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State of Washington
NO. 73955-7-I

73955-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES S. BRANT, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
SAN JUAN COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-05013-1

BRIEF OF RESPONDENT

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SERVICE	<p>Jennifer J Sweigert 1908 E Madison St Seattle, Wa 98122-2842 Email: SweigertJ@nwattorney.net</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the</p> <p>foregoing is true and correct.</p> <p>DATED July 29, 2016, Port Orchard, WA </p> <p>Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly admitted evidence of the events occurring in February and March as part of the res gestae of the April incident?

2. Whether Brant has failed to show that the prosecutor's comment regarding the victim's credibility was improper or that the allegedly improper conduct prejudiced his right to a fair trial?

3. Whether Brant fails to show cumulative error?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

James S. Brant, Jr. was charged by information filed in San Juan County Superior Court with residential burglary (domestic violence), assault in the fourth degree (domestic violence), and interfering with the reporting of domestic violence. CP 1.

Before trial, the State sought the admission of an incident involving an ax in 2007, as well as events occurring in the two months before the incident giving rise to the charges. 1RP 14-16. The trial court excluded the 2007 incident as too remote. 1RP 22. It found that the events of February and March 2015 were part of the res gestae of the charged crimes, which took place in April 2015. It further found they were relevant to the victim's fear of Brant for purposes of the assault

charges. 1RP 22-23. Brant sought to exclude evidence that the victim had taken a pistol from his truck in the Fall of 2014. 1RP 33-34. Although Brant's desire to retrieve the pistol played a significant role in the events on the day of the crime, the trial court excluded the evidence as more prejudicial than probative. 1RP 40.

After trial, the jury found Brant guilty of assault and burglary as charged, but acquitted him on the interfering with reporting charge. CP 34-37.

B. FACTS

Deanna Brant was married to James Brant for 23 years. 2RP 97-98, 101. She told him she wanted a divorce in September 2014. Brant was upset and thought they could fix the marriage. 2RP 98. Deanna did not think it could be. 2RP 99.

They ultimately separated in January 2015. 2RP 99. Deanna remained in the marital home and Brant moved into a shop they owned. 2RP 99. After he moved out, Brant was not permitted to enter her home without her permission. 2RP 100.

In February, Brant came over to discuss something, but then would not leave after she asked him to. 2RP 100. Deanna told him if he did not go, she would call the police. 2RP 100. He challenged her to do it, and she called 911. 2RP 100. A deputy came, and Brant left. 2RP 101.

In the end of March, Deanna arranged with Brant to pick up a Direct TV box from the shop where he was living. 2RP 102. He was supposed to be at work. 2RP 102. The box was in the room where Brant slept. 2RP 103. On his bed was a shotgun, shells and photos of their wedding. 2RP 103. Also on the bed was a note that purported to be Brant's last will and testament. 2RP 103.

Deanna grabbed the cable box and the items on the bed and left. 2RP 104. She took the shotgun because she was afraid he was going to hurt himself. 2RP 104. When she got home, she put the shotgun in her bedroom closet. 2RP 104.

Deanna tried unsuccessfully to call Brant. 2RP 104. Then she called his boss's number and Brant answered. 2RP 104. First she was relieved and then became angry. 2RP 105. She asked him "what the hell that was about." 2RP 106. He asked her what she meant. 2RP 106. She told him the gun and the note at the shop. 2RP 106. He did not really answer and told her he had to work. 2RP 106. She told him she was very concerned. 2RP 106.

On April 22, 2015, Deanna took her son and their exchange student to school. 2RP 107. After she returned, she did some work on the computer at her kitchen table. 2RP 107. The phone rang, and it was Brant, calling from the market. 2RP 109. He asked her if she needed

anything, and she said she did not. 2RP 109.

About five minutes later, there was a knock. 2RP 110. As she got up, she saw Brant getting back into his truck. 2RP 110. She opened the door, and there was a gallon of milk on the doorstep. 2RP 111. She put the milk in the refrigerator. 2RP 111. Then she walked out onto the porch and thanked him. 2RP 111.

