No. 102291-3

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

LEVAUGHN LAWPHELLE MCVEA,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 56692-3
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 21-1-00295-0
The Honorable James Orlando, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is LeVaughn Lawphelle McVea, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 56692-3, which was filed on August 1, 2023. (Attached in Appendix) The Court of Appeals ordered remand for resentencing on the improperly imposed firearm enhancements, but otherwise affirmed the convictions entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the State fail to prove all of the essential elements of felony harassment based on a threat to kill, where the statement LeVaughn McVea's daughter heard was not a threat?
2. Did the State fail to prove all of the essential

elements of felony harassment based on a threat to kill, where the only statement that could be interpreted as a possible threat was not overheard by or communicated to LeVaughn McVea's daughter, where she expressed only a generalized fear that McVea might shoot someone but not a specific fear that he would shoot and kill her, and where the circumstances do not objectively show that McVea would carry through on a threat to kill his daughter?

3. Did the State fail to prove that the object LeVaughn McVea pointed at his daughter was a firearm in-fact, where the purported firearm was not admitted at trial, no witness testified that McVea was known to own or carry a firearm, and where neither witness to the incident was familiar with firearms or could describe the object they saw in any meaningful way?

4. Was testimony describing three prior incidents where LeVaughn McVea allegedly used force against an adult family member admitted in violation of ER 404(b) and ER 403 where none of the acts were committed against his daughter and none of the acts concerned threats or attempts to kill?

IV. STATEMENT OF THE CASE

O.L. is LeVaughn McVea's eldest daughter, and lives in Tacoma with her grandmother, her younger brother and her uncle. (RP3 145-46, 148) In the afternoon of September 7, 2020, when O.L. was 13 years old, her father came to the house unexpectedly. (RP3 145, 148-49) O.L. went to the front door and spoke to McVea as he stood outside on the porch. (RP3 148-49) According to O.L., McVea seemed angry, he did not look like his normal self and his eyes seemed "darker" than usual. (RP3 149, 150, 151)

O.L. testified that McVea told her to come with him,

but she told him she could not because she had plans with her friend. (RP3 150) McVea again demanded that she come, and O.L. again refused. (RP3 150) McVea then accused O.L. of helping his current wife cheat on McVea. (RP3 150-51). O.L. testified that McVea got "really mad" and again demanded she come with him, stating "I'm your pop." (RP3 150)

According to O.L., McVea then pulled a gun out of his pocket and pointed it at her. (RP3 152-53) O.L. testified she was afraid McVea might shoot someone. (RP3 153-54) At that moment, O.L.'s grandmother came over and closed the door, and McVea walked back to his car. (RP3 154)

O.L. looked outside and saw that McVea and her uncle were fighting in the driveway. (RP3 156) She was still scared, so she ran to a neighbor's house and asked for help. (RP3 154, 156-57) The neighbor helped an upset and crying O.L. call the police, and O.L. stayed

there until the police arrived about an hour later. (RP3 157, 158-59, 296-97, 299) McVea left before the police officers arrived. (RP3 159)

Linnea Rushforth's daughter is O.L.'s mother. (RP3 210) O.L.'s mother lives in Cleveland, and Rushforth has custody of O.L. and her younger brother (who is not McVea's biological child). (RP3 210-11) Rushforth testified that McVea was welcome to come over to her house to see O.L. any time and that she encouraged them to maintain a father/child relationship. (RP3 214)

But on that day, she could hear McVea talking loudly to O.L., so she quickly came to the entry to see what was going on. (RP3 215) When O.L. told McVea that she could not go with him because she had other plans, McVea became agitated. (RP3 216-17) According to Rushforth, O.L. continued to explain that she could not go with McVea because she had plans, but that McVea seemed like he was "in another zone," and was not

absorbing what O.L. was saying. (RP3 217-18)

Rushforth testified that McVea started to leave but said, "I'm going to pop you all." (RP3 218) She took that to mean that he would kill or harm them. (RP3 218) As McVea walked away, Rushforth saw tucked in his pants what she believed was a gun. (RP3 219-20) She immediately locked the front door and called 911. (RP3 220)

From the front window of her home, she could see McVea rummaging in his car, and heard him yell that someone had taken his gun. (RP3 221-22) She assumed he eventually found it because she saw him holding what appeared to be a different gun. (RP3 222) She then noticed that McVea was scuffling with an unfamiliar person, so she yelled to them that the police were coming. (RP3 224) McVea then got into his car and drove away. (RP3 224)

Two police officers arrived about an hour later.

(RP3 269) Officer Brynn Cenicola, who interviewed O.L. at the neighbor's house, testified that O.L. seemed anxious and scared. (RP3 269) But O.L. did not tell Officer Cenicola that McVea had pointed a gun at her. (RP3 285) The officers went to look for McVea but did not find him. (RP3 270-71) They also did not locate any firearms or evidence of firearms in the area. (RP3 284-85)

The responding officers did not take a written statement from the neighbor or from Rushforth that day. (RP3 250, 299) Detective Adam Hofner later attempted to contact O.L. and Rushforth multiple times in order to interview them, but he received no response. (RP4 322) Four months after the incident, he was finally able to make contact with O.L. and Rushforth but they refused to give formal statements. (RP4 332) Nine months after the incident, they finally agreed to talk to investigators. (RP4 323, 326; Exh. D10)

The State eventually charged McVea with one count of felony harassment (threat to kill) and one count of assault with a deadly weapon, and alleged that he was armed with a firearm when he committed these offenses. (CP 52-54) McVea called and spoke to O.L. several times from the Pierce County Jail despite the existence of a pre-trial protective order. (Exhs. P9-A, P13) So the State also charged McVea with three counts of violation of a no-contact order and one count of tampering with a witness. (CP 54-58) The State alleged that all of the crimes were domestic violence offenses. (CP 54-58)

At trial, over defense objection, the State was allowed to elicit testimony from O.L. and Rushforth about prior incidents where McVea was physically aggressive or assaultive, in order to show the reasonableness of O.L.'s fear that McVea would carry through on a threat to kill. (RP1 9, 12-14, 17-19) O.L. testified about a recent incident where McVea pushed his current wife, Alicia,

who was pregnant at the time. (RP3 160) O.L. was worried he might hit Alicia so she and her brother lay down on the floor in front of Alicia to block McVea from getting to her. (RP3 160-61) O.L. also testified about a recent incident where McVea was angry because he believed that Alicia had cheated on him, and believed O.L. and Rushforth had helped her do so. (RP3 161) According to O.L., McVea tried to hit Alicia. (RP3 161)

