IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEREMY JAMES BONO and JARED NATHANIEL METCALF, Appellants.	No. 36131-1-II consolidated with No. 36243-1-II UNPUBLISHED OPINION

Van Deren, C.J.—In consolidated appeals, codefendants Jeremy Bono and Jared Metcalf appeal their convictions for first degree assault with a deadly weapon of Garrett Wilson. They both argue that the prosecutor committed misconduct during closing argument by relying on facts not in evidence. Metcalf also argues sentencing error. Both defendants filed statements of additional grounds for review (SAGs)[1] raising various issues without merit.

We affirm the convictions and we do not reach Metcalf's sentencing issue because it will require additional evidence to resolve and, therefore, should be raised in a personal restraint petition (PRP).

[1] RAP 10.10.

FACTS

On October 26, 2005, the Pierce County prosecutor charged Jeremy Bono and Jared Metcalf with first degree assault of Garrett Wilson. In October 2005, Wilson was staying at Tracy Vasquez's home. Vasquez saw Bono drive by his house on October 12, 2005. Twenty minutes later, Bono and Metcalf came to the open door and Metcalf asked for Wilson. Wilson knew Jeremy Bono because he had dated Bono's sister. They generally had gotten along, although Bono recently told Wilson that he would kill him if he slept with his sister. Wilson did not expect Bono and Metcalf as visitors that day.

Bono and Metcalf said that they needed to go for a ride and Wilson left with them. Wilson testified later that he left with the two men because he thought they were angry and because he did not want anything to happen in Vasquez's home. Vasquez looked out of the window and saw the three men driving away in a pickup truck. He saw Bono driving, with Wilson sitting in the middle and Metcalf sitting on the passenger side.

In the truck, Metcalf restrained Wilson and hit him. Metcalf punched Wilson with his fist and hit him with an empty liquor bottle. Metcalf uttered obscenities, some of which may have been of a sexual nature involving what might happen to Wilson. When Wilson asked Bono "why [he] was getting beat up," Bono said something about his sister being arrested. Report of Proceedings (RP) at 327. Metcalf told Wilson to empty his pockets; Wilson complied. Wilson defecated in his pants. He testified that he did this to be funny but he also suggested, prior to testifying at trial, that he did it to make himself repugnant to his assailants.

After driving for 20 minutes, Bono parked the truck on an isolated logging road. Metcalf told Wilson to remove his clothes, which Wilson did. Metcalf tried to grab Wilson and they both

fell to the ground. Wilson ran toward some bushes and two rocks hit him as he ran away. He hid in the bushes until Bono and Metcalf drove away. He then dressed and walked down the road, where a man driving by picked him up, called 911, and drove him to a fire station.

Paramedics transported Wilson to the hospital. Daniel Brocksmith, a physician's assistant, took photographs to document Wilson's condition when he first arrived at the hospital. Brocksmith testified that Wilson suffered a nasal fracture and skull fracture and that he was covered in feces and had numerous lacerations to his head and face. Wilson told Brocksmith that "he had been assaulted with bottles and fists." RP at 293.

At the hospital, Wilson indicated that he did not want to speak to police officers. Brocksmith reported that Wilson was "[c]ooperative to a point where he could tell them his personal information. But anything about the incident, he wouldn't say anything about it."[2] RP at 295. A week or so later, after he had been released from the hospital, Wilson spoke with an officer concerning the assault on October 12. As a result of the interview, the police arrested Bono and Metcalf. The prosecutor's office charged them with first degree assault of Wilson. Both informations included a deadly weapon enhancement.

After his arrest, Metcalf repeatedly contacted Wilson and offered him money to make the case go away. The State eventually arrested Wilson as a material witness; Wilson testified that he thought the case should not be prosecuted. Metcalf also called Vasquez multiple times and offered Vasquez money to write a statement that would "help him out." RP at 188. Vasquez eventually authored two statements—one for Metcalf and one for Bono—which indicated that

[2] At trial, Wilson denied speaking to officers at the hospital. But the State introduced testimony from a deputy sheriff, who interviewed Wilson on the day of the assault, that Wilson told him "that it was Jared that had assaulted him while Jeremy stood by and watched." RP at 453-54.

they had not assaulted Wilson.

