NO. 44642-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JESSE JAMES CLARK,

Appellant.

RESPONDENT'S BRIEF

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3. The State did not fail to prove that Mr. Clark received notice that he was required to appear in court.

4. The State did not fail to prove that Mr. Clark received notice that he was required to appear in court. The State is not required to prove that Mr. Clark had actual knowledge.

5. The State proved that Mr. Clark failed to appear as required on April 19 (count three) and August 2 (count five)

6. The State proved that Mr. Clark failed to appear on August 6 (count six).

7. Mr. Clark's convictions for extortion and possession of stolen property do not violate the Fifth and Fourteenth Amendment prohibition against double jeopardy.

8. Mr. Clark's two convictions do not violate double jeopardy.

9. Mr. Clark's convictions for four counts of bail jumping do not violate the Fifth and Fourteenth Amendment prohibition against double jeopardy.

10. Mr. Clark committed four counts of bail jumping.

11. The State did not engage in misconduct that was flagrant and ill-intentioned.

12. The State did not quantify the reasonable doubt standard in closing argument.

13. The State did not testify to facts outside the record.

14. The State did not improperly bolster the credibility of a witness.

15. The State did not improperly bolster its case.

16. The State did not improperly urge jurors to convict based on passion, prejudice, and propensity evidence.

17. Mr. Clark was not convicted through the operation of a statute that is unconstitutionally overbroad.

18. The accomplice liability statute does not impermissibly permit convictions based on "words" or "encouragement" spoken with knowledge but without intent to promote or facilitate a crime.

19. The accomplice liability statute does not impermissibly permit convictions based on "words" or "encouragement" even absent proof that the speech is likely to incite imminent lawless action.

20. The trial judge did not err by giving Instruction No. 12.

21. The sentencing court properly determined Mr. Clark's offender score.

22. The sentencing court properly did not consider the extortion and possession of stolen property charges as the same criminal conduct.

23. Mr. Clark's waived this argument on appeal by not arguing that the offenses were the same criminal conduct at the trial level.

B. STATEMENT OF THE CASE

1) Procedural History

On February 26, 2013, the Cowlitz County Prosecuting Attorney filed an amended information charging Jesse James Clark with Extortion in the First Degree on or about and between October 5, 2011, and October, 25, 2011 and Possession of Stolen Property in Second Degree on or about and between October 4, 2011 and October 25, 2011. CP 1-3.[1] The same information charged Mr. Clark with four counts of Bail Jumping for failing to appear in court as ordered on April 19, April 23, August 2, and August 6 of 2012. CP 1-3.[2] The case proceeded to a jury trial before The Honorable Michael Evans, which commenced on February 26, 2013 and concluded on March 1, 2013 with a jury verdict. RP 9-545.

The jury found Mr. Clark guilty as charged and Judge Evans sentenced him to a standard range sentence of 40 months. RP 539-545, 546-567; CP 4-17. Mr. Clark filed a timely notice of appeal. CP 18-32.

[1] RCW 9A.56.110 and RCW 9A.56.120; RCW 9A.56.160(1)(a) and RCW 9A.56.140(1).
[2] RCW 9A.76.170(1)

2) Statement of Facts

Jagger the bulldog was taken from the rural home of Jennifer Thomas on October 4, 2011 and found dead, his face detached from his body, on October 24 of the same year. RP 84-96, 106-108, 226-29; Ex. 147. After the abduction, Jennifer spoke with newspapers and TV stations, and put up posters hoping that Jagger would be found. RP 94, 96, 115. Jennifer testified about a Rose or Ivy Folsom with whom she was introduced to by her neighbor, Jeremy Rutherford, and a Johnny Jordan who was a relative of Mr. Rutherford and Ms. Folsom's boyfriend. RP 81-94, 96, 108-114, 386. Essentially, Jennifer and Mackenzie Thomas, Jennifer's daughter, testified that Ms. Folsom and Mr. Jordan were the individuals who, utilizing a green Ford Explorer, abducted Jagger. RP 81-94, 96, 108-114, 127-128, 130-35. That Explorer was ultimately seized by the police, inspected, and a detective testified that what looked like dog hair and blood were found and photographed in the back of the Explorer. RP 330-34. Eventually, a search warrant was executed at the home of Mr. Jordan where he was arrested after being found hiding in a closet. RP 170-71, 319-322, 406. Among the evidence discovered was one of the

posters Jennifer created seeking the return of Jagger in Mr. Jordan's pocket and a notebook with Jagger's name. RP 170-71, 319-327, 400. Ms. Folsom was present at the home at the time. RP 321. She was also eventually arrested. RP 162, 170.

Mr. Clark's name came up during Jennifer's attempts at getting information so she ended up taping a poster to his mailbox sometime after October 8. RP 97, 116-124. Mr. Clark already knew Jagger, however, because he had twice spent time with Jagger before the bulldog was taken. Mackenzie introduced Jagger to Mr. Clark one time at their home when he walked by with Mr. Rutherford, and a week later Jagger accompanied Mackenzie to Mr. Rutherford's home where Mackenzie, Jagger, Mr. Clark, and Mr. Rutherford hung out together for a couple hours. RP 128-130, 136-140.