They began to argue and he asked her why she did not just file for divorce. 2RP 111. She responded that they had been trying to settle things, and could not afford an attorney, but they could not seem to have a civil conversation, so she probably needed to file. 2RP 111. The conversation did not improve, so she decided to cut it off and started to walk inside. 2RP 112. He got out of his truck and asked to use the bathroom. 2RP 112. She told him to do it outside. 2RP 112.

Brant pushed the door open and walked past her into the house. 2RP 112. He walked past the bathroom down the hall to her bedroom. 2RP 112. He went to her closet and retrieved the shotgun. 2RP 112. Then he told her he wanted his pistol as well. 2RP 113. She told him to just get out of her house. 2RP 113.

Deanna had put a sticky note on the shotgun shortly after she had put it in the closet. 2RP 113. It said, "If you take this I will report it stolen. You don't need it. Stay the fuck out of my house." 2RP 115.

Brant took the sticky note and tried to stick it to her chest. 2RP 113.

Brant went out and put the shotgun in his truck. 2RP 115. He continued to yell that he wanted his pistol as well, and before she could shut the door, he was back and they struggled with it. 2RP 115. Brant pushed the door open and then pushed her up against the refrigerator, hurting her. 2RP 116. He was “completely enraged and screaming” that he wanted the pistol. 2RP 116. When he pushed her, he pushed against her shoulder and chest with both hands. 2RP 116, 153. He had her pinned to the refrigerator and was “right in her face.” 2RP 116-17. She was terrified. 2RP 117. It was the first time he had ever laid his hands on her. 2RP 117. It “changed everything” and made her afraid of what he was going to do. 2RP 117.

After he released her, Deanna went to the kitchen to get the phone from the charger. 2RP 118. Brant grabbed a coffee cup from the counter and smashed it in the sink, screaming that he wanted his pistol. 2RP 118. Then she saw the phone on the table where she had been working and picked it up. 2RP 118. Brant grabbed the phone from her, and threw it into the laundry room, where it broke. 2RP 118. He continued yelling about the pistol and she kept telling him to just get out of house. 2RP 118-19.

Deanna went to get the second phone in the living room. 2RP 119.

Brant pushed her down on the couch and threw the phone into the dining room, smashing it as well. 2RP 119. She stood up and kept telling him to get out. 2RP 120.

Brant picked up a water bottle and threw the water at her and said, “How do you like that, you stupid cunt.” She was stunned, and could not see because she had water on her glasses. 2RP 120. Then he crumpled the bottle and threw it at her. 2RP 120. She kept telling him to leave. 2RP 120.

Brant kept saying he wanted the pistol. 2RP 121. She told him she did not have it; it was not in the house. 2RP 121. Then she looked at her cell phone, but he grabbed it and began to walk toward the back door. 2RP 121-22. Deanna grabbed her car keys and pushed the panic button, which made the car start honking. 2RP 122. She followed him outside and kept telling him to give her her phone back. 2RP 122.

Brant threw the phone into the woods. 2RP 123. She went after it, but he ran past her and grabbed it. 2RP 123. She asked for it again, and he told her to give him his pistol. 2RP 123. Then he left and she went and called 911 from the bedroom phone. 2RP 123.

Deputy Nou arrived after she called. 2RP 143. While he was there, Brant called but she did not answer, and he left a message. 2RP 144. The call was within an hour after he had left. 2RP 144. He said he

would return the phone if she gave him the “item,” meaning the pistol. 2RP 145.

Deputy Robert Nou confirmed that he was dispatched to Deanna’s home on February 24 for a “verbal domestic.” 2RP 171. Brant was still there when he arrived. 2RP 172. He told Nou he was surprised that she actually called 911. 2RP 173. Brant left and Nou followed him out the driveway. 2RP 174.

Nou next had contact with the Brants on April 22. 2RP 174. He arrived at the house around noon. 2RP 176. Deanna was pale and withdrawn and upset. 2RP 176. He took photos of the broken cups, phones, crumpled water bottle, and water on the entertainment center. 2RP 179-82.

Nou followed Deanna to the clinic. 2RP 182. The doctor at the Lopez clinic saw Deanna. 2RP 165. She was tearful and upset. 2RP 165. She had right elbow and wrist pain. 2RP 165. She stated the injuries had been the result of an altercation with her husband. 2RP 165. The injury was not due to tennis elbow. 2RP 167.

