

NO. 67413-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARCELIS CHRISTOPHER KING,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	7
1. THE DEFENDANT'S CONVICTIONS FOR SECOND-DEGREE ASSAULT AND FELONY HARASSMENT DO NOT VIOLATE DOUBLE JEOPARDY	7
2. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT COMMITTED SECOND-DEGREE ASSAULT AND FELONY HARASSMENT AGAINST RONNY JOHNSON	16
3. THE TERM "TRUE THREAT" IS NOTHING MORE THAN A TERM OF ART THAT DESCRIBES THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF ANY CRIME	20
a. The Charging Document And Jury Instructions.....	21
b. The Elements Of The Crime Of Harassment.....	22
4. JURORS WERE INFORMED THAT THEY NEEDED TO BE UNANIMOUS TO RETURN A VERDICT	25

a.	The Issue Is Waived.....	27
b.	The Jury Instructions Informed The Jurors Of Their Duty.....	28
c.	Harmless Error.....	29
5.	THE PROSECUTOR DID NOT COMMIT MISCONDUCT	30
D.	<u>CONCLUSION</u>	39

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Blockburger v. United States, 284 U.S. 299,
52 S. Ct. 180, 76 L. Ed. 306 (1932)..... 9, 10, 12

Neder v. United States, 527 U.S. 1,
119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) 29

United States v. Dixon, 509 U.S. 688,
113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993)..... 14

United States v. Hiatt, 581 F.2d 1199
(5th Cir. 1978) 36

Washington State:

City of Seattle v. Patu, 147 Wn.2d 717,
58 P.3d 273 (2002)..... 27

In re Benn, 134 Wn.2d 868,
952 P.2d 116 (1998)..... 31

In re Fletcher, 113 Wn.2d 42,
776 P.2d 114 (1989)..... 14

In re K.R., 128 Wn.2d 129,
904 P.2d 1132 (1995)..... 27

In re Orange, 152 Wn.2d 795,
100 P.3d 291 (2004)..... 15

In re Stranger Creek, 77 Wn.2d 649,
466 P.2d 508 (1970)..... 12

State v. Allen, 101 Wn.2d 355,
678 P.2d 798 (1984)..... 25

<u>State v. Allen</u> , 161 Wn. App. 727, 255 P.3d 784, <u>rev. granted</u> , 172 Wn.2d 1014 (2011).....	20, 24
<u>State v. Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273 (2009).....	31
<u>State v. Atkins</u> , 156 Wn. App. 799, 236 P.3d 897 (2010).....	20, 24
<u>State v. Bailey</u> , 114 Wn.2d 340, 787 P.2d 1378 (1990).....	27
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	28
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	29
<u>State v. Calle</u> , 125 Wn.2d 769, 888 P.2d 155 (1995).....	8, 9, 10, 11, 12, 15
<u>State v. Clapp</u> , 67 Wn. App. 263, 834 P.2d 1101 (1992), <u>rev. denied</u> , 121 Wn.2d 1020 (1993).....	34
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	17
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	35, 38
<u>State v. Gocken</u> , 127 Wn.2d 95, 896 P.2d 1267 (1995).....	15
<u>State v. Gonzales</u> , 111 Wn. App. 276, 45 P.3d 205 (2002).....	31
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	28

<u>State v. Harvey</u> , 34 Wn. App. 737, 664 P.2d 1281, <u>rev. denied</u> , 100 Wn.2d 1008 (1983).....	35
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	27
<u>State v. J.M.</u> , 144 Wn.2d 472, 28 P.3d 720 (2001).....	23
<u>State v. Kilburn</u> , 151 Wn.2d 36, 84 P.3d 1215 (2004).....	23
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	22
<u>State v. Leming</u> , 133 Wn. App. 875, 138 P.3d 1095 (2006).....	13, 14
<u>State v. Lewis</u> , 15 Wn. App. 172, 548 P.2d 587, <u>rev. denied</u> , 87 Wn.2d 1005 (1976).....	27
<u>State v. Louis</u> , 155 Wn.2d 563, 120 P.3d 936 (2005).....	14
<u>State v. Mandanas</u> , 163 Wn. App. 712, 262 P.3d 522 (2011).....	8, 11, 12
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	31
<u>State v. Meneses</u> , 169 Wn.2d 586, 238 P.3d 495 (2010).....	28
<u>State v. Moultrie</u> , 143 Wn. App. 387, 177 P.3d 776, <u>rev. denied</u> , 164 Wn.2d 1035 (2008).....	28
<u>State v. Nunez</u> , 160 Wn. App. 150, 248 P.3d 103, 172 Wn.2d 1004 (2011).....	27

<u>State v. Pittman</u> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	28
<u>State v. Reed</u> , 102 Wn.2d 140, 685 P.2d 699 (1984).....	31
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	31
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	35, 36
<u>State v. Ryan</u> , 160 Wn. App. 944, 252 P.3d 895, <u>rev. granted</u> , 172 Wn.2d 1004 (2011).....	27
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	16, 17
<u>State v. Sargent</u> , 40 Wn. App. 340, 698 P.2d 598, <u>rev. denied</u> , 111 Wn.2d 641 (1985).....	31, 34
<u>State v. Schaler</u> , 145 Wn. App. 628, 186 P.3d 1170 (2008), <u>rev'd. on other grounds</u> , 169 Wn.2d 274 (2010).....	24
<u>State v. Sloan</u> , 149 Wn. App. 736, 205 P.3d 172, <u>rev. denied</u> , 220 P.3d 783 (2009).....	24
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	29
<u>State v. Stover</u> , 67 Wn. App. 228, 834 P.2d 671 (1992), <u>rev. denied</u> , 120 Wn.2d 1025 (1993).....	34
<u>State v. Tellez</u> , 141 Wn. App. 479, 170 P.3d 75 (2007).....	20, 24
<u>State v. Tilton</u> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	16