The trial court consolidated the two cases for trial. A jury found both Bono and Metcalf guilty as charged. The trial court sentenced Bono to 136 months plus 24 months for the deadly weapon enhancement. The court sentenced Metcalf to 176 months plus 24 months for the deadly weapon enhancement.

ANALYSIS

I. Prosecutorial Misconduct

Both Bono and Metcalf argue that the prosecutor committed misconduct during closing argument. Specifically, they contend that when the prosecutor argued that Wilson soiled himself to prevent Bono or Metcalf from sexually assaulting him, the prosecutor did not base his argument on facts in the record and the argument was highly prejudicial.

A. Standard of Review

As recently stated by our Supreme Court:

> To prevail on a claim of prosecutorial misconduct, a defendant must show first that the prosecutor's comments were improper and second that the comments were prejudicial. *See, e.g., State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359, *cert. denied*, 128 S. Ct. 2964 (2007); *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008), *cert. denied*, *Warren v. Washington*, 129 S. Ct. 2007 (2009). When objecting to closing argument for the first time on appeal, an appellant must show that the argument was "so flagrant and ill-intentioned that no instruction could have cured [it]." *Warren*, 165 Wn.2d at 30.

In analyzing prejudice alleged to arise from a prosecutor's argument, we look at the challenged comments "in the context of the total argument, the issues in the case, the evidence,

and the instructions given to the jury." *Warren*, 165 Wn.2d at 28. In addition, a jury is presumed to follow a court's instructions. *Warren*, 165 Wn.2d at 28.

B. Objections At Trial to State's Closing Argument

In response to Bono and Metcalf's claims of prosecutorial misconduct, the State first asserts that Bono and Metcalf failed to object to the challenged substance of the closing argument at various times. But the record shows that counsel objected at least once to the argument. All statements—whether objected to at trial or not—challenged by Bono or Metcalf on appeal go to whether the prosecutor improperly implied that Bono or Metcalf threatened to sexually assault Wilson and that Wilson soiled himself for this reason.

Bono objected to the prosecutor's statement regarding Wilson's reluctance to testify, specifically, the statement that "he doesn't want to come before you and talk about the fact that he potentially was raped and had to poop all over himself to prevent . . . ." RP at 591. The prosecutor was interrupted by a defense objection based on an insufficient factual basis of the prosecutor's argument. And Metcalf objected to the statement that:

> Mr. Metcalf's intent was to cause great bodily harm to Mr. Wilson, and probably other crimes, other acts such as rape. But as Mr. Wilson at one point said, he pooped on himself - he didn't use that word but I'm going to use it - in order to dissuade these two individuals from further humiliating him.

RP at 546-47. The trial court overruled both objections.

C. Factual Support for the State's Closing Argument

Metcalf and Bono argue that the prosecutor's comments lacked factual support. The State counters that its argument was supported by a reasonable inference from the evidence.

The relevant portions of Wilson's testimony state:

[STATE:] I want to ask you a question that I don't mean to embarrass you,

	it's just obviously part of this --
[WILSON:]	Yeah, I sh[*]t myself. You got a problem with that?
[STATE:]	. . . . When did you do that?
[WILSON:]	Shortly after we got in the truck while I was in a sleeper hold.
[STATE:]	Why did you do it?
[WILSON:]	Just because I thought it would be funny.
. . . .	
[STATE:]	Well, did you ever explain that differently?
[WILSON:]	I don't know, possibly.
[STATE:]	Did you ever explain it in relation to the sexual comments that were made about you?[3]
[WILSON:]	No.
. . . .	
[STATE:]	Well, I think you indicated in the affirmative that the comments were of a sexual nature of things that were going to be done to you, is that correct?
[WILSON:]	Yeah, it was well after I sh[*]t myself.
[STATE:]	*Did you not say that you sh*[*]*t yourself in order to avoid that kind of contact?*
[WILSON:]	No.
[STATE:]	You did not say that --
[WILSON:]	No.
	[METCALF COUNSEL:] Objection, asked and answered.
	[THE COURT:] Objection overruled.
[STATE:]	-- *in front of all three of the attorneys here*?
[WILSON:]	Not that I recall. I do not think I did. *I might have*. I don't know.
. . . .	
[STATE:]	Okay. Now, why would you take your clothes off?
[WILSON:]	. . . . I had pants full of crap.
. . . .	
[STATE:]	. . . . *Which person out of the people that were there told you to take your clothes off*?
[WILSON:]	*Well, if I don't think it was* [*Bono*]*, who does that leave*?
[STATE:]	[*Metcalf*]?
[WILSON:]	*Yep.*[4]
[STATE:]	And that's why you took your clothes off, correct?
[WILSON:]	No, it's not why.
[STATE:]	Well, you already --
[WILSON:]	It's a totally confusing situation, letting it come to an end.