On October 8, four days after Jagger's abduction, Jennifer began receiving text messages demanding her morphine and $1,000 for the return of Jagger. RP 98-104, 191-92, 194-200; Ex. 7-102. If she failed to comply Jagger was going to be "tortured and cut up." RP 101. Jennifer also received a text message that included a picture of Jagger tied up with a really short black rope that had an orange stripe. RP 100; Ex. 39. She

was told "that if you don't do exactly as you're told the next few pictures you get will be your friend slowly getting tortured to death." RP 197. The text messages sent to Jennifer from the extortioner(s) sometimes referenced "we" and other times referenced "I" when making demands. RP 195, 198, 215-16. Not knowing what to do, Jennifer went to the Sheriff's office for help. RP 99, 102-04.

Multiple sheriff's deputies described their role in the investigation into the text messages demanding a ransom for Jagger's safe return and their attempt to catch his abductor(s). RP 145-169, 175-180, 187-212. The plan was for deputies to use Jennifer's car and cell phone in order to pretend to be her and arrange a meeting with the abductor(s). RP 146-49, 187-190, 201-02, 204. Messages were exchanged between a deputy and the abductor(s), and after first attempt at a meeting failed, the parties agreed to meet at the Kelso golf course. RP 151-56, 175-78, 206.

By this time it was around 9 p.m. on October 8. RP 156, 158, 165-66, 207, 210. Additional deputies parked out of sight on the perimeter of the golf course at what they thought were the only two roads to enter and exit the golf course. RP 175-78. During this period of the operation only two vehicles were spotted in the area where the exchange was to take

place. RP 158, 166-67. Based on the time (late night), place (a golf course), and their experience the deputies indicated it would be odd for cars to be driving around this location at this time. RP 158-159, 210. One of the vehicles was stopped by the deputies on the perimeter and cleared as not involved. RP 158, 166-67. The other vehicle was driving slowly and described by a detective sergeant as tan or white import pickup truck with a barrel in the bed of the truck, that was standing up. RP 159-160. Another deputy, at the time, believed the vehicle was a Nissan truck, whereas another could only describe the vehicle as a pickup truck. RP 184-85, 211. The deputies were unable to stop this vehicle and contact its occupant(s) because it turned down a small road that they did not know about. RP 161, 167-69, 178-79. The text messages from the abductor(s) stopped contemporaneous to the observation of the pickup truck by the deputies in Jennifer's car and never restarted. RP 212, 106.

Lori Vanderhoff lived at Mr. Clark's residence located at 3899 Rose Valley Road, which was a rural area, from July of 2011 until sometime that fall. RP 258-260. Ms. Vanderhoff had known Mr. Clark since junior high and testified at trial that she loved him and considered him family. RP 258-260, 281. Ms. Vanderhoff also knew of Mr. Jordan

and Ms. Folsom; she described them as friends with Mr. Clark and she had seen them on two occasions at Mr. Clark's residence before Jagger was abducted. RP 262-63.

On October 4, the day that Jagger was taken from Jennifer's home, Ms. Vanderhoff came home to the residence she shared with Mr. Clark to find him in his white pickup truck with a little bulldog that was shaking. RP 263-64. Ms. Vanderhoff noticed that there was blood on the seat of the truck that was coming from the bulldog and she asked Mr. Clark from where he got the dog. RP 265. Mr. Clark responded that the dog was a friend's and that he was going to keep it for a couple days. RP 265.

That same day, Ms. Vanderhoff moved out to a camper or trailer she had on the property because she had a dog of her own and didn't want the two dogs together. RP 270. Later, when she went back into the residence, she found the bulldog on a futon. RP 267. The next day, Ms. Vanderhoff noticed that the bulldog was outside in or by a Lil' Tykes playschool desk that had plywood on top of it and that the dog was without food or water. RP 270-71. She and her daughter provided the bulldog with food and water. RP 271. Ms. Vanderhoff concluded that the bulldog was at Mr. Clark's home a couple days and that the last time she

saw the bulldog was likely on October 6. RP 273, 283-87. Ms. Vanderhoff testified that during this time period Mr. Clark had seemed to have been up for 9 or 10 days without sleeping, that his behavior was concerning, and that she had become fearful of him. RP 273-74.

On either October 9 or 10, Mr. Clark appeared at Ms. Vanderhoff's trailer and asked her to go on a walk with him. RP 275. During that walk, the two sat down and Mr. Clark said to Ms. Vanderhoff, "I beat the shit out of that fucking d—" and stopped in mid-sentence. RP 275. Ms. Vanderhoff responded by asking "Jessie, what happened to that dog anyways?" and Mr. Clark just said, "You don't have to worry about that dog no more." RP 275-76. Ms. Vanderhoff testified that there was no confusion that the d-word was dog, that Mr. Clark appeared serious, and that this interaction frightened her a little bit. RP 275-76. Based in part on this conversation Ms. Vanderhoff decided to move from Mr. Clark's property. RP 276.

After she left, Ms. Vanderhoff looked at The Daily News (a local newspaper) and saw a picture of the bulldog she believed to be the one that was at Mr. Clark's home. RP 277-78. As a result, on October 26, she went to a local high school and requested to speak with someone about the

case. RP 278, 387-388. A deputy arrived and Ms. Vanderhoff told him what she knew before going to the Sheriff's office and speaking with a sergeant. RP 278-79, 297-98, 387-88. Ms. Vanderhoff told the deputy that she had information regarding the missing bulldog and that she wanted to do the right thing. RP 297-98. The deputy testified that Ms. Vanderhoff said that the bulldog was at Mr. Clark's residence, that the dog had been in Mr. Clark's truck with an injured foot that was bleeding, and that Mr. Clark asked her "How do I get the blood off my seat?" RP 297-98. The deputy also testified that Ms. Vanderhoff explained to him how the bulldog was tied up outside in a Lil' Tykes type desk. RP 298. In addition, Ms. Vanderhoff testified at trial that Exhibit 39, the photograph depicting Jagger that was sent to Jennifer during the extortion attempt, was the same bulldog that was at Mr. Clark's residence and that the property surrounding the bulldog in the picture appeared to be Mr. Clark's property. RP 280-81; Ex. 39.