<u>State v. Vaughn</u> , 83 Wn. App. 669, 924 P.2d 27 (1996), <u>rev. denied</u> , 131 Wn.2d 1018 (1997).....	15
<u>State v. Vladovic</u> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	14
<u>State v. Wanrow</u> , 88 Wn.2d 221, 559 P.2d 548 (1977).....	29
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	30, 31, 35, 38
<u>State v. Williams</u> , 144 Wn.2d 197, 26 P.3d 890 (2001).....	23

Constitutional Provisions

Federal:

U.S. Const. amend. I.....	20
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Statutes

Washington State:

RCW 9.41.010.....	26
RCW 9.41.040.....	30
RCW 9.94A.533.....	26
RCW 9A.36.011.....	25
RCW 9A.36.021.....	9, 10, 13, 14, 17
RCW 9A.40.020.....	14
RCW 9A.46.020.....	9, 11, 17, 21, 23

Other Authorities

WPIC 2.04.....	25
WPIC 2.24.....	22
WPIC 35.04.....	25
WPIC 36.07.02.....	22

A. ISSUES PRESENTED

1. Should this Court overrule its own cases and hold that convictions for second-degree assault and felony harassment violate double jeopardy?

2. Under a sufficiency of the evidence claim, could a rational trier of fact have found the defendant committed the crimes of second-degree assault and felony harassment against Ronny Johnson?

3. Should this Court overrule its own case law and hold that the definition of a "true threat" is really an element of the crime of harassment?

4. Jurors need to be unanimous in finding the existence of a deadly weapon sentencing enhancement. Has the defendant shown that the jury instructions he approved did not properly inform the jurors that they needed to be unanimous in returning a finding that he was armed with a deadly weapon?

5. Should this Court reject the defendant's claim that his conviction should be reversed because of alleged prosecutorial misconduct?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was convicted as charged of the following felony offenses:

Count I: Assault in the second degree
Victim: Michael Rosier

Count II: Assault in the second degree
Victim: Ronny Johnson

Count III: Felony harassment
Victim: Michael Rosier

Count IV: Felony harassment
Victim: Ronny Johnson

Count V: Unlawful possession of a firearm in the first degree

CP 175-78, 72, 74, 76, 78, 80. The jury also found that the defendant was armed with a firearm on counts I, II, III and IV.

CP 69-71, 81. The defendant received a standard range sentence, with firearm enhancements, for a total term of confinement of 175 months. CP 265-74, 349-50.

2. SUBSTANTIVE FACTS

Husband and wife, Michael Rosier and Ronny Johnson, live in Renton with their children. 5RP¹ 164-65, 167. Their daughter is on the drill team with the daughter of Makel Andrews and co-defendant Kurtis Walker. 5RP 167-68.

On the evening of May 22, 2010, Rosier and Johnson went dancing at the Saigon Palms in Renton. 5RP 169. While at the club, they ran into Andrews. 5RP 172. Andrews invited them--and some other people, back to her apartment. 5RP 173. Although Rosier just wanted to go home, his wife won out and they drove over to Andrews' apartment together. 5RP 173-74.

When they got to the apartment, there were three or four of Andrews' friends, all females. 6RP 9-10. Feeling a bit out of place, Rosier sat down at a table while the women talked. 6RP 9-10. Rosier does not use drugs, and being the designated driver, he did not drink anything at Andrews' apartment. 6RP 12.

After about 15 minutes, the sliding glass door suddenly opened and three men came inside, the defendant--Marcelis King,

¹ The verbatim report of proceedings is cited as follows: 1RP--7/23/10, 10/27/10, 12/20/10 & 12/21/10; 2RP--1/3/11 & 1/5/11; 3RP--1/10/11; 4RP--1/11/11; 5RP--1/12/11; 6RP--1/13/11; 7RP--1/18/11; 8RP--1/19/11; 9RP--1/20/11, 1/24/11, 1/25/11 & 1/26/11; 10RP--2/25/11, 7/8/11, 7/22/11 & 8/9/11.

his co-defendant--Kurtis Walker,² and a third man, Robert Williams. 6RP 13-14. Prior to that evening, Rosier had never met any of the men before. 6RP 15, 18.

The three men surrounded Rosier, with Walker sitting down at the table across from Rosier. 6RP 16-17. Walker pulled out a bag of cocaine and began snorting it. 6RP 17. Walker, who was very high, did not like the fact that Rosier was in the apartment. 6RP 19. His speech was slurred and he began rambling nonsensically. 6RP 20-21. While this was going on, the defendant was saying that he wanted to "pop" somebody, meaning to shoot someone. 6RP 22.

Andrews and another woman, Shamika, then came into the living room, grabbed Walker and tried to corral him into another room. 6RP 24. The defendant then said to Walker, just let me shoot him, "I'll pop him right now." 6RP 24. As the women were holding onto Walker, one of them urged Rosier to take the opportunity to leave. 6RP 25.