[3] Prior testimony by Wilson admitted that the defendants "possibly" directed rude language of a sexual nature at him and that these comments "possibly" included descriptions of what would happen to him. RP at 331.

[4] Wilson previously testified that, "I was asked to get naked." RP at 334.

RP at 338-40 (emphases added).

Here, the record supports a reasonable inference that Wilson soiled himself to prevent sexual assault. Wilson testified that Bono and Metcalf directed sexual comments, "possibly" including threats, at him; that Metcalf told him to remove his clothing; and that he "might" have told attorneys that he soiled himself to avoid sexual contact. The State argued that Wilson had previously indicated that the defendants made sexual comments and that he defecated on himself "to avoid that kind of contact." RP at 338-39.

Although Wilson's answers at trial were equivocal regarding key events, the jury could reasonably weigh the evidence and assess the credibility of Wilson's trial testimony (1) minimizing the impact of the sexual comments, (2) explaining that he defecated on himself to be "funny," and (3) denying that anyone told him to remove his clothing. The jury also heard that Wilson previously indicated that he was unwilling to testify and was arrested as a material witness; in addition, the jury could observe that during Wilson's testimony he appeared hostile to the State. Furthermore, Wilson testified that Metcalf had tried to influence his testimony and an officer testified that Wilson told him he feared Bono and Metcalf.

Although Wilson at times denied that he feared sexual assault, the record reflects that the State impeached his testimony. Wilson denied speaking to officers but the State introduced testimony from a deputy that Wilson told him "Jared" assaulted him and "Jeremy" watched. Finally, the trial court instructed the jury that "lawyer's statements are not evidence," and that "you must disregard any remark, statement, or argument that is not supported by the evidence." Bono Clerk's Papers (CP) at 99.

"[P]rosecuting attorneys will be permitted a reasonable latitude in argumentative deduction from the evidence presented at trial." *State v. Ranicke*, 3 Wn. App. 892, 897, 479 P.2d 135 (1970). When the prosecutor's statements regarding sexual assault are viewed in light of the entire record, they do not rise to the level of prosecutorial misconduct. Here, we hold that the prosecutor's closing argument was based on logical inferences from the evidence in the record and, thus, was not improper. Because Wilson failed to show that the challenged argument was improper, we need not reach the issue of prejudice.[5]

II. Juvenile Adjudications Scored in Offender Score

At sentencing, Metcalf stipulated to his criminal history. A 1995 burglary,was listed and was described as an "adult" conviction. It was scored as one point, making Metcalf's offender score 5. Metcalf now argues that he was 14 years old in 1995. He argues here that the burglary conviction in 1995 should been scored as one half point because it was a juvenile adjudication.

The State does not argue that Metcalf's sentence is proper. Rather, it first argues that he stipulated to an erroneous fact and that he cannot raise this error on direct appeal.[6] *See In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 872, 50 P.3d 618 (2002). Although the State contends that Metcalf waived this argument,[7] the issue is whether Metcalf's argument requires additional evidence to resolve. If so, Metcalf should raise it in a collateral attack. "[A] personal

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[5] Moreover, because Metcalf's and Bono's argument regarding prosecutorial misconduct fails to meet the requirements for finding the objected-to portions of the closing argument improper, we need not analyze portions of the argument neither of them objected to. *Warren*, 165 Wn.2d at 26, 30.

[6] The State concedes that Metcalf "will not be precluded from seeking relief by personal restraint petition." Br. of Resp't at 30 n.3.

[7] Because the State acknowledges that Metcalf can raise this issue at some point, it is unclear how the matter has been waived.

restraint petition is the appropriate means of having the reviewing court consider matters outside the record." *State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

The State also argues that "[i]t is impossible to tell from the record on review whether or not the challenged burglary conviction was a juvenile conviction or whether the offense/sentencing dates were improperly listed in the stipulation or whether some other error occurred." Br. of Resp't at 30 n.3. We agree.