Another former neighbor of Mr. Clark's, Dmitry Powers, also testified. RP 347-369. At the time that Mr. Powers was testifying he was in custody serving a prison sentence. 348. Mr. Powers testified that in the early fall he was living out at 3770 Rose Valley Road, that during that

time period he knew Mr. Clark, and that in October he saw a bulldog sitting outside Mr. Clark's residence on multiple occasions. RP 348-353, 365. Mr. Clark told Mr. Powers that he bought the bulldog. RP 351, 357, 365.

Mr. Powers's indicated that at one point the bulldog was no longer present at Mr. Clark's residence. RP 353-354. Mr. Powers ended up speaking with the police, writing a statement, and signing it under oath. RP 355-57. He testified that he wrote in his statement that after the dog was no longer at Mr. Clark's home, that Mr. Clark had told him that he (Mr. Clark) had beat the shit out of the dog and that people wouldn't have to worry about the dog anymore. RP 356-57.

Mr. Powers' testimony was not straight forward, however. RP 347-369. He hemmed and hawed on a number of issues, including the subject matter of his written statement, as well as sometimes claiming a lack of memory. RP 347-369. The reason for the character of Mr. Powers' testimony became clear when he testified about meeting Johnny Jordan in prison, speaking to Mr. Jordan about his written statement, and his worries about being a "snitch." RP 358-361, 368-370. Specifically, Mr. Jordan said to Mr. Powers about his written statement: "I don't think that was you

who wrote that." RP 369, 358-59. In fact, when asked whether speaking to Mr. Jordan in prison changed his perspective on the information he had given to police about Mr. Clark, Mr. Powers responded: Yeah. RP 359.

Based on the information Ms. Vanderhoff provided to the police on October 26, a search warrant for Mr. Clark's residence was sought, granted, and executed that same day. RP 300, 386-390. October 26, was not the first day, however, that the police had been to Mr. Clark's residence during their investigation into Jagger's abduction. RP 223, 294, 374-75. On October 17, the police made contact with Mr. Clark to ask him about Jagger. RP 223, 294, 374-75. Mr. Clark denied knowledge of the bulldog, any involvement in the bulldog's abduction, and ever having a bulldog on his property, explaining that he did not even like dogs. RP 224-25, 294-96, 376-77.

When the police returned on October 26 with a search warrant in hand, Mr. Clark was not present. RP 301, 391. Nonetheless. Mr. Clark's home was searched and his white Toyota Tundra pickup truck was searched and impounded. RP 230-39, 300-307, 390-94. A deputy noticed that Mr. Clark's pickup truck contained a barrel of paint or some kind of solvent in its bed and saw what looked to be blood spots on the bench seat.

RP 233, 238. Another deputy photographed the truck once it was impounded and also saw what she described as blood stains on the passenger side of the bench seat. RP 338-340. Officers also discovered the makeshift doghouse out back as Ms. Vanderhoff had explained, as well as a leash, a collar, a dog hair inside on a futon, and observed a chain and black rope with an orange stripe that they recognized from the cell phone photograph that was sent to Jennifer during the extortion attempt. RP 234-37, 304-08, 390-94; Ex. 122, 39. Photographs were taken of each discovery and items considered evidence were collected. RP 230-31, 302-308. On November 1, Mr. Clark was arrested at the Cowlitz County courthouse when he appeared on an unrelated matter. RP 396-97.

Following Mr. Clark's arrest he was charged with Extortion in the First Degree and Possession of Stolen Property in the Second Degree. CP 1, Ex. 204. Mr. Clark was then ordered to appear for future court dates and failed to appear at four of them. RP 413-458. Consequently, he was charged with four counts of Bail Jumping. CP 2-3.

The State presented evidence of the Bail Jumping charges by way of the testimony of four court clerks and admitting into evidence clerk's minutes, bench warrants, booking sheets, and bail bonds. RP 413-458; Ex.

203-221. April 19, 2012 and April 23, 2012 were the first two court dates at which Mr. Clark failed to appear. RP 425-429, 450-52. He next appeared in court over a month later on May 22, 2012 hoping to quash the bench warrant that had been issued on April 19. RP 429-30, 436; Ex 208, 219-220. August 2, 2012 and August 6, 2012 were the next two court dates in which Mr. Clark failed to appear as ordered. RP 445-47, 457-59; Ex. 214-17. Mr. Clark's next appearance in court was once again over a month later on September 11, 2012 after he was arrested on a bench warrant that was issued on August 2. RP 452-55, Ex. 218, 221. Additional evidence supporting the Bail Jumping convictions will be detailed below.

C. ARGUMENT

1) THERE WAS SUFFICIENT EVIDENCE TO SUPPORT MR. CLARK'S BAIL JUMPING CONVICTIONS.

Evidence is sufficient to support a conviction if, when viewed in a 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. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In order to determine whether the necessary quantum of proof exists, the reviewing court "need not be convinced of the defendant's guilt beyond a reasonable doubt but only that substantial evidence supports the State's case." *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (2002) (citations omitted).