As Rosier and Johnson were leaving, the defendant alerted Walker that they were leaving. 6RP 26-27. When Rosier and

² Convicted of lesser charges, Walker did not file an appeal of his conviction.

Johnson jumped into their Ford Explorer, Walker came out and climbed into the back seat. 6RP 27. Walker asked Rosier and Johnson where it was they thought they were going. 6RP 28. As this was going on, the defendant got into an SUV and pulled in front of Rosier to block his path. 6RP 28.

As Walker rambled on in the back seat, Johnson called Andrews to come get him. 6RP 31. Andrews then came outside and got Walker. 6RP 31-32. As he was exiting the car, Walker said that he would be right back and instructed the defendant to keep Rosier and Johnson right where they were. 6RP 33. The defendant, who was standing at the driver's side window, then pulled out a Hi-Point 9mm semiautomatic handgun and threatened to kill the two of them. 6RP 33-35; 8RP 76. In tears, Johnson asked the defendant why he wanted to kill them. 6RP 34. Rosier testified that he thought about trying to gun the vehicle across the grass but he was afraid of getting shot in the back of the head. 6RP 34.

At one point, the defendant pointed the gun directly at the side of Rosier's face. 6RP 35. He then pointed the gun directly at Johnson, and with Johnson looking directly at the barrel of the gun, she begged him not to shoot the two of them. 6RP 36, 96-97.

While this was going on, Johnson was able to secretly dial 911 on her cell phone. 6RP 37-38, 183. Although she was not able to speak with the 911 operator, the police were able to determine her general location and respond to the area. 4RP 134-36, 142-43; 6RP 186. One officer called back Johnson's number and could hear a male voice saying, "I'll kill you, motherfucker." 4RP 138, 140.

When officers drove upon the scene, the defendant was still standing at the driver's side window of Rosier's vehicle. 4RP 33-34; 6RP 44. When the defendant spotted the officers, he said, "oh shit," dropped the gun onto Rosier's lap, and threatened, "you ain't going to say nothin." 6RP 45. The defendant then backed away from the vehicle. 4RP 39-40; 6RP 45. Officers located the gun on the floorboard at Rosier's feet. 4RP 46, 50, 53; 6RP 47. After determining what had happened, the defendant and Walker were placed under arrest. 4RP 70-71; 6RP 55.

Johnson and Rosier told the responding officers that the defendant had pointed a gun at them and had threatened to kill them. 5RP 93-94. Rosier testified that he thought he was going to die. 6RP 59. Johnson testified that she was afraid they both might be killed. 6RP 185. Johnson kept thinking of how her mother was

going to have to raise her children and wondering if the defendant was going to shoot her or her husband first. 6RP 194.

When officers recovered the defendant's gun, it was discovered that it was unloaded, with no magazine or bullet in the chamber. 6RP 55. Forensic testing showed that the gun had been fired in the past and was fully operational. 8RP 78, 81, 87.

Instead of having admitted into evidence his prior first-degree robbery conviction, the defendant entered into a stipulation whereby the jury was told that prior to May 22, 2010, he had been convicted of a "serious offense." 8RP 209.

The defendant did not testify. Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE DEFENDANT'S CONVICTIONS FOR SECOND-DEGREE ASSAULT AND FELONY HARASSMENT DO NOT VIOLATE DOUBLE JEOPARDY.

The defendant contends that his convictions for second-degree assault and felony harassment violate double jeopardy. He is incorrect. Applying the test for determining whether a double jeopardy violation has occurred, as outlined in

State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995), it is clear convictions for both offenses may stand. This is the holding of State v. Mandanas, 163 Wn. App. 712, 262 P.3d 522 (2011), a case wherein Mandanas was charged and convicted in the exact same manner as the defendant.

In beginning an analysis of an alleged double jeopardy violation, the first step is to look at what the double jeopardy clause is intended to protect against, i.e., the purpose of the rule. Without question, subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. Calle, 125 Wn.2d at 776. In many cases, a defendant's conduct, a single act, may violate more than one criminal statute. Without question, a defendant can permissibly receive multiple punishments for a single criminal act that violates more than one criminal statute. Calle, at 858-60 (finding no double jeopardy violation where a single act of intercourse violated the incest statute and the rape statute). Double jeopardy is only implicated when the court exceeds the authority granted by the legislature and imposes multiple punishments where multiple punishments are not authorized. Calle, at 776. Therefore, a reviewing court's role "is limited to determining what punishments

the legislative branch has authorized,” and determining whether the sentencing court has properly complied with this authorization.

Calle, at 776.

In Calle, the Supreme Court set forth a three-part test for determining whether multiple punishments were intended by the legislature. The first step is to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. Calle, at 776. Should this step not result in a definitive answer, the court turns to another rule of statutory construction, the two-part "same evidence" or "Blockburger" test. This test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that can only be overcome where there is "clear evidence" that the legislature did not intend for the crimes to be punished separately. Calle, at 778-80.

Neither the assault statute (RCW 9A.36.021), nor the felony harassment statute (RCW 9A.46.020), expressly allows or disallows multiple punishments for a single act. Because the statutes do not supply this Court with an answer, the Court must turn to the "same evidence" test.

The "same evidence" or "Blockburger"³ test asks whether the offenses are the same "in law" and "in fact." Calle, at 777. Offenses are the same "in fact" when they arise from the same act. Offenses are the same "in law" when proof of one offense would always prove the other offense. Calle, at 777. If each offense includes elements not included in the other, the offenses are considered different and multiple convictions can stand. Calle, at 777.