It is unclear whether the offender score calculation contains a scrivener's error or a factual error (the date of the burglary) or a legal error (the offender score). Should Metcalf be able to produce evidence on his age in 1995, whether the burglary occurred in 1995, and what his proper offender score should be, then a PRP will allow additional evidence and will allow review of how the 1995 conviction should be properly scored. *McFarland*, 127 Wn.2d at 338 n.5.

III. Statement of Additional Grounds For Review

A. Deadly Weapon

Metcalf's and Bono's SAGs both challenge the deadly weapon enhancement in their assault on Wilson. Metcalf argues, "In my [p]olice report and in the [h]ospital report the victim claims he was hit with a bottle . . . . Half way through trial it comes out that this bottle is plastic then the weapon changes to a rock. There is no evidence to support a we[a]pon at all." Metcalf SAG at 1. Bono appears to argue that the prosecution changed the weapon to a rock from a bottle as well.

The information does not identify a specific deadly weapon. The trial court correctly defined a deadly weapon for the jury as "any weapon, device, instrument, substance or article, which under the circumstances it is used . . . is readily capable of causing death or substantial

bodily injury." Bono CP at 113; *see* RCW 9A.04.110(6).

Wilson testified that he was hit with two rocks after he exited the truck, one in the back of the head, causing a skull fracture, and one near his ribs. He also testified that Metcalf previously hit him with a bottle in the truck. At trial, the defense moved to dismiss the deadly weapon enhancement. The trial court did not dismiss the enhancement and, in closing, the State argued that either the bottle or the rocks were deadly weapons.

Whether an object is readily capable of causing substantial bodily harm depends on the circumstances of its use. *State v. Cobb*, 22 Wn. App. 221, 223, 589 P.2d 297 (1978). Circumstances include "'the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.'" *State v. Sorenson*, 6 Wn. App. 269, 273, 492 P.2d 233 (1972) (quoting *People v. Fisher*, 234 Cal. App. 2d 189, 193, 44 Cal. Rptr. 302 (1965)). This determination is a question of fact and, thus, the jury must resolve it. *State v. Carlson*, 65 Wn. App. 153, 160, 828 P.2d 30 (1992).

Here, Wilson testified that he was hit with rocks, thrown with sufficient force to cause him serious injury. These circumstances support the jury's finding that rocks were used as deadly weapons. *Sorenson*, 6 Wn. App. at 273. In addition, although Wilson testified that he was hit with a plastic bottle, the State argued that the jury need not believe that the bottle was plastic in light of the extensive injuries to Wilson's face. In *State v. Pomeroy*, 18 Wn. App. 837, 844, 573 P.2d 805 (1977), for example, a glass beer bottle was considered a deadly weapon.

The State's argument in closing was plausible, given Wilson's reluctance to testify and the documented facial and other injuries he sustained. And in *State v. Mines*, 163 Wn.2d 387, 392, 179 P.3d 835 (2008), the photographic documentation of the victim's injuries supported an

assault conviction. Sufficient evidence of use of a deadly weapon exists in this case and we hold that the matter properly went to the jury to weigh the testimony and determine whether the State had proven that Bono and Metcalf assaulted Wilson with a deadly weapon.

B. Bono's SAG Issues

Bono raises several additional issues in his SAG.

1. Sufficiency of the Evidence[8]

a. Standard of Review

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). In determining whether evidence supports a jury verdict, we "view the evidence in the light most favorable to the State." *State v. McNeal*, 145 Wn.2d 352, 359-60, 37 P.3d 280 (2002). "Credibility determinations are for the trier of fact and are not subject to review." We "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

b. Corpus Delecti

Bono first argues that the State's evidence fails to demonstrate corpus delecti. He argues that the prosecution must prove that a crime occurred and that the proof of a crime cannot be based solely on a defendant's incriminating statements.

[8] Bono's claims of error that relate to matters of credibility and weight of evidence have no merit. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We also do not separately consider assignments of error in a SAG that are already addressed in appellate briefing submitted by defense counsel and the State.