In order to prove the crime of bail jumping the State must prove that the "defendant (1) was held for, charged with, or convicted of a particular crime; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required." *State v. Downing*, 122 Wn.App. 185, 192, 93 P.3d 900 (2004); RCW 9A.76.170. The State presents sufficient evidence that the defendant had knowledge of the requirement of a subsequent personal appearance when it "prove[s] . . . [the defendant] was given notice of his court date. . . ." *State v. Carver*, 122 Wn.App. 300, 306, 93 P.3d 947 (2004). In making a determination as

to whether notice was given, a fact-finder can consider " [e]vidence . . . of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses" because such evidence "is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the . . . routine practice." ER 406; *See State v. Prestegard*, 108 Wn.App. 14, 28 P.3d 817 (2001). Moreover, "whether a person is guilty of bail jumping does not depend on whether the court convened to hear his or her case." *State v. Aguilar*, 153 Wn.App. 265, 277-78, 223 P.3d 1158 (2009).

Here, as mentioned above, the State presented sufficient evidence of the Bail Jumping charges by way of the testimony of four court clerks and admitting into evidence clerk's minutes, bench warrants, booking sheets, and bail bonds. RP 413-458; Ex. 203-221. The State elicited testimony from Staci Myklebust, a court clerk of ten years, about the routine practice of the clerks of the Clerk's office on criminal dockets. RP 413-426. In particular, Ms. Myklebust testified about the clerk's minutes and their purpose, the importance of their accuracy, and most importantly, that the box on the clerk's minutes indicating a defendant is ordered to appear is only checked after the defendant is actually ordered to appear.

RP 424-425. Additionally, Ms. Myklebust testified that the practice of the court when it orders a defendant to appear at a future court date is to tell the defendant that they have to appear on a certain date, at a certain time, and on occasion when that does not occur that the Prosecutor will make sure to remind the court. RP 425. Ms. Myklebust testified, "we make sure that's done" and that the ordered to appear box will not be checked unless it actually happened. RP 425. Similarly, Angel Benneman, another court clerk, testified about the importance of keeping accurate clerks minutes, explained that a defendant has to appear at 8:30 a.m. on trial days, and that the court specifically orders the defendant to appear at that time on trial days. RP 439, 442-43.

April 19, 2012 and April 23, 2012 were the first two court dates at which Mr. Clark failed to appear. RP 425-429, 450-52. With regard to April 19, the State presented evidence by way of clerk's minutes and testimony from Ms. Myklebust, the clerk that was present on that date, that Mr. Clark appeared in court on March 27, 2012 and was ordered by the court to appear again on April 19 at 9 a.m. for a readiness hearing. RP 423-25; Ex. 206. Ms. Myklebust, the clerk present on April 19, testified that Mr. Clark failed to appear as ordered, that the court ordered a bench

warrant be issued, and that she generated a bench warrant as result. RP 425-29. The State also admitted into evidence the clerk's minutes from that date and the bench warrant that was issued by the court. Ex. 207, 208.

Similarly, with regard to April 23, the State presented evidence by way of clerk's minutes and testimony from Ms. Benneman, the clerk that was present on that date, that Mr. Clark appeared in court on February 2, 2012 and was ordered by the court to appear for trial on April 23. RP 439-441, Ex. 205. Sheryl Moul, the clerk present on April 23 testified that Mr. Clark failed to appear in court as ordered. RP 450-52. The State also admitted into evidence clerk's minutes from that court date, which showed that the court convened at 8:52 a.m., called the case but that Mr. Clark was not present, and adjourned a minute later. Ex. 209. On May 22, 2012, nearly a month later, Mr. Clark finally appeared in court asking to quash the bench warrant issued on April 19. RP 429-30, 436; Ex. 208, 210, 220.

August 2, 2012 and August 6, 2012 were the next two court dates at which Mr. Clark failed to appear. RP 445-47, 457-59; Ex. 214-17. With regard to August 2, the State presented evidence by way of clerk's minutes and testimony from Ms. Myklebust, the clerk that was present on that date, that Mr. Clark appeared in court on June 19, 2012 and was ordered by the

court to appear again on August 2 at 9 a.m. for a readiness hearing. RP 432-44; Ex. 212. The next time Mr. Clark was present in court, on June 27, 2012, the court once again ordered him to appear in court on August 2 at 9 a.m. according to the testimony of Ms. Benneman and the clerk's minutes that were admitted. RP 443-44; Ex. 213. Nonetheless, Ms. Benneman, the clerk present on August 2, testified that Mr. Clark failed to appear as ordered. RP 445-47. The State also admitted into evidence the clerk's minutes from that date, the bench warrant that was issued by the court, and the notice to Mr. Clark's bondsman about his failure to appear. Ex. 214-15, 217.

Similarly, with regard to August 6, the State presented evidence by way of clerk's minutes and testimony from Ms. Benneman, the clerk that was present on that date, that Mr. Clark appeared in court on May 29, 2012 and was ordered by the court to appear for trial on August 6. RP 442-441, Ex. 211. The next time Mr. Clark was present in court, on June 27, 2012 the court once again ordered him to appear in court on August 6 for trial according to the testimony of Ms. Benneman and the clerk's minutes that were admitted. RP 443-44; Ex. 213. Susan Wiltfong, the court clerk on August 6, testified that while the defendant's attorney and prosecutor

were present in court, Mr. Clark failed to appear. RP 457-59. The State also admitted into evidence clerk's minutes from that court date, which showed that the court convened at 8:55 a.m., that the lobby was checked for Mr. Clark, that Mr. Clark failed to appear, and that the court adjourned at 8:57 a.m. Ex. 216. On September 11, 2012 over a month later Mr. Clark finally appeared in court again after he was arrested on the bench warrant that issued on August 2. RP 452-55; Ex. 218-221.