Here, the defendant's convictions are not the same "in law." As charged, to convict the defendant of second-degree assault, the State was required to prove that he assaulted the victim with a deadly weapon. CP 175-78; CP 101, 106; RCW 9A.36.021(1)(c). Felony harassment does not require that a defendant use a deadly weapon or that he assault his victim.

As charged, to convict the defendant of felony harassment, the State was required to prove that the defendant, acting without lawful authority, knowingly threatened to kill the victim and that the words or conduct of the defendant placed the victim in reasonable fear that the threat to kill would be carried out. CP 175-78; CP 118,

³ Referring to Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

122; RCW 9A.46.020(1), (2). Second-degree assault does not require a defendant knowingly threaten his victim, that the threat be a threat to kill or that the victim be placed in reasonable fear of actual death.

With each charged crime having an element not contained in the other (in this case multiple elements), the two offenses fail the "same in law" prong of the "same evidence" test. It makes no difference that the convictions may be the same "in fact." Calle, at 780 (failure under either the "same in law" or the "same in fact" prong of the "same evidence" test defeats a claim that the convictions violate double jeopardy). Because the offenses are not the same "in law," this Court must find that the defendant's convictions were appropriately punished separately unless "there is a clear indication of contrary legislative intent." Calle, at 780. Here, there is no such contrary evidence in the statutes or legislative history, and the defendant does not argue otherwise.

That second-degree assault and felony harassment, as charged herein, do not violate double jeopardy, is the exact result reached by this Court in Mandanas, supra. The doctrine of *stare decisis* provides that this Court must adhere to this prior ruling unless the defendant can make "a clear showing" that the rule is

"incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). The defendant cannot meet this burden.

The defendant argues that Mandanas does not apply to his case because, he asserts, Mandanas was decided on different grounds. Specifically, he claims that this Court ruled that Mandanas' convictions did not violate double jeopardy because each conviction was based on different facts, thus it failed the same "in fact" portion of the "same evidence" test. Def. br. at 13. This is not correct. In applying the Blockburger "same evidence" test, this Court specifically held that the crimes as charged--exactly as how the defendant was charged here--failed the "same in law" portion of the two part "same evidence" test. "Felony harassment and second degree assault," this Court stated, "do not constitute the same offense for purposes of double jeopardy. Mandanas's offenses **are not the same in law.**" Mandanas, at 719-20 (emphasis added). The fact that the convictions may also have failed the "same in fact" prong of the test is irrelevant because failure under either prong defeats a claim of double jeopardy. Mandanas, at 720-21; Calle, at 780. To find that Mandanas does not apply, the defendant would

have to distinguish the same "in law" finding of this Court, and this he cannot do.

The defendant also asserts that his case is more akin to State v. Leming, 133 Wn. App. 875, 138 P.3d 1095 (2006), wherein the court held that *as charged*, Leming's convictions for second-degree assault and felony harassment did violate double jeopardy. Def. br. at 12-13. But the defendant's case is unlike Leming. The State charged Leming under a completely different prong of the second-degree assault statute. Specifically, Leming was charged under RCW 9A.36.021(1)(e) of the second-degree assault statute that required the State to prove that he, with intent to commit felony harassment, assaulted the victim. Leming, 133 Wn. App. at 889. The court of appeals found that--*as charged*--the State was indeed required to prove the charge of felony harassment in proving the assault charge and therefore the two crimes satisfied the "same evidence" test. Id. But Leming's analysis of the "same evidence" test has no application here because Leming and the defendant were charged under different

prongs of the assault statute and thus the elements that the State was required to prove were completely different.⁴

Finally, the defendant seems to argue that because the State used his same conduct to prove both charges, a double jeopardy violation has occurred. However, this fact-based type analysis for determining double jeopardy has been rejected by both the United States Supreme Court and the Washington State Supreme Court.

In 1993, the United States Supreme Court specifically overruled the "same conduct" fact-based test for determining double jeopardy. United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). Two years later, the

⁴ The analysis in Leming is also highly suspect. The court assumed that per the language of the prong of the assault statute charged, that a person is guilty of second-degree assault if, "with *intent* to commit a felony, [he] assaults another," the State was required to actually prove the commission of the other felony offense--in Leming's case, felony harassment. RCW 9A.36.021(1)(e) (emphasis added). This assumption seems to be in direct conflict with multiple Supreme Court decisions. For example, first-degree kidnapping includes similar language, making it a crime to "abduct another person with *intent* to facilitate commission of any felony." RCW 9A.40.020(1)(b) (emphasis added). The Supreme Court has held that because first-degree kidnapping does not actually require the completion of the other felony offense, just that the State prove the defendant had the intent to commit the other offense, the two crimes--first-degree kidnapping and the predicate offense--do not violate double jeopardy. See State v. Louis, 155 Wn.2d 563, 120 P.3d 936 (2005); In re Fletcher, 113 Wn.2d 42, 776 P.2d 114 (1989); State v. Vladovic, 99 Wn.2d 413, 662 P.2d 853 (1983). The Leming court does not address these cases--cases that seem in direct conflict with the analysis used in Leming.