We do not consider a corpus delecti argument when raised for the first time on appeal.[9] "[T]he corpus delecti rule is a judicially created rule of evidence, not of constitutional magnitude" and, thus, not reviewable when raised for the first time on appeal. *State v. Dodgen*, 81 Wn.App. 487, 492, 915 P.2d 531 (1996).

Moreover, a corpus delecti argument is inapplicable in this case because neither defendant testified or otherwise made incriminating statements used at trial. *State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996) notes that the corpus delecti rule functions to prohibit admission of a defendant's confession absent independent prima facie evidence that the crime was committed. *See also Dodgen*, 81 Wn. App. at 492. We do not further address the claim.

c. Mens Rea and Actus Reas

Bono argues that the State's evidence was insufficient to prove actus reas and mens rea. We consider Bono's mens rea and actus reas contentions as assertions that the State failed to present sufficient evidence of essential elements of the crime charged.

To prove assault in the first degree, the State had to show that (1) Bono or an accomplice assaulted Wilson, (2) the assault was committed with a deadly weapon or by force likely to produce great bodily harm, and (3) Bono or an accomplice intended to inflict great bodily harm. RCW 9A.36.011(1)(a). Viewed in the light most favorable to the State, the evidence shows that Bono was angry at Wilson and had previously threatened to harm him; Metcalf punched Wilson and struck him with a bottle in the truck; Metcalf threatened Wilson with further harm; as they exited the truck, Metcalf grabbed Wilson and they both fell; as Wilson was running away from the truck, he was hit with two rocks; and Bono and Metcalf left Wilson, who they had seriously

[9] Bono raised this issue in the trial court, but his counsel did not.

injured, in a remote area. This evidence is sufficient to prove all elements of assault in the first degree. *Green*, 94 Wn.2d at 221-22.

Bono also argues that there were no allegations that he contributed to Wilson's assault.

The jury instructions allowed for principal or accomplice[10] liability for the assault against Wilson. The evidence shows that, at a minimum, Bono accompanied Metcalf to Vasquez's house, Wilson did not know Metcalf but knew Bono, Bono drove a truck while Metcalf assaulted Wilson, and Bono and Metcalf left Wilson in a remote area. Viewed in the light most favorable to the State, sufficient evidence shows that Bono acted, at the very least, as an accomplice to the assault against Wilson and, in fact, may have also directly assaulted him when Wilson was hit by two rocks as he ran from the truck. *E.g.*, *State v. Trout*, 125 Wn. App. 403, 413, 105 P.3d 69 (2005) (concluding that a jury could find that the defendant "promoted or facilitated" others who committed an assault).

Bono further argues that "[t]here existed no causal contact to support restitution on behalf of Mr. Bono." Bono SAG at 23. For the reasons discussed previously demonstrating that sufficient evidence exists to convict Bono of assault, this claim fails.

2. Alleged Prosecutorial Misconduct

Bono next argues prosecutorial misconduct and malicious prosecution. To obtain a reversal of a criminal conviction on the ground of prosecutorial misconduct, the defendant must show the impropriety of that conduct and its prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Much of the argument in Bono's SAG focuses on the closing argument issue raised by counsel and previously resolved. We address only additional misconduct

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[10] RCW 9A.08.020(3) provides:

A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it; or

(b) His conduct is expressly declared by law to establish his complicity.

arguments.

When Wilson arrived at court, he was wearing leg braces. At the beginning of his testimony, the prosecutor asked him about his most recent employment. Wilson responded, "I was doing tree work." Wilson said the reason he was wearing leg braces was that he had fallen 40 feet, "shattered [his] left heel, broke [his] tibia and fibula, and fractured [his] right ankle." RP at 314.

Bono maintains that the prosecutor deliberately confused the jury by asking Wilson about his broken legs at trial, when neither Bono nor Metcalf broke Wilson's legs. But the record shows that the State elicited evidence that Wilson injured his legs while trimming trees. Bono cannot show prejudice from the State's introductory questioning and his claim fails. *Brown*, 132 Wn.2d at 561, 563; *see also State v. Cronin,* 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

Bono also argues that certain statements in the prosecutor's opening and closing remarks were "baseless." Bono SAG at 29. But the record supports the prosecutor's arguments. Further, "prosecuting attorneys will be permitted a reasonable latitude in argumentative deduction from the evidence presented at trial." *Ranicke*, 3 Wn. App. at 897.