Finally, O.L. testified that she heard through other family members that McVea had hit his brother on the head and his brother required hospitalization as a result. (RP3 163) Rushforth also testified that McVea had called her after this incident and was upset and crying, and said "I didn't mean to hurt my brother." (RP3 227)

At the conclusion of the trial, the court instructed the jury to decide whether McVea had used a deadly weapon in committing the harassment and assault offenses, as opposed to a firearm as alleged in the Information. (CP

52-53, 106, 116, 117) The jury found McVea guilty of all charges and special allegations. (RP 372-74; CP 110-21) In a special verdict, the jury found that McVea used a deadly weapon in committing the harassment and the assault offenses. (CP 116, 117)

At sentencing, the trial court imposed an 18 month sentence enhancement for being armed with a firearm while committing the harassment and a 36 month sentence enhancement for being armed with a firearm while committing the assault. (RP5 392; CP 495) In addition, the court required McVea to register as a firearm offender. (RP5 392; CP 504)

The court imposed a total term of confinement of 120 months. (RP5 392; CP 495) The court originally directed the firearm enhancements to be served concurrently, but later entered an order correcting the judgment to reflect that they should be served consecutively. (CP 495, 526) That resulted in a total

term of confinement of 138 months. (CP 525)

McVea timely appealed. (CP 520) McVea argued that the State presented insufficient evidence to support his convictions, that trial court improperly admitted evidence of his prior threats and aggressive interactions with other family members, and that the trial court erred by imposing firearm enhancements and registration when the jury only found that he was armed with a deadly weapon. The Court of Appeals accepted the State's concession regarding the sentencing enhancements, but otherwise affirmed McVea's convictions.

ARGUMENT & AUTHORITIES

The issues raised by McVea's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

A. THE STATE FAILED TO MEET ITS BURDEN OF PROVING BEYOND A REASONABLE DOUBT ALL OF THE ELEMENTS OF HARASSMENT, ASSAULT, AND THE DEADLY WEAPON ALLEGATIONS.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvene*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); U.S. Const. amend. 14; Wash. Const. art. I, § 3. The State's burden includes proof of elements of the charged crimes and any sentence enhancements. See *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (defendant has "a right to have a jury determine beyond a reasonable doubt if he was guilty of the crime and sentencing enhancement charged.")

Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential

elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.[1]

Although the evidence is viewed in the light most favorable to the prosecution on review, "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). "A 'modicum' of evidence does not meet this standard." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

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[1] A challenge to the sufficiency of the evidence supporting a conviction may be raised for the first time on appeal as a due process violation. *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011); *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); RAP 2.5(a)(3).

1. There was insufficient evidence to convict McVea of felony harassment.

The evidence presented by the State did not establish beyond a reasonable doubt any of the essential elements of felony harassment.

RCW 9A.46.020(1) provides in relevant part that a person is guilty of harassment if:

> (a) Without lawful authority, the person knowingly threatens:
> (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; . . . and
> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

Harassment is a gross misdemeanor, but is elevated to a felony if "the person harasses another person … by threatening to kill the person threatened or any other person." RCW 9A.46.020(2)(a)(b)(ii). The State alleged that McVea committed felony harassment under RCW 9A.46.020(2)(b)(ii) because he threatened O.L.L. and "the threat was a threat to kill O.L.L." (CP 53,

89)

To prove felony harassment based on a threat to kill, the State must show that the person threatened was placed in reasonable fear that they would be killed. *State v. C.G.*, 150 Wn.2d 604, 610, 80 P.3d 594 (2003). Further, the threatened person's fear must be reasonable based on an objective standard, considering all the facts and circumstances of the case. *State v. Cross*, 156 Wn. App. 568, 582, 234 P.3d 288 (2010).

In this case, the State failed to prove that McVea threatened to kill O.L.; that O.L. subjectively feared that McVea would carry out a threat to kill; or that any such fear was objectively reasonable.

a. *The State did not prove that McVea threatened to kill O.L.*

O.L. testified that McVea demanded she come with him. When she refused, he became angry and said "I'm your pop." (RP3 150) This is not a threat. It is a

statement of fact—McVea is her "pop," a term that is commonly understood to mean father.[2]

The prosecutor later misstated O.L.'s testimony by stating that McVea told O.L. he would "pop off." (RP3 151) The State may attempt to rely on O.L.'s agreement with this misstatement by the prosecutor as evidence that McVea threatened O.L.. (RP4 345) Any such attempt should be rejected. First, the prosecutor's statements are not evidence.[3] Second, "pop off" is not a threat to kill. To "pop off" generally means "to talk thoughtlessly and often loudly or angrily."[4] There was no evidence presented by the State that "pop off" has any other meaning than this.

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[2] See "pop." *Merriam-Webster.com*. 2022. https://www.merriam-webster.com (30 November 2022).

[3] See WPIC 1.02; Instruction 1 ("The evidence that you are to consider during your deliberations consists of the testimony that you have heard *from witnesses* and the exhibits that [the judge has] admitted during the trial") (CP 78, emphasis added).

[4] See "pop off." *Merriam-Webster.com*. 2022. https://www.merriam-webster.com (30 November 2022).

If McVea did say that he would "pop off," he was likely saying that he would become louder and angrier if O.L. did not come with him.

The statement that McVea made to O.L. was simply not a threat to harm or kill O.L., and cannot support a conviction for harassment.

b. *The State did not prove that O.L. reasonably feared that McVea would carry through on a threat to kill her.*

Under RCW 9A.46.020(1)(b), the defendant's words or conduct must place the person threatened in reasonable fear that the threat will be carried out. This provision involves three general requirements.

First, the person threatened must find out about the threat. *State v. Trey M.*, 186 Wn.2d 884, 905-06, 383 P.3d 474 (2016). As argued above, the statement that O.L. heard was not a threat. However, Rushforth testified that she heard McVea say "I'm going to pop you all," which could possibly be interpreted as a threat to shoot

someone. (RP3 218) But this is not what O.L. testified to hearing him say, and there is no evidence that she ever learned about this other possible interpretation of his statement.