Washington State Supreme Court did the same, recognizing that a factual analysis based test had been rejected by the United States Supreme Court and that the State double jeopardy clause does not provide broader protection than its federal counterpart. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995). This rejection of a fact-based double jeopardy analysis makes sense when considering the question is one of legislative intent of which the facts of a particular case tell us nothing. See also State v. Vaughn, 83 Wn. App. 669, 924 P.2d 27 (1996), rev. denied, 131 Wn.2d 1018 (1997) (recognizing rejection of the "same conduct" rule in finding no double jeopardy for kidnap and rape). In short, the defendant's same conduct based argument must be rejected. As stated in Calle, supra, and reiterated in In re Orange, 152 Wn.2d 795, 817-18, 100 P.3d 291 (2004), the test is "whether each provision requires proof of a fact which the other does not." Orange, 152 Wn.2d at 817-18. Under existing case law, the defendant's convictions are properly punished separately.

2. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT COMMITTED SECOND-DEGREE ASSAULT AND FELONY HARASSMENT AGAINST RONNY JOHNSON.

The defendant contends that even when the evidence is viewed in the light most favorable to the State, no rational jury could have found he committed second-degree assault and felony harassment against Ronny Johnson. This argument must be rejected. The defendant's argument ignores much of the evidence presented at trial and does not appropriately apply the standard of review on appeal.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where it is plainly indicated as a matter of logical

probability. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. Salinas, 119 Wn.2d at 201.

To convict the defendant of second-degree assault, the jury had to find that the defendant assaulted Ronny Johnson with a deadly weapon. CP 106; RCW 9A.36.021(1)(c). As pertinent here, assault was defined as "an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." CP 104.

To convict the defendant of felony harassment, the jury had to find that the defendant knowingly threatened to kill Ronny Johnson immediately or in the future and that the words or conduct of the defendant placed her in reasonable fear that the threat to kill would be carried out. CP 122; RCW 9A.46.020. As defined here, a threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person. And the threat must occur in a context or under such circumstances where a reasonable person would foresee that the

statement or act would be interpreted as a serious expression of intent to carry out the threat. CP 116.

The defendant takes isolated statements from Johnson's testimony and, based on those isolated statements, he claims no rational jury could have found he possessed the intent to assault Johnson or that he knowingly placed her in fear. This claim has no merit. It is true that at one point in describing the incident, Johnson testified that the defendant had the gun at waist level and that it was not pointed at her. 6RP 183-84. She also testified that she did not remember all of what the defendant said. Id. But the defendant's reliance upon these portions of Johnson's testimony ignores other critical testimony.

Rosier and Johnson told responding officers that the defendant pointed the gun at them multiple times and threatened to kill them. 5RP 93-94. An officer even heard one of the threats to kill over Johnson's cell phone when she secretly called 911. 4RP 140. Rosier testified that when the defendant threatened to kill them, Johnson started crying and pleading with the defendant, "why

do you want to kill us...we didn't do nothing to you." 6RP 34. The defendant responded to Johnson that it "don't matter." 6RP 34.

Rosier also testified that at times the defendant did have the gun down at his waist, but that he repeatedly raised the weapon and pointed it straight at he and Johnson. 6RP 35-36. There was no question, according to Rosier, that at times the defendant had the gun pointed directly at Johnson and that she was staring straight at the gun. 6RP 96-97.

Based on a review of all the facts, not just isolated statements, when viewed in the light most favorable to the State, there can be no question that a rational trier of fact could have found that the defendant assaulted Johnson by pointing a gun at her with the intent to create fear, and knowingly threatened her by telling her that he would kill her while pointing a gun at her.⁵

⁵ The defendant also relies on the fact that the gun was not loaded. This is irrelevant. All the evidence indicates that both Rosier and Johnson believed the gun was fully loaded.

3. THE TERM "TRUE THREAT" IS NOTHING MORE THAN A TERM OF ART THAT DESCRIBES THE PERMISSIBLE SCOPE OF THREAT STATUTES FOR FIRST AMENDMENT PURPOSES; IT IS NOT AN ELEMENT OF ANY CRIME.

The defendant contends that it is error not to include the following language in every charging document and "to convict" jury instruction involving a verbal threat:

A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person.

He argues that this language is not merely definitional, but is an element of every criminal statute involving a verbal threat. This is inconsistent with existing case law. See, e.g., State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007); State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010); State v. Allen, 161 Wn. App. 727, 255 P.3d 784, rev. granted, 172 Wn.2d 1014 (2011). The term "true threat" is a term of art used to describe the permissible scope of threat statutes for First Amendment purposes. The language describing what constitutes a true threat is definitional, no different from language used to define "intent," "recklessness" or "great

bodily harm." This language need not be included in the charging document or "to convict" jury instruction.

a. The Charging Document And Jury Instructions.

In count III of the Information, the State alleged that the defendant "knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Michael Rosier, by threatening to kill him, and the words or conduct did place said person in reasonable fear that the threat would be carried out." CP 176; RCW 9A.46.020.⁶

The court gave the jury a "to convict" instruction that read in pertinent part:

To convict the defendant Marcelis Christopher King of the crime of felony harassment as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 22, 2010, the defendant knowingly threatened to kill Michael Rosier immediately or in the future;
- (2) That the words or conduct of the defendant placed Michael Rosier in reasonable fear that the threat to kill would be carried out;

⁶ Count IV included the same language with Ronny Johnson listed as the victim. CP 177.

- (3) That the defendant acted without lawful authority; and
- (4) That the threat was made or received in the State of Washington.

CP 118 and CP 122 (count IV involving victim Ronny Johnson);

see also WPIC 36.07.02.