After escorting Deanna to the clinic, Nou met with Deputy Peter. 2RP 182. They initially called and asked Brant if he would come to the sheriff’s substation. 2RP 183. He declined, so Nou and Peter went to Brant’s residence. 2RP 183. Brant came out when they arrived. 2RP 184.

Brant told them that he had gone to Deanna's house to talk. 2RP 202. Then he went into the house because he wanted to get his guns back. 2RP 204. He got the shotgun from the closet, saw the note on it, and put the gun in his truck. 2RP 204.

Then he went back into the house to get the pistol. 2RP 204. Deanna became aggressive so he held her against the refrigerator to try to calm her down. 2RP 205. He asserted that the injury to her elbow was pre-existing. 2RP 205.

Deanna got away from him and got the phone. 2RP 205. When he walked into the kitchen she threw the phone at him. 2RP 205. He caught it and threw it to the floor, breaking it. 2RP 205. Deanna turned and went into the dining room. 2RP 205. He was trying to confront her because he wanted to talk to her about her moving with their son to Las Vegas and their other issues. 2RP 205.

Brant said he smashed a coffee cup to get her to start talking. 2RP 206. He admitted throwing the water and bottle at her. 2RP 206. He then grabbed the other phone from her and broke it as well. 2RP 206. He said he did it because he wanted his pistol. 2RP 206.

They struggled for the cell phone and he got it. 2RP 206. He demanded the pistol again, and Deanna told him she did not have it. 2RP 206. Then they went outside. 2RP 207. He threw the phone at the truck

but missed. 2RP 207. They both went for it again and he got it again. 2RP 207. She said she needed to make a call, and he told her to go use the bedroom phone. 2RP 207. He kept the cell, and got in his truck and left. 2RP 208.

Brant testified and asserted Deanna did not have his permission to be in the shop in March. 2RP 230. He said he took out the shotgun because he was contemplating suicide. 2RP 233. He did not because of his sons. 2RP 233.

He flicked the sticky note at her. 2RP 239. He did not touch her. 2RP 240. She screamed at him that she was going to call the police like the note said because he was stealing the shotgun. 2RP 240. After putting the shotgun in the truck, he came back and told her to give him his pistol. 2RP 241.

Deanna had taken the pistol from his truck in October. 2RP 241. He was concerned because he had a concealed weapons permit for it. 2RP 241. She had good reason to take the pistol from the truck. 2RP 247.

They both went back into the house and were standing in the laundry room, still arguing. 2RP 247. She had the phone in her hand. 2RP 247. They were about six feet apart and she threw the phone at him. 2RP 248. He caught it and then she came at him. 2RP 248. He threw it down so his hands would be free. 2RP 248. He grabbed her by the arms

and held her against the refrigerator to try to calm her down and not get hit. 2RP 248-49.

Then he let her go and she followed him into the kitchen. 2RP 249. They were screaming at each other, and he broke the mug because he was angry. 2RP 249.

Then he went into the living room to try to get away from her. 2RP 250. They both went for the phone on the table, and collided. 2RP 250. He wanted to get the phone to call 911. 2RP 250. She fell on the couch and then really started screaming at him. 2RP 250. He backed up and she started coming at him, so he threw the phone to free his hands again. 2RP 250. Then he grabbed the water and threw it at her to try to stop her from coming at him. 2RP 251. It stopped her for a minute. 2RP 251. He saw the cell phone on the kitchen counter and then went to grab it. 2RP 251.

He went outside. 2RP 251. She screamed at him to give the cell phone back and he told her no, that it was theirs. 2RP 251. She ran outside ahead of him. 2RP 251. He stopped on the deck and she tried to grab the phone so he tried to throw it into the truck. 2RP 252. The throw was wild and it went over the truck. 2RP 252. They took off after it, and he retrieved it. 2RP 252. They started arguing again and he told her he would give her the phone when she gave him the pistol. 2RP 252. She

said she did not have it. 2RP 252. He asked who had it and she would not say. 2RP 253. He told her she could use the bedroom phone if she needed to make a call. 2RP 253. She started toward the house and he left. 2RP 253. The only time she told him to leave was after he took the cell phone. 2RP 254.