Here, the evidence presented by the State, when viewed in a light most favorable to the prosecution, was sufficient to support Mr. Clark's bail jumping convictions. The testimony of court clerks Ms. Myklebust and Ms. Benneman regarding the routine practice of the clerk's office is informative because said testimony explains what the clerk's minutes actually mean when the "court orders the defendant to appear" box is checked. And what that box being checked means is that the court told Mr. Clark of the specific dates and times he was ordered to appear in court. Moreover, testimony concerning the routine practice of the clerk's office "is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the . . . routine practice." ER 406; *See State v. Prestegard*, 108 Wn.App. 14, 28 P.3d 817 (2001).

Consequently, one can infer that each time the "court ordered the defendant to appear" box was checked on the clerk's minutes, it happened only after the court actually ordered Mr. Clark to appear and after the court instructed Mr. Clark of the specific date and time.

With regard to any failure to prove that Mr. Clark failed to appear at the specific time ordered; each time Mr. Clark failed to appear, he did not reappear in court for approximately one month. The first time he reappeared it was specifically to quash his warrant. Consequently, he knew he missed court as ordered and that a warrant was outstanding. And the second time he reappeared he had to be brought in pursuant to a bond revocation meaning his bondman had to bring him to the jail in order to get him into court. RP 455. The reasonable inferences that can be drawn from this evidence are that Mr. Clark was given notice of his court dates and failed to appear as required. Sufficient evidence supports his bail jumping convictions.

2) MR. CLARK'S CONVICTIONS DO NOT VIOLATE THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY.

Both the United States Constitution and the Washington State Constitution protect against double jeopardy by prohibiting multiple convictions for the same crime. U.S. Const. Amend. V.; Wash. Const. art. I sec. 9; *State v. Hall*, 168 Wn.2d 726, 729-30, 230 P.3d 1048 (2010). Moreover, each "provide[s] identical protection." *State v. Ose*, 156 Wn.2d 140, 144, 124 P.3d 635 (2005) (citing *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005)). There are two possible tests for determining whether convictions subject a defendant to double jeopardy. If a defendant violated more than one statutory provision, the court will apply the 'same evidence' test, which mirrors the federal 'same elements' test. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). The convictions violate double jeopardy protection under the same evidence test if the offenses are legally and factually identical. *Adel*, 136 Wn.2d at 632. But under this test, convictions would always violate double jeopardy protection when a defendant violates the same statute multiple times. *Adel*,

at 633. In this situation, the 'unit of prosecution test' applies, and the convictions will not violate double jeopardy protection if the defendant's acts constituted separate units of prosecution. *Id.* at 634.

A) Mr. Clark's convictions for Extortion and Possession of Stolen Property do not violate double jeopardy.

Under the same evidence test a defendant's "double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law." *State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40 (2007) (quoting *State v. Calle*, 125 Wn.2d 769, 777, 888 P2d 155 (1995)). "[O]ffenses are not constitutionally the same if there is any element in one offense not included in the other and proof of one offense would not necessarily prove the other." *Id.* (alteration in original) (quotation and citations omitted). Furthermore, if each offense "contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes." *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005) (citing *Calle*, 125 Wn.2d at 777). Ultimately, the same evidence test "controls unless there is a clear indication that the legislature did not intend to impose multiple punishments." *Womac*, 160 Wn.2d at 652 (citation omitted); *State v.*

Harris, 167 Wn.App 340, 352-53, 272 P.3d 299 (2012) ("Where the results of the same evidence test would allow multiple convictions to stand, only clear evidence of a contrary legislative intent can override the same evidence test results.") (internal quotations and citation omitted).

Here, Mr. Clark's convictions for Extortion in the First Degree and Possession of Stolen Property in the Second Degree do not violate his double jeopardy rights as the elements required to prove each crime are strikingly different. That is, each offense contains elements that the other does not. In this case to prove extortion the State had to prove that (1) Mr. Clark knowingly attempted to obtain property or services of another by threat; and (2) such threat communicated, directly or indirectly, an intent to cause physical damage to property of a person other than the defendant. Whereas to prove possession of stolen property, the State had to prove that (1) Mr. Clark knowingly received, retained, possessed and/or concealed stolen property belonging to Jennifer Thomas; (2) Mr. Clark acted with knowledge that the property was stolen; (3) Mr. Clark withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto; and (4) the stolen property exceeded $750 in

value. This, as previously noted, each offense contains multiple elements the other does not.

Moreover, proof of one the offenses would not *necessarily* prove the other. The State had ample evidence available to it to argue that Mr. Clark was involved in the extortion attempt in numerous ways, and not just as an accomplice based on his possession of Jagger; for example, as the person sending the text messages to Jennifer, by providing his truck to the principles, or utilizing it himself during the attempted exchange at the golf course. And, in fact, the State made such arguments in closing and rebuttal. RP 500-04, 528-532. Because the offenses here are not the same in fact or law, the same evidence test allows for multiple punishments and controls unless there is a clear indication that the legislature did not intend to impose multiple punishments. Mr. Clark has failed to show that there is a clear indication from that legislature that it did not intend to impose multiple punishments when a person is convicted of either of these two crimes. Consequently, Mr. Clark's convictions for Extortion in the First Degree and Possession of Stolen Property in the Second degree do not violate double jeopardy.