The court also gave the following definitional instruction:

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat rather than as something said in jest or idle talk.

CP 116 (emphasis added); see also WPIC 2.24.

b. The Elements Of The Crime Of Harassment.

A charging document is sufficient if it sets forth all elements of the offense. State v. Kjorsvik, 117 Wn.2d 93, 100, 812 P.2d 86 (1991). As charged and convicted here, a person commits the crime of felony harassment if he knowingly threatens to kill immediately or in the future the person threatened, and the words or conduct place the person threatened in reasonable fear that the

threat will be carried out. RCW 9A.46.020. The statute sets out all the elements of the crime.

In defining the constitutional limits of the harassment statute, the Supreme Court has stated that to avoid unconstitutional infringement on protected speech, the harassment statute must be read as prohibiting only "true threats." State v. Kilburn, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004); State v. J.M., 144 Wn.2d 472, 478, 28 P.3d 720 (2001); State v. Williams, 144 Wn.2d 197, 208-09, 26 P.3d 890 (2001). A "true threat" is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Kilburn, 151 Wn.2d at 43.

Whether a true threat has been made is determined under an objective standard that focuses on the speaker. Kilburn, at 44. The relevant question is whether a reasonable person in the defendant's position would foresee that, taken in context, a listener would interpret the statement as a serious threat. Kilburn, at 46.

Here, the Information contained all the essential elements of the crime. The trial court gave an instruction defining "threat" that

incorporated that definition of a "true threat." CP 116. This is all that is required.

This is consistent with Tellez, supra, Atkins, supra, and Allen, supra, wherein courts have repeatedly rejected the argument that the language defining a "true threat" must be charged in the information and/or included in the "to convict" jury instruction. See also State v. Sloan, 149 Wn. App. 736, 205 P.3d 172, rev. denied, 220 P.3d 783 (2009); State v. Schaler, 145 Wn. App. 628, 186 P.3d 1170 (2008), rev'd. on other grounds, 169 Wn.2d 274 (2010).

In this case, the State does not dispute that it was required to prove that the defendant's threat was a "true threat." As instructed here, the jury was required to find beyond a reasonable doubt that the defendant "knowingly threatened to kill" the victim and that the threat occurred "in a context or under such circumstances where a reasonable person in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intent to carry out the threat rather than as something said in jest or idle talk." CP 116, 122. The defendant has cited no case, and the State has found none, holding that the language defining a "true threat" is a separate element that must be included in the charging document and

"to convict" instruction for felony harassment, or for any other crime that contains a threat element.⁷ The defendant was properly charged and the jury was properly instructed on all the elements of the crime of felony harassment.

4. JURORS WERE INFORMED THAT THEY NEEDED TO BE UNANIMOUS TO RETURN A VERDICT.

The defendant proposed a concluding instruction, and now claims that the instruction he proposed did not adequately instruct the jurors that they needed to be unanimous to return a verdict as to the firearm enhancements. This claim should be rejected. It is unrealistic to assume that the jurors believed they needed to be unanimous to return a guilty verdict as to the underlying charges but that they believed they did not need to be unanimous as to the firearm enhancements.

⁷ The defendant's position is similar to that of a person charged with (for example) first-degree assault, which requires the intent to inflict "great bodily harm." See RCW 9A.36.01 1(1). The charging document and the "to convict" instruction must contain the statutory element of "great bodily harm," which is then defined for the jury as "bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." See WPIC 2.04, 35.04. See also *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984) (generally a trial court must define technical words or expressions used in the jury instructions). But no case requires that the definition of the term be included in the charging document.

For counts I, II, III and IV, it was alleged that the defendant was armed with a firearm during the commission of the underlying offenses. CP 175-78; RCW 9.41.010 and RCW 9.94A.533(3). When it came time to determine how to instruct the jury, the defendants provided the court with a set of proposed jury instructions. 9RP 41. The so-called "concluding instruction," instruction 48, was proposed by the defendant with the court specifically stating that it was going to use the defendant's version of the instruction. 9RP 76; CP 137-44. The defendant did not take exception to any of the instructions. 9RP 77.

Instruction number 48 does not refer to the firearm enhancements by name. However, it does specifically tell the jurors that "[b]ecause this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) and notify the bailiff." CP 144. The jurors were also instructed that "[a]s jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." CP 91. The jurors were provided with 13 verdict forms--including the four special verdict forms. CP 69-81.

a. The Issue Is Waived.

The invited error doctrine dictates that a party may not set up a potential error at trial and then claim that the trial court erred on that basis on appeal. In re K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). In other words, a claim of trial court error cannot be raised "if the party asserting such error materially contributed thereto." In re K.R., 128 Wn.2d at 147. Such material contribution may include acquiescence as well as direct participation. See State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990); State v. Lewis, 15 Wn. App. 172, 548 P.2d 587, rev. denied, 87 Wn.2d 1005 (1976). The invited error doctrine bars a claim even if that claim impacts a constitutional right. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002). Accordingly, the invited error doctrine bars consideration of the issue here. See also State v. Nunez, 160 Wn. App. 150, 248 P.3d 103 (failure to object bars review), rev granted, 172 Wn.2d 1004 (2011), contrast, State v. Ryan, 160 Wn. App. 944, 252 P.3d 895, rev. granted, 172 Wn.2d 1004 (2011).

b. The Jury Instructions Informed The Jurors Of Their Duty.