Second, the person threatened must subjectively fear that the threat will be carried out. *See Cross*, 156 Wn. App. at 582; *State v. E.J.Y.*, 113 Wn. App. 940, 953, 55 P.3d 673 (2002). The threat made and the threat feared must be the same. *C.G.*, 150 Wn.2d at 609. O.L. testified that she was concerned that McVea would "shoot the gun at her or [her brother]," but she did not testify that she feared McVea would actually try to kill her. (RP3 154)

From this evidence, a rational factfinder might, at most, draw the reasonable inference that O.L. was in fear of being injured by her father. But that finding is insufficient to support a conviction for felony harassment, which requires a showing that O.L. was in fear of being

killed by her father. *See C.G.*, 150 Wn.2d at 610-11.

Third, the victim's fear must be reasonable based on an objective standard, considering all the facts and circumstances of the case. *Cross*, 156 Wn. App. at 582; *E.J.Y.*, 113 Wn. App. at 953. The appellate court applies an objective standard to determine whether the victim's fear that the threat will be carried out was reasonable, considering all the facts and circumstances of the case. *State v. Alvarez*, 74 Wn. App. 250, 261, 872 P.2d 1123, aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). "This is an important limiting element in the statute, requiring the trier of fact to consider the defendant's conduct in context and to sift out idle threats from threats that warrant the mobilization of penal sanctions." *Alvarez*, 74 Wn. App. at 261.

It would not have been objectively reasonable for O.L. to fear that her father would shoot and kill her simply

because she refused to leave her house with him that day. McVea had displayed a temper in the past, and had been physical with other adults in their family, but there was no evidence that McVea had ever been violent or threatened to be violent with O.L. at any other time in her life. In fact, before that day, McVea had a good relationship with the family and was allowed to come and go from Rushforth's house and visit O.L. whenever he wanted. (RP3 214-15, 234)

Even when viewing the evidence in the light most favorable to the State, no rational trier of fact could have found beyond a reasonable doubt that McVea threatened to kill O.L., that O.L. was in fear of being killed, or that any such fear was objectively reasonable. Therefore, the evidence was insufficient to support McVea's conviction for felony harassment.

2. There was insufficient evidence to convict McVea of assault with a deadly weapon and the deadly weapon enhancements.

The State did not present sufficient evidence to prove that McVea was armed with a deadly weapon, and therefore failed to prove an essential element of second degree assault and failed to prove the deadly weapon enhancement allegations.

The State elected to instruct the jury that, to find McVea guilty of second degree assault, it must find that he assaulted O.L. "with a deadly weapon." (CP 95, 549, 550) The corresponding definition of "deadly weapon" given to the jury stated that "[a] firearm, whether loaded or unloaded, is a deadly weapon." (CP 97, 552) The State also chose to instruct the jury that it should determine, for the purpose of the special verdicts, whether McVea was armed with a deadly weapon when he committed the harassment and second degree assault offenses. (CP 106, 565-67) The court instructed the jury that "[a] pistol,

revolver, or any other firearm is a deadly weapon whether loaded or unloaded." (CP 106) But the State did not present sufficient evidence to prove that the object McVea showed O.L. was a firearm, and therefore did not prove that he was armed with a deadly weapon.

A "firearm" is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(15) (Former RCW 9.41.010(11) (2021)). A firearm need not be operable during the commission of a crime to constitute a "firearm" within the meaning of RCW 9.41.010. *State v. Faust*, 93 Wn. App. 373, 381, 967 P.2d 1284 (1998). Instead, the relevant question is whether the firearm is a "gun in fact" rather than a "toy gun." *Faust*, 93 Wn. App. at 380; *State v. Tasker*, 193 Wn. App. 575, 595, 373 P.3d 310 (2016). A gun-like object that is incapable of being fired is not a "firearm." *State v. Jussila*, 197 Wn. App. 908, 933, 392 P.3d 1108 (2017).

The State must at least present some circumstantial evidence that the object used in the commission of a crime was a firearm in-fact, rather than a gun-like object. For example, in *Tasker*, the court concluded that the following evidence was sufficient to prove the existence of a firearm:

> Mr. Tasker pointed the gun at [the victim's] face in demanding her purse and used it to advance a kidnapping. Visibility was good; the crime occurred in daylight on a June afternoon. [The victim] saw the gun at close range and was unwavering in her testimony that it was a gun. While she forthrightly admitted to little experience with guns "in real life," she was old enough, as the mother of a middle schooler, to have seen guns in photographs, on the news, in television programs and in movies. The clicking noise she described hearing behind her head was consistent with Mr. Tasker's use of a real gun. Collectively, the evidence was sufficient to establish the gun met the definition of a "firearm[.]"

193 Wn. App. at 595. See also *State v. Anderson*, 94

Wn. App. 151, 162-63, 971 P.2d 585 (1999)[5] (firearm was admitted as an exhibit at trial, law enforcement testified gun appeared to be a real gun, and witnesses testified they felt a gun with a trigger); *State v. Raleigh*, 157 Wn. App. 728, 734, 238 P.3d 1211(2010) (law enforcement identified gun as a Brigadier 9mm pistol, and the State presented evidence that the object held a magazine loaded with a round of ammunition and had a working safety and slide); *State v. McKee*, 141 Wn. App. 22, 31, 167 P.3d 575 (2007) (witness described weight and feel of gun).

In this case, the purported firearm was not admitted at trial. O.L., who was 13 years old at the time, described the object in a childlike manner as a "cowboy gun" like ones seen in "the movies." (RP3 152) She did not remember what color it was, and when asked if she knew

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[5] *Reversed on other grounds*, 141 Wn.2d 357, 5 P.3d 1247 (2000).

what sort of gun it was she stated, "I don't know guns." (RP3 152, 175) Rushforth only saw a "flash" of the object when it was partially obscured and tucked into McVea's back pocket or waistband. (RP3 219-20) She could not remember what it looked like. (RP3 220) Neither O.L. nor Rushforth touched or heard the sound of the object. The State also failed to offer any evidence that McVea had ever been seen with a gun in the past or that he had ever been known to carry or own a gun.