B) The unit of prosecution for the bail jumping statute is each court date the defendant fails to appear at after being ordered to appear.

"Whether or not a defendant faces multiple convictions for the same crime turns on the unit of prosecution." *Hall*, 168 Wn.2d at 730 (citing *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)). Because the unit of prosecution analysis is a question of law, review is de novo. *Id.* at 729.

The test for determining the unit of prosecution is well-settled:

> "The first step is to analyze the statute in question. Next, we review the statute's history. Finally, we perform a factual analysis as to the unit of prosecution because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one 'unit of prosecution' is present."

Id. at 730 (quoting *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007)). If the legislature failed to define the unit of prosecution for a crime and its intent is unclear after applying the above test, then the rule of lenity requires that "any ambiguity must be resolved against turning a single transaction into multiple offenses." *Tvedt*, 153 Wn.2d at 711 (quoting *Adel*, 136 Wn.2d at 634-35). That said, "a statute is not

ambiguous merely because different interpretations are conceivable." *Ose*, 156 Wn.2d at 146.

The bail jumping statute provides that "[a]ny person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state . . . and who fails to appear . . . is guilty of bail jumping." RCW 9A.76.170(1). *State v. O'Brien,* 164 Wn.App 924, 267 P.3d 422 (2011), is the only Washington case to examine the unit of prosecution for bail jumping. The defendant in *O'Brien* was convicted of four counts of a bail jumping when one court released him "under multiple orders entered in different cases, each one requiring him to surrender on the same day and at the same time," and he failed to appear just that one time. *Id.* at 929-30. *O'Brien* found the bail jumping statute "ambiguous as to whether the legislature intended to punish the single failure to appear or the violations of multiple court orders," noted that the statute's history did not shed any light as to the legislature's intent regarding the unit of prosecution, and applied the rule of lenity by resolving the ambiguity in the defendant's favor. *Id.* Consequently, three of the defendant's four bail jumping convictions were reversed. *Id.* at 929-30, 932-33. Importantly, however,

O'Brien specifically held that it was only finding the bail jumping statute ambiguous regarding the unit of prosecution "as applied to the facts of th[e] case" before it. *Id.* at 932.

More instructive for the facts here, where Mr. Clark failed to appear at four separate court dates, are *Ose*, *State v. DeSantiago*, *State v. Westling*, and *State v. Root*. 156 Wn.2d 140, 103 P.3d 1238 (2005); 149 Wn.2d 402, 419, 68 P.3d 1065 (2003); 145 Wn.2d 607, 610, 40 P.3d 669 (2002); 141 Wn.2d 701, 9 P.3d 214 (2000). In *Ose* the defendant pleaded guilty to 25 counts of second degree possession of stolen property under RCW 9A.56.160(1)(c), which provides that "[a] person is guilty of possessing stolen property in the second degree if . . .[h]e or she possesses a stolen access device." RCW 9A.56.160(1)(c); 156 Wn.2d at 145. In rejecting the defendant's unit of prosecution challenge *Ose* focused on the legislature's choice of the indefinite article "a" in "a stolen access device" and held that "because the word 'a' is used only to precede singular nouns except when a plural modifier is interposed, the legislature's use of the word 'a' before 'stolen access device' unambiguously gives RCW 9A.56.160(1)(c) the plain meaning that possession of each stolen access device is a separate violation of the statute." 156 Wn.2d at 146.

In so holding, *Ose* stated that "this court has consistently interpreted the legislature's use of the word 'a' in criminal statutes as authorizing punishment for each individual instance of criminal conduct, even if multiple instances of such conduct occurred simultaneously." *Id.* at 147. *DeSantiago*, *Westling*, and *Root* provide support. 156 Wn.2d at 147-48. *DeSantiago* interpreted RCW 9.94A.533(3) and (4), which allows for sentence enhancements if a defendant or an accomplice was armed with 'a' firearm or 'a' deadly weapon and held that the statute allows a defendant to "be punished for 'each' weapon involved." 149 Wn.2d at 418-19. Similarly, *Westling* interpreted RCW 9A.48.030(1), which provides that "[a] person is guilty of arson in the second degree if he knowingly and maliciously causes a fire or explosion which damages a building, or any . . . automobile" and held that because the legislature used the words "a fire," the unit of prosecution for the arson statute was per fire caused by the defendant. 145 Wn.2d at 611–12. Likewise *Root* considered how the legislature's use of the words "a minor" in the sexual exploitation of a minor statute, RCW 9.68A.040, impacted the unit of prosecution analysis and held that because "[t]he statute specifically states 'a minor,' . . . [the defendant] may be charged per child involved." 141 Wn.2d at 710–

11. Furthermore, our Supreme Court, in consistently interpreting the legislature's use of the word "a" in criminal statutes as authorizing punishment for each individual instance of criminal conduct does so "presum[ing] that the legislature is aware of [the Court's] prior interpretations of its enactments." *Ose*, 156 Wn.2d at 148 (citing *State v. Tili*, 139 Wn.2d 107, 116, 985 P.2d 365 (1999).