In reviewing the propriety of jury instructions, the instructions must be read in a straightforward and commonsense manner. State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720 (2006), abrogated on other grounds by State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). Rather, instructions are sufficient if they are readily understood and not misleading to the ordinary mind. State v. Meneses, 169 Wn.2d 586, 592, 238 P.3d 495 (2010). Instructions are viewed as a whole. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Here, the defendant refers to instruction 48 and asserts that because the instruction did not specifically use the term "special verdict," the jurors were not informed that they must be unanimous to find the defendant was armed with a firearm. This is an overly narrow and strained interpretation of the instruction. The instruction told the jurors that they had to be unanimous to return a verdict. The jury was required to render a verdict on firearm enhancements. It is not realistic to believe that because the instruction did not use

the term "special verdict," that the jurors believed they could return a verdict that was less than unanimous. Read as a whole, the instructions here accurately state the law.

c. Harmless Error.

Even if there was error here, it was harmless. Under a harmless error analysis, an instructional error is presumed to be prejudicial unless it affirmatively appears that it was harmless. State v. Smith, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997) (citing State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)). As held by the Supreme Court, "[i]n order to hold the error harmless, we must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

In returning a verdict on the underlying charge of second-degree assault, the jury necessarily found beyond a reasonable doubt that the defendant assaulted Rosier and Johnson with a deadly weapon--the only weapon here being a firearm. In returning a verdict on the charge of unlawful possession of a firearm, the jury necessarily found beyond a reasonable doubt that

at the same time, the defendant possessed an actual firearm. CP 131, 134-36; RCW 9.41.040. Thus, any instructional error was harmless.

5. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

The defendant contends that the prosecutor committed such flagrant and egregious misconduct in closing argument that his conviction must be reversed, and that his failure to raise an objection below must be excused. This claim is without merit. The defendant claims the prosecutor committed misconduct by disparaging defense counsel, misstating the law, and vouching for the witnesses. The record does not support the defendant's claims, and he can show neither prejudice nor why he should be excused from having failed to object below.

The law governing claims of misconduct is well-settled. When a defendant alleges that the prosecutor's arguments prejudiced his right to a fair trial, he bears the heavy burden of establishing both the impropriety of the prosecutor's arguments and that there was a "substantial likelihood" that the challenged comments affected the verdict. State v. Warren, 165 Wn.2d 17, 26,

195 P.3d 940 (2008); State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984). The prejudicial effect of alleged improper comments is not determined by looking at the comments in isolation but by placing the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudicial error does not occur until such time as it is "*clear and unmistakable*" that counsel has committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598, rev. denied, 111 Wn.2d 641 (1985). Absent a proper objection and a request for a curative instruction, the defense waives the issue of misconduct unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009).

While a prosecutor may comment on a defendant's exercise of a constitutional right, it is improper for a prosecutor to draw an adverse inference from the exercise of a constitutional right. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); In re Benn, 134 Wn.2d 868, 952 P.2d 116 (1998). It is also misconduct for a prosecutor to disparage the role of defense counsel. State v. Gonzales, 111 Wn. App. 276, 282-83, 45 P.3d 205 (2002). The

defendant asserts that the prosecutor did both in discussing the demeanor of Mike Rosier and Ronny Johnson when they testified.

Their demeanor. You're able to observe their demeanor of Ms. Johnson and Mr. Rosier here in – in court while they were testifying. That was appropriate under the circumstances. I think Mr. Rosier got a little bit annoyed during the cross-examination of the questions that were being asked of him, and that was certainly appropriate under the circumstances. Ms. Johnson was clearly very nervous. Remember she couldn't remember how long she had been married for or when her anniversary was.

9RP 96.

The defendant contends that the prosecutor's statements clearly were intended to persuade the jury to convict because defense counsel made it unpleasant for them to testify. This is not the "clear and unmistakable" import of the prosecutor's argument. Rather, what appears clear is that the prosecutor was discussing the witnesses' demeanor--as she stated--and describing why their testimony should be considered credible--that their reactions were perfectly normal expected reactions to testifying. The prosecutor did not state, argue or suggest that the defense did not have the absolute right to cross-examine any and all of the State's witnesses in any manner counsel saw fit.

The defendant contends that the following passage is similarly flawed:

Motive. Mr. Rosier and Ms. Johnson don't have anything to gain by accusing Mr. King and Mr. Walker of assaulting them with a firearm, of threatening to kill them. They have got a lot to lose by being a part of this process. Lose their privacy. They were asked a whole bunch of questions about themselves, what they do, what they were doing that night. They expose themselves to shame and embarrassment. If recalled Mr. Rosier's testimony he was asked about his work. What do you do for work? And Mr. Rosier said building engineer. What about Mr. King's attorney do twice. He got up there and said you're not an engineer. Where'd you go to college? Oh, you didn't go to college. You are just a janitor. How many times did Mr. King's attorney say to Mr. Rosier you're just a janitor? Do you think that that might have been a little bit embarrassing for Mr. Rosier when he talked down to like that by an attorney?

.

And finally criminal liability. They expose themselves to criminal liability for making something like this up.

9RP 99-100. Again, the prosecutor was simply explaining why the witnesses should be considered credible, because they had no motive to lie and were willing to subject themselves to the rigors of a trial. The defendant also asserts that the statement about exposing themselves to criminal liability is misconduct because it assures the jurors that the witnesses must be telling the truth or the prosecutor would have charged them with perjury. This is a far cry

from what was said. Rather, each witness takes an oath in front of the jury to tell the truth. Like any witness, and as jurors commonly understand, any witness who takes the stand and lies under oath is subject to later criminal prosecution.