Rushforth testified that she could hear McVea yelling that he could not find his gun as he rummaged around inside his car. (RP3 221-22) The State may rely on this testimony as evidence that McVea was armed. (RP4 351) But this statement does not indicate that the object he brought to the front door and possessed during the assault and harassment offenses was a firearm in-fact. If that object was an operable firearm, then why would McVea need to be looking for a gun in his car?

And there was no evidence this second gun-like object was a firearm in-fact either, as it was only observed from a distance and neither O.L. nor Rushforth provided any meaningful description of it.

No reasonable trier of fact could have found beyond a reasonable doubt that the object O.L. and Rushforth saw was a firearm in-fact.

3. The failure of proof requires reversal.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

The State failed to present evidence sufficient for a trier of fact to find that McVea committed the crimes of harassment or assault with a deadly weapon, or that he

was armed with a deadly weapon during the commission of these acts. Accordingly, McVea's harassment and assault convictions and the deadly weapon sentence enhancements should be reversed and dismissed.

B. THE TRIAL COURT ERRED IN ADMITTING THE PRIOR BAD ACTS EVIDENCE BECAUSE IT WAS NOT RELEVANT AND THEREFORE AMOUNTED TO INADMISSIBLE PROPENSITY EVIDENCE.

The trial court abused its discretion and committed prejudicial error when it allowed the State to present evidence in violation of ER 404(b) and ER 403 of three prior incidents where McVea used force against an adult family member.

1. Absent a specific exception, propensity evidence is inadmissible.

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to commit crimes, but may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of

mistake or accident." ER 404(b); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct. *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

Before evidence of prior crimes, wrongs, or acts can be admitted, two criteria must be met. First, the evidence must be shown to be logically relevant to a material issue before the jury. The test is "whether the evidence ... is relevant and necessary to prove an essential ingredient of the crime charged." *State v. Robtoy*, 98 Wn.2d 30, 42, 653 P.2d 284 (1982) (quoting *State v. Goebel*, 40 Wn.2d 18, 21, 240 P.2d 251 (1952) (*Goebel* II.))

ER 404(b) must also be read in conjunction with ER 403, which mandates exclusion of evidence that is substantially more prejudicial than probative. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Evidence of prior acts should be excluded if "its effect would be to generate heat instead of diffusing light, or... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950) (*Goebel* I)). In doubtful cases, "the scale should be tipped in favor of the defendant and exclusion of the evidence." *Smith*, 106 Wn.2d at 776.

When a defendant is charged with felony harassment, evidence about the complaining witness' knowledge of the accused's prior violent acts may be relevant to the reasonable fear element. *State v. Ragin*, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999); *Fisher*, 165 Wn.2d at 744. The trial court in this case admitted prior acts as relevant to the question of whether O.L.'s fear that McVea would kill her was reasonable.

A trial court's ruling admitting evidence is reviewed

for abuse of discretion. *Fisher*, 165 Wn.2d at 745. Improper admission of evidence constitutes reversible error if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Thomas*, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983) (citing *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980)).

2. The prior acts to which O.L. and Rushforth testified should have been excluded under ER 404(b) and ER 403.

O.L. testified that she witnessed an angry McVea push and try to hit Alicia. (RP3 160-61) O.L. and Rushforth testified they heard from others that McVea hit his brother hard enough to require hospitalization. (RP3 163, 227) None of these incidents pass the two-part test for admissibility, and the trial court should have excluded them. These incidents should have been excluded because neither is relevant to the question of whether McVea's statement to O.L. placed her in reasonable fear

that a threat to kill would be carried out, which was the State's proffered purpose. Pushing or striking an adult is a far cry from murder, and is even more detached from the idea of murdering ones' own young daughter.

These incidents may have "defused light" on whether O.L. could reasonably fear that McVea might hurt her or another adult in the home that day. But that was not the issue here. The issue was whether O.L. could reasonably fear McVea would *murder her*. These prior incidents did nothing to illuminate that issue. Accordingly, their admission was an abuse of discretion.

The error is prejudicial because, as argued above, the evidence relating to whether McVea made a threat to kill or used a firearm during this incident was weak at best. Evidence of these prior acts did nothing but "generate heat" and impugn McVea's character. The prior bad act evidence improperly presented to the jury could only make the jurors see McVea in a negative light,

and make the jurors more likely to believe he committed the unrelated and dissimilar crimes charged in this case. The impact of this highly prejudicial but totally irrelevant testimony deprived McVea of a fair trial, and his convictions must be reversed.

VI. CONCLUSION

For the foregoing reasons, this Court should accept review and reverse the Court of Appeals.

I hereby certify that this document contains 4,966 words, excluding the parts of the document exempted from the word count, and therefore complies with RAP 18.17.

DATED: August 21, 2023

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APPENDIX

Court of Appeals Opinion in *State v. Levaughn McVea*, No. 56692-3

Filed
Washington State
Court of Appeals
Division Two

August 1, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LEVAUGHN LAFAYELLE MCVEA, Appellant.	No. 56692-3-II UNPUBLISHED OPINION

GLASGOW, C.J. — LeVaughn McVea pointed a gun at his 13-year-old daughter and threatened her. The jury convicted McVea of felony harassment and second degree assault and also returned special verdict findings that he was armed with a deadly weapon for both counts. At sentencing, the trial court imposed firearm sentencing enhancements, rather than deadly weapon enhancements, and ordered McVea to register as a felony firearm offender.

McVea appeals. He argues that the trial court improperly admitted evidence of his prior threats and violent interactions with family members and that the State presented insufficient evidence to support his convictions. McVea also argues the trial court erred by imposing firearm enhancements and registration when the jury found that he was armed with a deadly weapon. The State concedes we should remand for resentencing on the enhancements.

We accept the State's concession and we reverse in part and remand for the trial court to strike the firearm sentencing enhancements and impose deadly weapon enhancements instead. We otherwise affirm.