On cross he admitted the suicide note was addressed to Deanna. 2RP 256. He asserted it was a coincidence that the note and wedding photos were on the bed with the shotgun the day she went to get the box. 2RP 257.

He acknowledged that she did not invite him into the house before he went in to get the shotgun. 2RP 258. Nor did she invite him when he entered the second time. 2RP 258. She did not try to strike him before he grabbed her. 2RP 259. He claimed their agreement was that he could enter the home at will when she was there. 2RP 262.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE EVENTS OCCURRING IN FEBRUARY AND MARCH AS PART OF THE RES GESTAE OF THE APRIL INCIDENT.

Brant argues that the trial court erred in admitting the evidence that Brant had refused to leave Deanna's home in February and evidence of the

circumstances surrounding her taking of his shotgun in March. This claim is without merit because both of the incidents were part of the events that led to the burglary and assault in April. They were thus properly admitted as part of the res gestae of the crime. Moreover, even if they constituted ER 404(b) evidence, the trial court properly evaluated them and admitted them as part of the res gestae, to show Deanna's fear, and to show that Brant knew he was not entitled, as he claimed, to be in the house. Finally, where the evidence that he entered the house without permission and clearly assaulted Deanna was uncontested, any error would be harmless.

An appellate court reviews a trial court's interpretation of an evidentiary rule de novo. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). However, once the rule is correctly interpreted, a trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *DeVincentis*, 150 Wn.2d at 17. The trial court acted within its discretion in admitting this evidence as part of the res gestae.

1. Res Gestae evidence is admissible under ER 401 and ER 402.

The trial court admitted the evidence as res gestae. 1RP 23. This Court recently concluded that res gestae evidence is not properly analyzed under ER 404(b):

In our view, and as other courts and legal scholars have noted, this judicially created "res gestae" exception bears little or no resemblance to the specific exceptions that ER

404(b) enumerates, inviting contemplation of the ejusdem generis rule of statutory construction. ... Except for identity, these enumerated exceptions concern the defendant's state of mind or thought process. In contrast, "res gestae" evidence pertains to the factual context of the crime, not to the defendant's mindset. In our view, "res gestae" evidence is so unlike the expressly listed ER 404(b) exceptions that considering "res gestae" evidence to be an ER 404(b) exception contravenes the ejusdem generis doctrine.

State v. Grier, 168 Wn. App. 635, 645, 278 P.3d 225 (2012). The Court instead concluded that res gestae evidence more appropriately fell within ER 401's definition of "relevant" evidence, which is generally admissible under ER 402. *Grier*, 168 Wn. App. at 646 (citing *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995)). The Court thus concluded that evidence of the defendant's threatening behavior was admissible as res gestae evidence, "(1) not only because it arguably might have fallen under an ER 404(b) exception, but (2) also because it was evidence of the continuing events leading to the murder, relevant under ER 401, and, thus, not "prior misconduct" of the type generally inadmissible under ER 404(b)." *Grier*, 168 Wn. App. at 647; see also *State v. Briejer*, 172 Wn. App. 209, 227, 289 P.3d 698 (2012) (following *Grier*'s analysis; proper res gestae evidence "complete[s] the crime story").

The evidence introduced here was relevant to complete the story. It showed the deterioration in the Brants' relationship that culminated in the assault in April.

Moreover, the February incident established that Brant knew that he was not entitled to enter the house without permission which was relevant to the burglary charge. It also showed that he knew Deanna would call the police if he did not leave. This fact explained why he would destroy the phones, which was relevant to the charged crime of interfering with the reporting of domestic violence. CP 30-31.

The March incident explained how Deanna came to be in possession of the shotgun. Without the background regarding the suicide note, the jury could have been left with the impression that she was simply being unreasonable and vindictive.

