Humphries left, Ortiz dragged her upstairs and threatened to kill her while pointing the gun at her. RP 222-23. Each of these incidents, standing alone, could have constituted the assault; thus, a *Petrich* instruction was required.

Moreover, it was quite possible that a reasonable jury could have failed to find that two of the three incidents occurred beyond a reasonable doubt. Rivera's allegation of a fight the day before in which Ortiz beat her up was not corroborated by any witness, nor did any of the officers who responded note that she was bruised or injured in any way. As to the third incident, when Ortiz allegedly dragged Rivera up the stairs and pointed the gun at her, Abraham's version of events differed from Rivera's. To the contrary, Abraham testified that Ortiz pushed Rivera against a wall and then left. RP 130-31. Because the evidence was not overwhelming, a reasonable jury could have found that Abraham was a more credible witness. Thus, the error cannot be presumed to be harmless, and reversal is required.

F. Cumulative error denied Ortiz a fair trial.

When possible errors, standing alone, might not warrant a new trial, a court can still order a new one when the accumulation of error warrants it. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

In this case, the trial errors are numerous and overwhelmingly prejudicial to Ortiz's ability to obtain a fair trial. From the introduction of collateral, prejudicial evidence of prior domestic violence incidents, to the prosecutor's improper argument from those incidents, to the trial court's refusal to dismiss the charges despite the absence of non-speculative evidence supporting the higher charges, to the shotgun approach of throwing multiple allegations at Ortiz in the hopes that one will stick, the trial court bent over backward to permit the prosecution to go to any lengths to obtain felony convictions against Ortiz. Here, error piled upon error in allowing Ortiz to be convicted not based on the merits of the evidence, but on the passions of the jury, inflamed by the overwhelming flurry of allegations and fanned by the State's emphasis on Ortiz's prior acts and its efforts to generate sympathy for Rivera and Humphries. Under the circumstances, what jury could possibly consider the incident fairly and impartially?

Ortiz's trial was so tainted by these errors that it cannot be relied upon as having produced a just result. The judgment and sentence should be reversed and a new trial should be granted.

VI. CONCLUSION

Multiple errors in this case served to create a substantial risk that Ortiz was convicted not because the jury believed he committed the charged crimes beyond a reasonable doubt, but because it was permitted, even encouraged, to rely on its passions and its prejudices against Ortiz and to sympathize with Rivera and Humphries. This prejudicial influence was enhanced when the trial court permitted the second degree assault charges to stand despite the lack of evidence that Ortiz used a deadly weapon when he confronted Rivera and Humphries, and when it refused to dismiss the felony harassment charge even though the State presented no evidence whatsoever that Humphries was placed in fear that Ortiz would kill her. Lastly, conviction was effectively guaranteed when the trial court failed to instruct the jury that it must unanimously agree on the act constituting the assault against Rivera, notwithstanding the State's presentation of multiple allegations that could have each been the basis of the charged crime. Under the circumstances, Ortiz did not receive a fundamentally fair trial. His conviction should be reversed and the case

remanded for a trial that relies on the evidence, not speculation, character assassination, and inflamed passions.

RESPECTFULLY SUBMITTED this 21st day of February, 2012.



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CERTIFICATE OF SERVICE

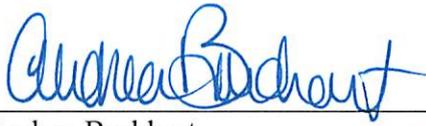
I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the Brief of Appellant upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 21st day of February, 2012 in Walla Walla, Washington.



Andrea Burkhart