Bono further makes claims of prosecutorial misconduct related to filing the initial information, the decision to charge first degree assault, and the prosecutor's failure to offer him a plea agreement. These decisions are within the proper exercise of prosecutorial discretion. *State v. Korum*, 157 Wn.2d 614, 625, 141 P.3d 13 (2006). "[P]rosecutors are vested with wide discretion in determining how and when to file criminal charges." *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). We give great deference to matters within a prosecutor's discretion. *State v. Pettitt*, 93 Wn.2d 288, 294-96, 609 P.2d 1364 (1980); *State v. Talley*, 122 Wn.2d 192,

214-16, 858 P.2d 217 (1993). Furthermore, any plea negotiations are matters outside the record and cannot be addressed on direct appeal. *State v. McFarland*, 127 Wn. 2d at 338 n.5. Sufficient evidence supports the charged crimes and we do not find the prosecutor's charging decisions unreasonable.

Bono additionally asserts that the prosecutor improperly caused Vasquez to testify about an unrelated beating. The record shows that the prosecutor questioned Vasquez about why his "attitude towards testifying ha[d] changed from what it was this morning." Vasquez explained that it was because he had previously "had a beating by two guys . . . for supposedly being a snitch." RP at 192. Vasquez, however, emphasized that neither Bono nor Metcalf had hurt him and that Bono or Metcalf never threatened him. Bono's counsel moved to strike the answer and the court denied the motion.

Evidence is unfairly prejudicial if it "'is more likely to arouse an emotional response than a rational decision by the jury.'" *Cronin*, 142 Wn.2d at 584 (quoting *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)); ER 402. Even assuming that testimony about an unrelated beating could be prejudicial, Vasquez took care to divorce Bono and Metcalf from the beating and it is clear that the trial court did not abuse its discretion in overruling the defense motion to strike Vasquez's answer. *State v. Allen*, 57 Wn. App. 134, 143-44, 788 P.2d 1084 (1990).

Bono next claims that the prosecutor bribed witnesses and committed other misconduct to force witnesses to testify for the State, such as granting immunity. A prosecutor may grant immunity to an unwilling witness to assure his testimony at trial. *See State v. Bryant*, 146 Wn.2d 90, 97, 42 P.3d 1278 (2002). Absent additional evidence, this does not rise to the level of bribery. *McFarland*, 127 Wn. 2d at 338 n.5. Moreover, the trial record lacks any evidence of

monetary or other bribes by the State or that the State arrested material witnesses to intimidate them or otherwise change their testimony. Consequently, Bono's claims fail.

3. Severance

Bono also contends that he should not have been tried with Metcalf. He asserts that in 2005 or early 2006, he unsuccessfully filed a motion to sever against the advice of his attorney. Bono further asserts that he was prejudiced by a joint trial for a number of reasons, including testimony that Metcalf had evaded police at the time of his arrest, that Metcalf had tried to pay witnesses to change their statements, and that there was no testimony that Bono assaulted Wilson.

We will not disturb the trial court's decision regarding joinder or severance absent manifest abuse of discretion. "Washington law disfavors separate trials." *State v. Johnson*, 147 Wn. App. 276, 283, 194 P.3d 1009 (2008) (quoting *State v. Grisby*, 97 Wn.2d 493, 506, 647 P.2d 6 (1982)), *review denied*, *State v. Balaski*, 165 Wn.2d 1050 (2009). "Trial courts properly grant

. . . severance motions only if a defendant demonstrates that a joint trial would be 'so manifestly prejudicial as to outweigh the concern for judicial economy.'" *State v. Johnson*, 147 Wn. App. at 283-84 (quoting *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991)).

Here, neither Bono nor Metcalf testified. Consequently, the trial court was not faced with the situation in which one defendant sought to blame the other or where defendants presented mutually antagonistic defenses. *Johnson*, 147 Wn. App, at 284. Moreover, trial testimony makes clear that it was Metcalf, not Bono, who evaded police and contacted witnesses. Finally, as discussed previously, sufficient evidence exists to show Bono assaulted Wilson or was an accomplice to the assault. Bono's arguments of improper joinder fail.