The incidents in February, March and April were part of a continuous series of events. Brant moved out in January. A month later Deanna had to call the police to get him to leave her home. A month after that, he left a shotgun, wedding pictures, and a suicide note for her to find. She took the shotgun out of concern for him. A month after that he showed up, and again entered her home without permission, seized the shotgun, and then assaulted her, demanding his pistol that he believed she had.¹ Brant's actions on April 22 made considerably less sense without

¹ She had taken that gun from his truck the previous fall because she was concerned that their son would have access to it. 1RP 39. The trial court refused to admit evidence of regarding her taking of the pistol on the grounds that it was more prejudicial and not related to the events in April. 1RP 40. During Brant's testimony, he brought out that Deanna had taken the pistol from his truck in October. 2RP 241. The State objected that the defense had excluded that evidence, and the objection was resolved by Brant's further

the context of the events of the last two months. The court also found that it was relevant to the issue of Deanna's fear, which was an element of assault. 1RP 23. The trial court acted well within its discretion in admitting this evidence.

2. Even if ER 404(b) applied, the trial court properly evaluated the evidence.

Even if the *Grier* were not to apply here, the trial court properly evaluated the evidence. Pursuant to ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Brant contends that the trial court erred in the manner in which it analyzed and admitted the alleged ER 404(b) evidence. This is so, he asserts, because the trial court did not properly make a record of its balancing of the probative value of the evidence against its prejudicial effect.

When determining admissibility under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence, (2) identify the purpose for admission, (3) determine whether

testimony that she had good reason for taking it. 2RP 242-47.

the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against its prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

“The court’s balancing of the prejudicial nature of ER 404(b) evidence must take place on the record.” *State v. Carleton*, 82 Wn. App. 680, 685, 919 P.2d 128 (1996). However, there is no magic words requirement. Thus, where the trial court did not explicitly weigh the probative value of prior misconduct evidence against its prejudicial effect, but admitted only some evidence of the defendant’s prior acts while excluding evidence of the acts that were most inflammatory, our Supreme Court concluded that the record as a whole demonstrated that the trial court had fulfilled the requirements of the rule. *State v. Powell*, 126 Wn. 2d 244, 264–65, 893 P.2d 615 (1995).

Likewise, where the record reflected that the trial court adopted the express argument of one of the parties as to the relative weights of probative value and prejudice, there was no error. *State v. Pirtle*, 127 Wn.2d 628, 650–51, 904 P.2d 245 (1995). “But these variations serve to reinforce the general rule ...: the record must in some way show that the court, after weighing the consequences of admission, made a ‘conscious determination’ to admit or exclude the evidence.” *Carleton*, 82 Wn. App. at 685 (quoting *State v. Tharp*, 96 Wn.2d 591, 597, 637 P.2d 961 (1981)).

Here the record mirrors both *Powell* and *Pirtle*. In addition to the incidents in February and March, the State also sought to introduce a 2007 incident where Brant hit his wife's car with an ax. 1RP 14. The trial court excluded that incident as "too remote." 1RP 22.

Additionally, the trial court's allowance of the February and March incidents followed directly on the parties argument. The final comment before the court ruled was from Brant's counsel that the evidence was "very prejudicial and you're going to have to make that balance." 1RP 22. The trial court then immediately observed in the course of its ruling that the evidence was "very relevant" and very important to the State's case:

I will allow on direct, though, testimony from Ms. Brant on incidents from September 2014, starting in September 2014 when she asked Mr. Brant to leave. And I think everything that goes from there forward is *res gestae*, and I do think that the incident, certainly the March 27 incident I think is not only *res gestae*, it's I think very relevant to the issue of fear.

And I think the fact that she called 911 on February 24 goes to the issue of fear. And as far as that goes, counsel, it seems to me that the state needs to be in a position that they can introduce evidence of either a physical touching or the fear of imminent harm, unwanted touching. An assault is either and I don't think it's fair to the state to limit the state to having to convince the jury beyond a reasonable doubt that there was an actual touching, it was other than – it would not be excused as a self-defense. I think fear is a major factor in one of the elements in assault under the circumstances of this case.

So I'm going to allow everything that's been mentioned that the state is suggested they want to offer. I'll allow it on direct as long as it's from September 14

forward, and specifically to include the February 24 incident where 911 was called and the March 27 incident, the so-called gun display incident, both as to intent -- or both as to fear on the part of the alleged victim here and as to res gestae. And I think those were the only issues.