FACTS

I. BACKGROUND

OL, McVea's daughter, lived in Tacoma with her younger brother and her maternal grandmother, Linnea Rushforth. One afternoon, when OL was 13 years old, she found McVea standing on the porch. McVea asked OL to come with him and OL refused several times. The situation escalated, McVea began yelling, he pointed a gun at OL and at some point during the incident said, "'I'm going to pop you all'" if OL did not go with him. 3 Verbatim Rep. of Proc. (VRP) at 242. OL's grandmother called 911. OL's uncle arrived and fought with McVea while OL ran next door to a neighbor's house, which prompted the neighbor to also call 911. McVea left after Rushforth yelled the police were coming.

The State charged McVea with felony harassment and second degree assault, both with firearm enhancements. The State later added charges for witness tampering and several violations of pretrial no contact orders, which are not at issue in this appeal.

II. PRETRIAL

Felony harassment based on a threat to kill requires proof that the defendant threatened to kill another person and that the victim had a reasonable fear the threat would be carried out. RCW 9A.46.020; *State v. C.G.*, 150 Wn.2d 604, 612, 80 P.3d 594 (2003). Before trial, the State moved to admit evidence of four incidents of McVea's past violent behavior that OL either had witnessed or had knowledge of. The State asserted that OL would testify that she was afraid McVea would kill her, and McVea's prior acts were admissible to show that OL's fear of death was reasonable under ER 404(b). Specifically, the State moved to admit evidence of three assaults that had occurred within the two months leading up to the alleged incident. These incidents included an

assault on OL's stepmother in the driveway, when McVea pushed OL's stepmother and OL watched; a separate assault on her stepmother that OL witnessed; and an assault on OL's uncle that OL learned about from Rushforth. The State also moved to admit evidence of an incident where OL watched McVea shoot a gun at another person's vehicle when she was between seven and eight years old.

McVea opposed the State's motion and filed a motion to exclude the evidence of prior acts, arguing they did not meet any exception under ER 404(b) and were extremely prejudicial. He asserted that the prior acts were not relevant because they were not directed towards OL and three of the incidents did not involve a weapon.

The trial court found that the incident in the driveway, the incident with OL's stepmother, and the incident with OL's uncle, were "close in time" to when the alleged incident occurred and were admissible pursuant to ER 404(b) for the specific purpose of proving the reasonableness of OL's fear. 1 VRP at 23.The trial court reasoned that evidence of "a real assault that [OL] either witnessed or had direct knowledge about" was relevant to understanding whether OL had a reasonable basis for believing that McVea would carry out his alleged threat. 1VRP at 17. The trial court also found that because the evidence was necessary to prove an element of felony harassment, it would not be overly prejudicial with a proper limiting instruction. The trial court excluded evidence of the fourth incident involving the shooting into a car because it was too remote in time to lend any real viability to the reasonableness of OL's fear and it was too prejudicial.

III. TRIAL

A. Evidence Presented

1. Testimony about the current incident

At trial, OL testified that when McVea arrived at her grandmother's house, he seemed "[a]ngry" and did not look like his normal self. 3 VRP at 149-50. When McVea told OL to come with him, she said that she could not because she had plans to meet a friend. McVea repeated his request to "come with [him] now." 3 VRP at 150. OL testified that after she refused a second time, McVea became angry and said, "'I'm your pop,'" then he accused OL of helping her stepmother cheat on him. *Id.*

Rushforth joined OL at the front door when she heard McVea's raised voice. She heard OL say she could not go with McVea because she had other plans. She heard McVea again ask OL to come with him, but it was "like he was in another zone," and he did not respond to OL's replies. 3 VRP at 217.

OL testified that McVea pulled a gun out of his front pocket and pointed it at her. The prosecutor asked OL to confirm what McVea said while holding the gun: "And you said that he said that he was pop off? . . . Is that what you said?" 3 VRP at 151. OL responded, "Yes." 3 VRP at 152. Rushforth testified that she heard McVea say, "'I'm going to pop you all.'" 3 VRP at 218, 242. She understood that to mean that "[h]e was going to kill us . . . or kill -- do something to my granddaughter." 3 VRP at 218.

OL described the gun as looking "like a cowboy gun," similar to one "off of the movies." 3 VRP at 152. OL said that she felt scared that McVea would shoot the gun at her or her brother.

OL yelled to Rushforth, "'He's got a gun. He's going to kill something. . . . Call the police.'" 3 VRP at 259.

Rushforth testified that McVea walked away. When he did, he repeated the "pop statement," and she noticed the flash of a gun tucked in the back of his pants. 3 VRP at 219. While Rushforth was still on the phone with 911, she heard McVea yell, "'You took my gun.'" 3 VRP at 221. He eventually found a gun in his car, "but it wasn't the same gun [Rushforth] saw in his pocket" on the porch. 3 VRP at 222.

OL testified that her uncle arrived, and McVea and her uncle started yelling and fighting in the driveway. Rushforth testified that while they were fighting in the driveway, a gun dropped to the ground. OL ran to the neighbor's house. The neighbor testified that she opened the door to find OL looking very "fearful," with "tears in her eyes." 3 VRP at 296. OL told the neighbor that "she needed to call 911" and that "her dad was there . . . to take her somewhere . . . and that he had a gun." 3 VRP at 296-97. Rushforth eventually yelled that the police were coming and McVea left.

2. Testimony about prior incidents of violence against family members

The trial court instructed the jury that part of OL's testimony and part of Rushforth's testimony could be used only to decide whether OL was placed in reasonable fear that the alleged threat would be carried out. The trial court told the jury that they may not consider the answers to specific questions posed to both OL and Rushforth for any other purpose.

After this instruction, OL testified that there had been events in the months before the incident that made her more afraid of McVea's behavior that day. OL testified that on one occasion, she witnessed McVea push her pregnant stepmother. On another occasion, OL returned home with her other grandmother and stepmother to find McVea in the driveway. McVea accused the three

of them of helping OL's stepmother cheat. McVea repeatedly tried to hit OL's stepmother and said, "'Don't make me pop off.'" 3 VRP at 162. OL testified that she was scared during that incident because she didn't know what McVea was going to do. OL also testified that she heard from Rushforth that OL's uncle was in the hospital because McVea "busted" his head open. 3 VRP at 163. OL stated that these incidents changed the way she felt about McVea because before these incidents she "didn't think he would [have done] it to [her]." 3 VRP at 164.