Next, the defendant claims the prosecutor was vouching for the witnesses by stating that Rosier and Johnson's testimony was not "perfect," but "appropriate." See 9RP 95-96. But again, the prosecutor was appropriately discussing the evidence, how the witnesses could not remember every detail and how their testimony did not completely match each others, i.e., it was not rehearsed and fabricated. This was a perfectly permissible argument based on the evidence.

Along with the defendant's requirement to prove "clear and unmistakable" misconduct (Sargent, supra) is the acknowledgment that greater latitude is given in closing argument than elsewhere during trial. State v. Stover, 67 Wn. App. 228, 232, 834 P.2d 671 (1992), rev. denied, 120 Wn.2d 1025 (1993). When a prosecutor does no more than make reasonable arguments and inferences based on the facts in evidence, no misconduct occurs. State v. Clapp, 67 Wn. App. 263, 274, 834 P.2d 1101 (1992), rev. denied, 121 Wn.2d 1020 (1993). During closing argument, counsel may

draw and express all reasonable inferences from the evidence. State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281, rev. denied, 100 Wn.2d 1008 (1983). The prosecutor was well within those bounds here, expressing reasonable inferences and making reasoned arguments based on the evidence presented at trial. The defendant has failed to prove misconduct.

In addition, a defendant's failure to object to misconduct at trial constitutes waiver on appeal unless the misconduct was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In other words, even if misconduct occurred at trial, reversal is not required if the error could have been obviated by an objection and curative instruction that the defense did not request. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Such is the case here. The defendant failed to object to any of the above alleged instances of misconduct. He also fails to prove that if he had objected, a simple curative instruction and/or admonishment of the prosecutor would not have obviated any potential prejudice.⁸

⁸ See, e.g. Warren, 165 Wn.2d at 24-28 (the prosecutor's complete misstatement of the law regarding the burden of proof was sufficiently corrected by the court after a defense objection).

Finally, the defendant contends that it was improper for the prosecutor to state in rebuttal that the defense had misrepresented the facts. 9RP 153-55. This was the only alleged misconduct to which an objection was lodged. The objection was overruled. 9RP 154. Not mentioned by the defendant on appeal, the trial court also believed, and stated--outside the presence of the jury--that the defense had indeed misrepresented the facts and misstated the law. 10RP 23.

It is not misconduct for a prosecutor to argue that the evidence does not support the defense theory of the case. Russell, 125 Wn.2d at 87. In addition, remarks of the prosecutor, even if improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her actions and statements. Id.; see also United States v. Hiatt, 581 F.2d 1199, 1204 (5th Cir. 1978) (the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel).

Here, there were at least two major statements or arguments made by the defense that were not supported by any reasonable inference from the facts in the record and/or were misstatements of the law. For example, the prosecutor explained her statement

about misrepresenting the facts by saying that "[t]here is no evidence in this case that this case is about people not wanting Mr. Rosier to drive drunk. No evidence." 9RP 154.

In closing, defense counsel told the jury that Rosier was drunk and wanted to leave regardless of what anyone else said or did to him. 9RP 130. He claimed there were people with "good intentions" telling him not to drive drunk. 9RP 135. Counsel told the jury that Rosier could be charged with attempted driving under the influence. 9RP 136. "The truth is," counsel proclaimed, "is a group of people tried to talk a person out of being a drunk driver." 9RP 137.

As the prosecutor appropriately pointed out, there was absolutely no evidence presented to support this argument. Not a single witness testified that anyone was trying to stop Rosier from driving because he was drunk. Not a single witness testified that Rosier was drunk or appeared to be drunk--and this included all the trained officers who had contact with Rosier. It was perfectly permissible for the prosecutor to point out this huge flaw in the defense argument.

Defense counsel also claimed that the gun recovered from the car belonged to Rosier and that he could be charged with

unlawfully possessing a weapon without a concealed weapons permit. 9RP 133-34. However, Detective Peter Montemayor testified a person does not need a permit to possess a firearm in this state. 8RP 113. He testified that you only need a concealed weapons permit if you are carrying a gun on your person in a concealed manner or if you are carrying a loaded gun in your car. 8RP 113. It is fine to have a gun in your car, without a concealed weapons permit, Montemayor testified, if it is unloaded as the gun was here. 8RP 113. Thus, it was perfectly permissible for the prosecutor in rebuttal to state that the argument made by defense counsel was not accurate. 9RP 159.

Even if misconduct did occur here, a conviction will not be reversed unless the misconduct actually resulted in prejudice. Fisher, 165 Wn.2d at 747. The defendant must prove that there was a "substantial likelihood" that the challenged comments affected the verdict. Warren, 165 Wn.2d at 26. Here, even if there was misconduct, there was nothing so egregious to overcome the strong evidence in this case. The defendant cannot prove that but for the alleged misconduct, there was a substantial likelihood the verdict would have been different.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's convictions and sentence.

DATED this 23 day of April, 2012.

Respectfully submitted,

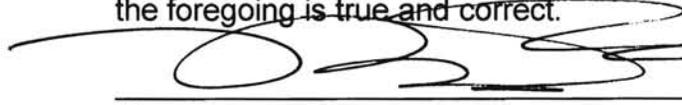
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. KING, Cause No. 67413-7-1, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

04-23-12

Date