1RP 22-23. The last thing the trial court heard was Brant's argument that the evidence was more probative than prejudicial and that it had to carefully weigh that. It then proceeded to exclude one item, and then find that the remaining two were highly relevant and that it would be unfair to the State to exclude them. The court satisfied its duty of evaluating the evidence under ER 404(b), even if it did not utter the magic words. This contention should be rejected.

3. *The probative value of the evidence exceeded any unfair prejudice.*

a. February incident where Brant refused to leave.

As Brant notes, one of the elements of residential burglary was that he entered or remained unlawfully in the residence. Brief of Appellant at 10. Here, the residence in question was the parties' former marital home. They had not yet filed for divorce and there were no protection orders in place barring Brant from the home. As such there was only Deanna's word that he did not have permission to enter the home. Indeed, Brant testified that he believed that he had the right to enter the home at will if Deanna was present. 2RP 262. That the police had had him leave the property in two months earlier while she was present showed that such a belief was untenable, and further refuted any notion that he had a right to

lawfully be in the former marital home.

Further, the incident was part of the res gestae of the crime. It showed the context of the parties' relationship, and its increasing deterioration. Regardless of whether the *Grier* analysis is correct, res gestae evidence has been recognized as a proper purpose for which prior act evidence is admissible under ER 404(b). *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Under the res gestae exception to ER 404(b), evidence of other acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime. *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002 (2005). The Supreme Court has described this doctrine as follows:

Where another offense constitutes a "link in the chain" of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible "in order that a complete picture be depicted for the jury."

State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997) (*quoting State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)), *cert. denied*, 523 U.S. 1007 (1998). The trial court properly concluded that the probative value of this evidence outweighed any unfair prejudice.

b. March incident where Brant left his shotgun on the bed.

As previously discussed, this evidence was part of the res gestae of the events leading up to the crime. Moreover, it was relevant to show that

Deanna's possession of the shotgun (and of the pistol, if she had it) was reasonable. This is a proper purpose. *See State v. Ashley*, ___ Wn.2d ___, 2016 WL 3917522, at *7 (Jul. 14, 2016) (“the evidence showed that her behavior was not inexplicable, not unreasonable”) (internal quote marks omitted). It was also relevant to show why she would be in fear. *Id.*, at *5. That there was evidence of a battery as well was of no consequence. The charge included, and the jury was instructed on common law assault as well as common law battery. CP 27. The State was entitled to prove every element of the charged offense. *Ashley*, 2016 WL 3917522, at *5. The trial court did not abuse its discretion in allowing this evidence.

4. Any error would be harmless.

The erroneous admission of ER 404(b) evidence is a nonconstitutional error and is therefore harmless unless there is a reasonable probability that the result of the trial would have been different had the error not occurred. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The admission of ER 404(b) evidence for an improper purpose is also harmless if the evidence was also admitted for a proper purpose. *See State v. Powell*, 126 Wn .2d 244, 264–65, 893 P.2d 615 (1995) (trial court's decision to admit prior misconduct evidence under ER 404(b) will be upheld if one of the bases is justified).

Here, the evidence was uncontested that Brant entered Deanna's

home without her permission, and once inside, he grabbed her arms, also without her permission. Although he testified that he was entitled enter her home at will when she was home, he cites no legal theory that supports that contention. There is not reasonable probability that exclusion of this evidence would have changed the outcome of the trial. This claim should be rejected.

B. BRANT HAS FAILED TO SHOW THAT THE PROSECUTOR’S COMMENT REGARDING THE VICTIM’S CREDIBILITY WAS IMPROPER OR THAT THE ALLEGEDLY IMPROPER CONDUCT PREJUDICED HIS RIGHT TO A FAIR TRIAL.

Brant next claims that that the prosecutor committed misconduct in her closing argument by arguing that “And it’s offensive to consider, I’m sorry, that she was up here faking being upset.” Brant did not object to the comment at trial. This comment was not improper in context, and even if it were Brant fails to meet his burden of showing enduring prejudice.