Here, the bail jumping statute which provides that "[a]ny person having been released by court order or admitted to bail with knowledge of the requirement of *a* subsequent personal appearance . . . and who fails to appear . . . is guilty of bail jumping" should be interpreted consistent with *Ose*, *DeSantiago*, *Westling*, and *Root*. RCW 9A.76.170(1) (emphasis added).[3] Consequently, the legislature's use of the word "a" before "subsequent personal appearance" unambiguously gives RCW 9A.76.170(1) the plain meaning that failing to appear at each subsequent personal appearance is a separate violation of the statute. In other words, the unit of prosecution for the bail jump statute is each court date the defendant fails to appear at after being ordered to appear. In addition, this construction is entirely consistent with *O'Brien* and its unit of prosecution

analysis. Thus, Mr. Clark is guilty of four counts of bail jumping for failing to appear in court on four separate dates (April 19, 23 and August 2, 6) when he had been ordered to appear at each one.

In addition, and worthy of note, is that Mr. Clark was ordered to appear on April 19 when he appeared in court on March 27, ordered to appear on April 23 when he appeared in court on February 2, ordered to appear on August 2 when he appeared in court on June 19 and again on June 27, and ordered to appear on August 6 when he appeared in court on May 29 and again June 27. Ex. 205-06, 211-213. Consequently, Mr. Clark was released by a *separate* court order for *each* court date that he missed. In other words, each time Mr. Clark failed to appear he violated a court order that was separate and distinct from the other orders requiring him to appear in court.

3) MR. CLARK WAS NOT DENIED A FAIR TRIAL.

At trial,"[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences" in their closing arguments. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). Any allegedly

[3] As noted by *O'Brien*, the statute's history does not provide any insight for the purposes of a unit of prosecution analysis. 164 Wn.App at 930 FN. 11.

improper statements by the State in closing arguments "should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). Thus, the State commits misconduct if its arguments improperly shift the burden of proof to the defendant or mischaracterize the burden. *State v. Gregory*, 158 Wn.2d 759, 859-60, 147 P.3d 1201 (2006); *State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012). If the defendant can establish that misconduct occurred, the determination of whether the defendant was prejudiced is subject to one of the two standards of review: "[i]f the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. If the defendant did

not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760 (citations omitted).

Simply put, a defendant must first establish a prosecutor engaged in misconduct and then, when failing to object at trial, that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *Id.* at 760-61 (citation omitted); *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Under the heightened standard, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."); *State v. Warren*, 165 Wash.2d 17, 195 P.3d 940 (2008) (prosecutor's misstatements about the burden of proof undermined the presumption of innocence but were not incurable).

Here, Mr. Clark did not object a single time during the State's closing or rebuttal closing to the arguments that he now asserts are misconduct. Consequently, Mr. Clark must first establish the State engaged in misconduct and then that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *Emery*, 174 Wn.2d at 760-61. His first assertion of misconduct is that the State improperly quantified the reasonable doubt standard. Br. of App. at 25. But the statement about which Mr. Clark complains, even if considered misconduct, cannot be considered flagrant and ill intentioned when viewed within the context of the prosecutor's entire argument and the jury instructions as we must. The prosecutor stated:

> Well, the law says you don't have to be convinced beyond all doubt, beyond any doubt, 99%. You have to beyond a reasonable doubt. And Judge Evans defines it for us. He tells us that a reasonable doubt is one for which a reason exists, and if you have an abiding belief; a belief that lasts, a belief that endures in the defendant's guilt, then you are convinced, as the law requires, beyond a reasonable doubt.

RP 506. The prosecutor here, given the context and the fact that the jury was properly instructed on the law regarding reasonable doubt, did not

commit misconduct. Moreover, any misconduct could have been obviated with a curative instruction.

The other allegations of misconduct by Mr. Clark are similarly wanting. For example, Mr. Clark complains about the following argument:

> Mrs. Vanderhoff told you the same as she told the police, that was concerned about that, the Defendant had been acting erratically, engaged in some bizarre behavior, up for ten days at a stretch, and he told . . . her they aren't welcome on the property.

RP 498. For one, "[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences" in their closing arguments. *Smith*, 104 Wn.2d at 510. For another, Ms. Vanderhoff's actual testimony was that Mr. Clark had seemed to have been up for 9 or 10 days without sleeping, that his behavior was concerning, and that she had become fearful of him. RP 273-74. Granted, neither Ms. Vanderhoff nor anybody else testified that Mr. Clark said "they aren't welcome on the property," but that is a thin reed on which to hang an argument about flagrant and ill intentioned misconduct.

Additionally, Mr. Clark asserts that the prosecutor's argument that "everything she [Ms. Vanderhoff] says is corroborated by what the police

find when they finally get enough evidence to search Defendant's house" impermissibly bolstered her credibility using facts that had been specifically excluded by the court. But that is not true. Deputy Marc Johnson specifically testified as to what Ms. Vanderhoff told him. RP 297-98. Furthermore, when Deputy Johnson testified about his role in executing the search warrant at Mr. Clark's home, he testified about how the things he found matched what Ms. Vanderhoff had described to him. RP 303-05. Moreover, the evidence was straightforward that after Ms. Vanderhoff reported what she knew that a search warrant was sought and executed, especially because it all happened on the same day. RP 300, 386-390. Finally, Ms. Vanderhoff's trial testimony about what she observed at Mr. Clark's house was corroborated by each of the deputies who partook in executing the search warrant as each testified to finding the items that Ms. Vanderhoff had described on the witness stand. Consequently, no misconduct can be found in the above argument by the prosecutor.