After the trial court gave the same limiting instruction during Rushforth's testimony, Rushforth said that a few months before the charged incident, she learned that McVea's brother was in the hospital with bleeding on the brain after a fight with McVea. Rushforth also testified that OL had talked to her about the incidents in the driveway and her stepmother's home and that all of these events were upsetting to OL.

B. Jury Instructions, Closing Argument, and Verdict

At the conclusion of trial, the trial court reminded the jury that to find McVea guilty of felony harassment, it could consider evidence relating to McVea's prior misconduct only "to the extent you find it relevant to the issue of whether [OL] was placed in reasonable fear that the threat to kill would be carried out." Clerk's Papers (CP) at 85. The trial court also instructed the jury that to find McVea guilty of second degree assault, the jury must find beyond a reasonable doubt that McVea assaulted OL "with a deadly weapon." CP at 95. The trial court instructed that "[a] firearm, whether loaded or unloaded, is a deadly weapon." CP at 97. The court also gave the jury special verdict forms asking the jurors to determine whether McVea was armed with a deadly weapon at the time of the crimes.

In closing argument, the State explained to the jury that in order to convict McVea of felony harassment, the State had the burden to prove all of the elements. With regard to whether OL's fear was reasonable, the State reminded the jury that this was not the first time that OL had "seen her father lose control and get violent." 4 VRP at 346. The State recounted OL's testimony about McVea's prior violence against family members. The State argued that these incidents were "in her mind" and that they added to the already reasonable fear of OL having a gun pointed at her. 4 VRP at 346.

The jury found McVea guilty of felony harassment and second degree assault, both with deadly weapon enhancements, violations of the pretrial no-contact orders, and witness tampering.

C. Sentencing

McVea appeared pro se at sentencing. The trial court imposed a sentence at the top of the standard range of 84 months for the assault conviction, 42 months for the felony harassment conviction, and 60 months for the witness tampering conviction to be served concurrently. The trial court also imposed 54 months of consecutive firearm enhancements, even though the jury answered only deadly weapon special verdicts. The total sentence was 138 months.

The trial court also ordered McVea to register as a felony firearm offender. McVea questioned the felony firearm registration form. He stated that he never had to register before. The trial court instructed the State that McVea did not need to sign the form, the State could just indicate that he was refusing to sign. McVea asserted, "I'm not going to register." 5 VRP at 408. The prosecutor stated, "We will say you refused," and McVea confirmed that he refused. 5 VRP at 408-09.

McVea appeals his convictions and sentence.

ANALYSIS

I. ADMISSIBILITY OF PRIOR ACTS

McVea argues the trial court abused its discretion by admitting McVea's prior bad acts under ER 404(b). He asserts that the prior acts were not relevant because they all concerned adult family members and this incident concerned his "own young daughter." Opening Br. of Appellant at 35. We disagree.

A. Legal Principles

We review a trial court's admission of evidence for abuse of discretion. *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). An abuse of discretion occurs when a "'trial court's decision is manifestly unreasonable or based upon untenable grounds.'" *Id.* (quoting *State v.* Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)).

ER 404(b) bars evidence of prior bad acts "for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). Evidence of prior bad acts may, however, "be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." *Id.*

When determining whether prior bad acts are admissible, a court considers whether the prior conduct occurred by a preponderance of the evidence, the purpose for which the evidence is sought to be introduced, its relevancy to the crime charged, and whether its probative value outweighs the danger of unfair prejudice. *Gunderson*, 181 Wn.2d at 923. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

To prove felony harassment based on a threat to kill, the State had to establish "that the person threatened was placed in reasonable fear that the threat to kill would be carried out." *C.G.*, 150 Wn.2d at 612. If the evidence shows the victim's subjective fear, we consider whether the fear was reasonable using an objective standard considering the context of the case. *State v. Cross*, 156 Wn. App. 568, 582, 234 P.3d 288 (2010). Evidence of what the victim knew of the defendant's past violent acts is relevant to determine whether the victim's fear was objectively reasonable. *See State v. Ragin*, 94 Wn. App. 407, 411-12, 972 P.2d 519 (1999).

In *Ragin*, the defendant called the victim from jail and threatened to murder the victim and his family. *Id.* at 410. At Ragin's trial for felony harassment, the trial court admitted evidence of Ragin's previous statements to the victim including "that he could build bombs, had access to guns . . . , and that he could level the City Church and 'waste' the pastors." *Id.* On appeal, Division One held that the trial court did not abuse its discretion in admitting the statements because the prior acts put the threats in context in order to allow the jury to determine whether the victim's fear was reasonable. *Id.* at 411-12.

B. Prior Acts in this Case

Here, the trial court did not abuse its discretion when admitting evidence of some of McVea's prior bad acts under ER 404(b). It was not disputed that the prior acts occurred. The trial court found that evidence of "a real assault that [OL] either witnessed or had direct knowledge about" was relevant to proving the reasonableness of OL's fear. 1 VRP at 17. The trial court acknowledged that this evidence would be prejudicial, but found that because the State was required to prove OL's fear was objectively reasonable as an element of felony harassment, the probative value of the evidence outweighed the prejudicial effects. And the trial court excluded a

prior shooting incident that it determined was too remote to be probative and would be too prejudicial.

At trial, the State only referred to McVea's prior bad acts to argue the reasonableness of OL's fear. The State asked OL what impact these prior bad acts had on her. She responded that they changed the way she felt about her father. Rushforth also testified as to the effect of the prior events on OL, stating that OL had talked about them and they were upsetting to her. During closing arguments, the State referred to the elements of felony harassment before reminding the jury that this was not the first time that OL had "seen her father lose control and get violent." 4 VRP at 346. The State asserted that all of the prior acts were "in [OL's] mind" at the time of the incident and provided context to the reasonableness of OL's fear. 4 VRP at 346-47. The State never argued that these events showed McVea's propensity for violence.

The trial court also mitigated the prejudicial effect of McVea's prior bad acts by providing both oral and written instructions directing the jury to consider evidence of McVea's prior bad acts only for the purpose of determining the reasonableness of OL's fear. We presume the jury followed the trial court's instructions. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). The prior acts in this case helped show that OL knew her father could be violent with immediate family members, including his own wife and brother. See *Ragin*, 94 Wn. App. at 412. We hold that the trial court did not abuse its discretion by admitting evidence of McVea's prior bad acts under ER 404(b).