Bono next argues that testimony by Vasquez that Metcalf told him he was not involved in the assault constituted a *Bruton v. United States,* 391 U.S.123, 88 S. Ct. 1620 (1968) error and

necessitated separate trials. Bono's counsel argued that use of statements by Metcalf that could implicate Bono required a limiting instruction if the State introduced Vasquez's testimony about Metcalf's attempts to change Vasquez's testimony and requested exclusion of "any reference to any of those phone conversations with regard to Mr. Bono." RP at 35. The State did not object to Bono's request.

Under *Bruton*, a criminal defendant may be entitled to severance if (1) his codefendant implicates him in a confession, (2) the confession is introduced into evidence without sufficient redaction, and (3) the defendant who confessed does not testify and is, therefore, not subject to cross-examination. 391 U.S. at 135-37. Vasquez testified that Metcalf told him that he did not commit the assault. Vasquez did not testify that Metcalf said Bono committed the crime against Wilson. The record lacks any testimony that Metcalf mentioned Bono during his conversations with Vasquez. Further, Vasquez's statement, made at Metcalf's request, implicates an unknown third party, not Bono. Vasquez also testified that Bono never threatened him. Finally, Metcalf did not confess and implicate Bono nor did any testimony suggest that Metcalf implicated Bono by word or action. Consequently, the trial court did not abuse its discretion in refusing to sever Bono and Metcalf's trial. *State v. Lane*, 56 Wn. App. 286, 298, 786 P.2d 277 (1989).

4. Evidentiary Issues

Bono asserts that Vasquez's statement regarding Bono's threat to kill Wilson if he slept with his sister was hearsay,[11] that it was unduly prejudicial, and that the trial court abused its discretion in admitting it. Bono's counsel moved to exclude any statement by Wilson speculating

[11] Because he did not raise the hearsay objection at trial, the court need not address it for the first time on appeal. *State v. Wixon*, 30 Wn. App. 63, 78, 631 P.2d 1033 (1981); RAP 2.5(a). In any event, a statement is not hearsay when it is offered against a party and is his own statement. ER 801(d)(2)(i).

about why the beating occurred. The State offered the statement to show motive. It reasoned that Wilson would testify that he was threatened approximately two weeks before the beating, that the statement was relevant to demonstrate motive for the assault, and that the relevance of the statement outweighed its prejudice. The court adopted the State's argument and denied the defense request.

We review a decision to admit or exclude evidence for abuse of discretion. *State v. DeVincenti*s, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Under ER 404(b), evidence of past crimes, conduct or acts can be admitted to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In determining whether evidence of prior misconduct is admissible under ER 404(b), the trial court must identify the purpose for introducing the evidence, determine whether the evidence is relevant to prove the charged crime, and weigh the probative value against its prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). 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.

The trial court concluded that Bono's threat was highly relevant to and probative on the issue of motive. As the State argued, "[I]t's obviously highly probative because of the nature of the assault. It was a very serious assault." RP at 89. Moreover, the threat occurred only two weeks before the beating. Consequently, we conclude the trial court did not abuse its discretion

in allowing the testimony. *DeVincenti*s, 150 Wn.2d at 17.

Bono also argues that photographs of Wilson's injuries were prejudicial and should have been either in black and white or not used at all. Photographs of victim injuries are relevant. *See State v. Finch*, 137 Wn.2d 792, 812-13, 975 P.2d 967 (1999). The decision of whether to admit photographs lies within the trial court's sound discretion. *State v. Lord*, 117 Wn.2d 829, 870, 822 P.2d 177 (1991). Here, a medical witness testified about the circumstances under which he took the pictures. Moreover, neither defense counsel objected to the State's use of the photographs at trial. The failure to object to the admission and use of an exhibit precludes appellate review. *State v. O'Neill*, 91 Wn. App. 978, 993, 967 P.2d 985 (1998). Even assuming we should address this unobjected-to admission of photographs, we find no abuse of discretion. *Lord*, 117 Wn.2d at 970.

We affirm Bono and Metcalf's convictions for first degree assault with a deadly weapon and do not reach Metcalf's sentencing issue, noting that the matter may be properly developed in a PRP, provided Metcalf can produce evidence to support his assertion.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Houghton, J.

Hunt, J.