Mr. Clark next contends that the prosecutor's closing argument encouraged the jury to convict Mr. Clark based on passion and prejudice rather than the evidence in the case by linking Mr. Clark to Jagger's

mistreatment and by arguing that Mr. Clark participated in the extortion plot out of greed. The prosecutor's argument here was proper and supported by the evidence. The abductor(s) demanded money and drugs otherwise they would torture the Jagger. The prosecutor's argument merely identified Mr. Clark's motive. Jagger was found dead with his face separated from his body. And the evidence that Mr. Clark did not treat Jagger kindly, or at least not like one would a pet or friend's pet, goes to show his knowledge in the whole caper and indifference, at best, as to what would happen to Jagger.

Finally, Mr. Clark asserts that when the prosecutor stated that rebuttal is his favorite part of trial because ". . . by [that] point, [he] get[s] to hear what the defense arguments are and they never fail to entertain" he improperly denigrated defense counsel. Br. of App. 30. The State concedes such a statement should not have been made. Nonetheless, it is doubtful said statement resulted in prejudice that had a substantial likelihood of affecting the jury verdict or whatever prejudice that was caused by the statement could not have been obviated by a curative instruction. Accordingly, Mr. Clark's convictions should be affirmed.

4) THE ACCOMPLICE LIABILITY STATUTE IS NOT UNCONSTITUIONALLY OVERBROAD

A statute is unconstitutional on its face if "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). Such statutes are rendered inoperative. *Id.* A statute that is unconstitutional as applied prohibits the future application of the statute in a similar context, but the statute is not totally invalidated. *Id.* at 669. Specifically, a statute is overbroad if it prohibits a substantial amount of protected speech and conduct. *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989); *City of Seattle v. Webster*, 115 Wn.2d 635, 641, 802 P.2d 1333 (1990) ("A statute which regulates behavior, and not pure speech, will not be overturned as overbroad unless the challenging party shows the overbreadth is both real and substantial in relation to the statute's plainly legitimate sweep.") (internal quotations omitted).

The Court of Appeals in *State v. Coleman*, 155 Wn.App. 951, 231 P.3d 212 (2010) considered the same attack on the accomplice liability statute, RCW 9A.08.020, that Mr. Clark makes. In *Coleman*, the defendant argued the statute was unconstitutionally overbroad because it

criminalizes a substantial amount of speech protected by the First Amendment. *Id.* at 960. *Coleman* rejected the defendant's argument and found that the accomplice liability statute "requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime." *Id.* at 961. This, therefore, avoids activities that are not performed in aid of a crime and that only consequentially further the crime. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 448, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

The Court of Appeals in *State v. Ferguson*, 164 Wn.App. 370, 264 P.3d 575 (2011) also considered the same attack on the accomplice liability statute that Mr. Clark presents. *Ferguson* held that the accomplice liability statute "forbids advocacy directed at and likely to incite or produce imminent lawless action," and does not forbid the "mere advocacy of law violation that is protected under the holding in *Brandenburg*." *Ferguson*, 164 Wn. App. At 376. Thus, both *Coleman* and *Ferguson* rejected overbreadth challenges to the accomplice liability statute.

This court should decline Mr. Clark's invitation to reconsider *Coleman* and *Ferguson* where, here, Mr. Clark's role as an accomplice was based entirely on his conduct.

5) MR. CLARK'S SAME CRIMINAL CONDUCT ARGUMENT IS WAIVED BECAUSE HE FAILED TO MAKE THE ARGUMENT TO THE TRIAL COURT.

When a defendant is convicted of two or more crimes "the default method of calculating [his] offender score is entirely in the State's favor because it treats all current offenses as distinct criminal conduct." *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). Thus, "each of [the] defendant's convictions counts toward his offender score unless he convinces the court" that some or all of his current convictions encompass the same criminal conduct. *Id.*; RCW 9.94A.589(1)(a). "The decision to grant or deny this modification is within the sound discretion of the trial court and, like other circumstances in which the movant invokes the discretion of the court, the defendant bears the burden of production and persuasion." *Graciano*, 176 Wn.2d at 540. Thus, a "same criminal conduct" determination will be reversed by an appellate court only when there is a clear abuse of discretion or misapplication of the law. *State v.*

French, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). That said, when a defendant does "not argue at sentencing that the offenses constituted the same criminal conduct, that argument is waived on appeal." *State v. Phuong*, 174 Wn.App. 494, 547, 299 P.3d 37 (2013) (citing *State v. Brown*, 159 Wn.App. 1, 16–17, 248 P.3d 518 (2010)); *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 496, 158 P.3d 588 (2007) (holding the same criminal conduct issue waived when the defendant "failed to ask the court to make a discretionary call of any factual dispute regarding the issue of 'same criminal conduct' and he did not contest the issue at the trial level") *overruled on other grounds by State v. Knight*, 162 Wn.2d 806, 174 P.3d 1167 (2008).

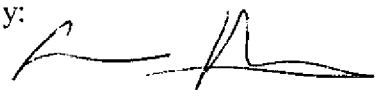
Here, Mr. Clark failed to argue at sentencing that any of his crimes encompassed the same criminal conduct. RP 551-561. Consequently, he waived the same criminal conduct issue on appeal and this court should not address it.

D. CONCLUSION

For the reasons argued above, Mr. Clark's convictions should be affirmed.

Respectfully submitted this 3rd day of February, 2014.

SUSAN I. BAUR
Prosecuting Attorney

By: 

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on February 27, 2014.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

February 05, 2014 - 11:34 AM

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