II. SUFFICIENCY OF THE EVIDENCE

McVea argues that the State did not present sufficient evidence to support his conviction for felony harassment. McVea also argues that the State failed to prove that he was armed with a deadly weapon for purposes of his second degree assault conviction and the deadly weapon sentencing enhancements. We disagree.

Evidence is sufficient to support a conviction if any rational trier of fact, "viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt." *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). "In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Circumstantial and direct evidence are equally reliable. *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014). We defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

A. Felony Harassment

To convict for felony harassment, the State must prove beyond a reasonable doubt that the defendant knowingly made a threat to kill and that the person threatened reasonably feared that the defendant would carry out the threat. RCW 9A.46.020(1)(b),(2)(b)(ii). McVea contends that the State did not provide sufficient evidence to support his felony harassment conviction. Specifically, McVea argues that the State failed to prove that McVea threatened to kill OL, that OL subjectively feared that McVea would carry out the threat, or that any such fear was objectively reasonable. We disagree.

1. Threat to kill

McVea argues that OL only referred to McVea as her "'pop'" and the prosecutor put words in her mouth when they asked her to confirm he said something about popping off. Opening Br. of Appellant at 20. Additionally, McVea argues that even if McVea did say he would "'pop off'" as the prosecutor inferred, that did not constitute a threat to kill. *Id.* He asserts that threatening to "'pop off'" likely meant that he would become "louder and angrier if [OL] did not come with him." *Id.* at 21. But McVea ignores that we must take the State's evidence as true, there was evidence he pointed a gun at OL, and Rushforth heard him threaten to "'pop you all.'" 3 VRP at 218, 242.

"[T]he plain meaning of 'threaten' as used in RCW 9A.46.020 includes all threats, whether or not verbalized." *State v. Pinkney*, 2 Wn. App. 2d 574, 580, 411 P.3d 406 (2018). Gestures or conduct can convey a threat as that term is defined. *Id.* at 581. "[T]he nature of a threat depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." *C.G.*, 150 Wn.2d at 611. It is not relevant that the speaker does not intend to carry out the threat. *State v. Kilburn*, 151 Wn.2d 36, 38, 84 P.3d 1215 (2004).

Here, the circumstances show that McVea arrived at the house agitated and not acting like himself. When OL refused to go with him, he pulled out a gun and pointed it at her. In a claim of insufficient evidence, the defendant necessarily admits the truth of the State's evidence and we must draw all reasonable inferences in the State's favor. *Homan*, 181 Wn.2d at 106. OL testified that McVea pointed a gun at her when he became angry that she could not go with him, and Rushforth heard McVea threaten, "'I'm going to pop you all. '" 3 VRP at 218. Assuming this testimony is true, as we must, and resolving conflicting evidence about what McVea said in the

State's favor, we conclude this was sufficient evidence to establish that McVea threatened to kill OL. When considering all of the circumstances, a rational jury could have found that McVea threatened OL's life.

2. OL's fear

McVea argues both that OL did not subjectively fear he would kill her, and that even if she did experience such fear, her fear was not reasonable. With respect to the former contention, McVea argues that OL testified only that she was scared that McVea would "'shoot the gun at her or [her brother],'" but did not say she feared that McVea would actually try to kill her. Opening Br. of Appellant at 22 (alteration in original). With respect to the latter contention, McVea asserts that although he had displayed a temper in the past, there was no evidence that McVea had ever been violent with or directly threatened OL. Thus, he contends, her fear was not reasonable.

To prove felony harassment based on a threat to kill, the State must show that the person threatened was placed in reasonable fear that the threat to kill would be carried out. *C.G.*, 150 Wn.2d at 612. Thus, the victim must subjectively fear that the threat will be carried out, and the fear must be objectively reasonable. *State v. E.J.Y.*, 113 Wn. App. 940, 952-53, 55 P.3d 673 (2002). The reasonableness of the victim's fear is a question for the trier of fact in light of the total context. *State v. Trey M.*, 186 Wn.2d 884, 906, 383 P.3d 474 (2016).

Here, while it is true that OL did not directly say that she feared McVea would kill her, OL did testify that when McVea pointed the gun at her, she felt "scared," and she thought McVea was going to shoot her or someone else. 3 VRP at 154. As discussed above, there was evidence that OL witnessed or knew about multiple incidents where McVea physically attacked close family

members, including his pregnant wife. And there is little meaningful distinction between a fear of being shot versus a fear of being killed.

The fact that McVea had a history of violence against adults, does not render a 13-year-old's fear unreasonable—to the contrary, it supports that fear. We conclude that there is sufficient evidence that OL's testimony established subjective fear when she said she was afraid McVea would shoot her, and her fear was objectively reasonable in light of all of the circumstances. There was sufficient evidence to establish McVea committed felony harassment.

B. Second Degree Assault with a Deadly Weapon and the Deadly Weapon Enhancement

McVea argues that the State did not present sufficient evidence to prove that the object McVea pointed at OL was a "'gun in fact' rather than a 'toy gun.'" Therefore, the State failed to prove that McVea was armed with a deadly weapon for the purposes of his second degree assault conviction and the sentencing enhancements. Opening Br. of Appellant at 26. We disagree.

The trial court instructed the jury that to convict McVea of second degree assault, the State had to prove that McVea assaulted another person with a deadly weapon. RCW 9A.36.021(1)(c). The jury was also told that the relevant definition of "assault" was "an act 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." CP at 96; *see State v. Abuan*, 161 Wn. App. 135, 154, 257 P.3d 1 (2011). A "deadly weapon" includes any "loaded or unloaded firearm." RCW 9A.04.110(6); CP at 97. A "firearm" is defined as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(12)[1].

[1] We cite to the current statute because the relevant language has not changed.

The State was not required to prove that the firearm was operable. *State v. Olsen*, 10 Wn. App. 2d 731, 738, 449 P.3d 1089 (2019). Both parties discuss *Tasker,* where Division Three recognized, "[e]vidence that a device appears to be a real gun and is being wielded in committing a crime is sufficient circumstantial evidence that it is a firearm." *State v. Tasker*, 193 Wn. App. 575, 594, 373 P.3d 310 (2016).

In *Tasker*, the defendant challenged whether the device he used against the victim was a "firearm" for purposes of the firearm sentencing enhancement. *Id.* at 580-81. Division Three held that the State presented sufficient evidence to support a finding that Tasker committed his crime with a firearm based on the victim's description of the gun as "dark" and "small." *Id.* at 578, 595. The court reasoned that the victim saw the gun at close range, in broad daylight, with good visibility and was unwavering in her testimony that it was a gun. *Id.* at 595. Despite having no experience with guns "'in real life,'" she had seen guns in photographs, on the news, in television programs and in movies. *Id.* Division Three held that "[c]ollectively, the evidence was sufficient to establish the gun met the definition of a "firearm." *Id.*

Here, as in *Tasker,* OL saw the gun at close range, with good visibility on a sunny afternoon. Despite not having much experience with guns, OL described the gun as a "cowboy gun" similar to one "off of the movies." 3 VRP at 152. Her testimony was also consistent, telling both her grandmother and neighbor within an hour of the incident that McVea had a gun. Rushforth also testified to the presence of a gun, asserting that she saw a flash of a gun tucked in the back of McVea's pants when he was walking away.

In sum, two different witnesses testified that they saw a gun, and OL described the gun McVea pointed at her by comparing it to guns she had seen in movies. We defer to the trier of fact

on the persuasiveness of the evidence. *Ague-Masters*, 138 Wn. App. at 102. Construing the evidence in the light most favorable to the State, there was sufficient evidence for a jury to find that McVea was armed with a deadly weapon for purposes of the assault conviction and the deadly weapon sentencing enhancements. We affirm McVea's convictions as well as the jury's findings that he used a deadly weapon when he committed the assault and the felony harassment.

III. SENTENCING

A. Firearm Sentencing Enhancement

McVea next argues, and the State concedes, that we should remand for resentencing to strike the firearm enhancements from his judgment and sentence and replace them with deadly weapon enhancements because the jury found that McVea was armed with a deadly weapon.

Under both the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the right to a jury trial requires that a sentence be authorized by the jury's verdict. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). "For purposes of sentence enhancement, the sentencing court is bound by special verdict findings, regardless of the findings implicit in the underlying guilty verdict." *Id.* at 900. Thus, even where a firearm is used in the commission of a crime, the only way to determine whether a deadly weapon enhancement or a firearm enhancement is authorized, is to look at the jury's special findings. *Id.*

Here, the trial court imposed firearm enhancements at sentencing despite the deadly weapon special verdicts. The only way to determine which enhancement was authorized is to look at the jury's special verdicts, and here, the jury found McVea committed the felony harassment and second degree assault with a deadly weapon. We accept the State's concession and remand for

the trial court to vacate the firearm enhancements and impose deadly weapon enhancements instead. RCW 9.94A.533(4)(b),(c).

B. Firearm Offender Registration

McVea argues that the trial court also erred by requiring him to register as a felony firearm offender because the jury found that McVea was armed with a deadly weapon, not a firearm. McVea asserts that making him register without a jury determination violated his Sixth Amendment right to a jury trial.[2]

The State responds that the trial court did not abuse its discretion because the evidence at trial demonstrated that McVea was "armed with a firearm" during his offenses. Br. of Resp't at 40. We affirm the firearm registration requirement.[3]

A person convicted of a felony firearm offense *must* register as a firearm offender in certain circumstances including when the "offense [was] committed against a child under the age of eighteen." RCW 9.41.330(3)(b). Otherwise, the court's order to register as the result of a felony firearm offense is discretionary. RCW 9.41.330(1). A "felony firearm offense" includes "[a]ny felony offense if the offender was armed with a firearm in the commission of the offense." RCW

[2] Although the relevant assignment of error refers to a violation of statutory authority, McVea's argument appears to be only that the registration requirement violates the Sixth Amendment right to a jury trial.

[3] The State challenges whether McVea can raise this issue for the first time on appeal. If McVea is correct that the felony firearm registration is punishment, then the issue can be raised for the first time on appeal because the issue would implicate the trial court's authority to enter the order being challenged. *See* RAP 2.5(a); *Neilson ex rel. Crump v. Blanchette*, 149 Wn. App. 111, 115, 201 P.3d 1089 (2009) ("Generally, we may refuse to review a claim of error not raised in the trial court. However, where . . . the asserted error concerns the trial court's authority to act, we may elect to review the issue" (citation omitted)).

9.41.010(11)[4]. The statute does not state that *a jury* must find that the defendant was armed with a firearm in order for the crime to constitute a felony firearm offense. Here, because McVea's crimes were committed against a child, the registration requirement was mandatory if he committed his felonies with a firearm. RCW 9.41.330(3)(b).

A defendant's Sixth Amendment jury trial right requires that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. *Apprendi, v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The "statutory maximum" is the maximum sentence a judge may impose based on facts either admitted by the defendant or reflected in the jury's verdict. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). But the Washington Supreme Court has held that the firearm registration requirement is a collateral consequence that does not enhance the sentence or punishment. *State v. Gregg*, 196 Wn.2d 473, 484-85, 474 P.3d 539 (2020). As such, the requirement to register is not punitive, but rather a regulatory consequence, and a jury determination is not required. *See State v. Felix*, 125 Wn. App. 575, 578-79, 105 P.3d 427 (2005) (concluding that a judge-made finding that a crime involved domestic violence did not violate the defendant's constitutional rights because consequences were regulatory, not punitive). Because the registration requirement is not punitive, McVea's constitutional rights were not violated when the trial court imposed a registration requirement without a jury finding.

The trial court checked a box on the judgment and sentence indicating in part that felony firearm registration was required because McVea committed felonies against a person under the

[4] We cite to the current statute because the relevant language has not changed.

age of 18 while armed with a firearm. McVea's argument is that the registration requirement violated his Sixth Amendment right to trial because *the jury* did not specifically find he was armed with a firearm when he committed felony harassment and second degree assault. For the reasons explained above, we disagree, and McVea raises no other basis to challenge the firearm registration requirement imposed on him.

CONCLUSION

We reverse McVea's sentencing enhancements and remand for the trial court to strike the firearm sentencing enhancements and replace them with deadly weapon enhancements. We otherwise affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.

We concur:

Maxa, J.

Cruser, A.C.J.

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