To establish prosecutorial misconduct, a defendant must prove that the prosecutor’s conduct was improper and that this improper conduct prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). If the defendant failed to object to the prosecutor’s alleged misconduct at trial, a reversal is warranted only if this Court finds that the misconduct was so flagrant and ill-intentioned that it caused an

“enduring and resulting prejudice” incurable by a jury instruction. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

This standard requires the defendant to establish that (1) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict,” and (2) no curative instruction would have obviated the prejudicial effect on the jury. *State v. Thorgerson*, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011). The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remark. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

In addition, this Court reviews a prosecutor’s allegedly improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *Russell*, 125 Wn.2d at 85-86; *Dhaliwal*, 150 Wn.2d at 578. In determining whether prosecutorial misconduct occurred, the Court first evaluates whether the prosecuting attorney’s comments were improper. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

The argument to which Brant now objects must be viewed in its context, where the prosecutor was responding in rebuttal to Brant’s

argument that because she had been in Navy law enforcement,² Deanna could not have been afraid.

The prosecutor began her closing with a discussion of the elements and definitions of residential burglary. 3RP 304. The prosecutor then addressed the evidence supporting those elements. 3RP 305-06. She then turned to the definition and elements of assault. 3RP 306-07. She then related the evidence to those precepts. 3RP 307-09. The prosecutor then noted that she had to prove that Brant was not acting in self defense, and discussed how the evidence showed that he was not. 3RP 310.

During her closing, Brant's counsel opened her argument with the contention that the case was "story about who's going to win a fight." 3RP 311. After discussing some of the evidence, counsel expanded on that theme, this time suggesting that Deanna was acting when she testified: arguing that when Brant went back into the house,

So he goes back in the house. She's still angry. They're just escalating. It's now the fight, right. It's not an argument. It's the fight and they've had this before and it's going out the same way it always has. She was not afraid. She could cry in the right spots, but when I was asking her the questions she wasn't crying.

3RP 313-14. Counsel then acknowledged that Brant was behaving in an angry and threatening manner, but discounted it, again attacking Deanna's

² The evidence was actually that she had been discharged from the Navy before they married, 23 years earlier. 2RP 222, 224.

credibility:

That would make a reasonable person pretty angry but that doesn't mean they're intending to commit a crime, that doesn't mean you're intending to scare somebody. *I don't think that woman is scareable*, all right.

3RP 314 (emphasis supplied).

During rebuttal, the prosecutor summarized the succession of events leading up to the April 22 incident. 3RP 324-25. She addressed counsel's criticism of not admitting the suicide note into evidence. 3RP 325. She then turned to counsel's contention that Brant had to have intent to commit a crime at the time he entered the house. 3RP 325.

Only then did she turn to Brant's argument that Deanna was not assaulted because she was strong:

And I think one of the worst things about this type of case is when you were all here and I asked everybody does a victim have to be meek, there was nobody who said, yes, but isn't that always the argument when we get to this point. What did counsel say about Deanna Brant. She's not scareable. She sounded pretty scared to me on that tape and you can listen to it. And it's offensive to consider, I'm sorry, that she was up here faking being upset. You don't have to cower in a corner to be the victim of a crime. She said, yes, she was yelling back at him when he was in her house get out of my house. Yeah. He's the one that's not allowed to be there, he's the one who's doing these things to her in her home.

3RP 325-26. After that the prosecutor addressed the defense contention that Deanna burglarized Brant's home. 3RP 326. She encouraged the jurors to read their instructions, and recounted how Brant's statements to

the deputy were consistent with Deanna's testimony. 3RP 326-27. She then summed up with a request to find Brant guilty. 3RP 327.

A prosecutor's remarks in rebuttal, even if they would otherwise be improper, are not misconduct if they are "invited, provoked, or occasioned" by defense counsel's closing argument, so long as the remarks do not go beyond a fair reply. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Here, it is apparent that the prosecutor was arguing that the witnesses demeanor was credible. She was not attacking defense counsel. The State is allowed to draw "an inference from the evidence as to why the jury would want to believe one witness over another" during closing arguments. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). The trial court instructed the jury that they "are the sole judges of the credibility of each witness." CP at 16. This Court presumes that the jury follows the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Brant has failed to show that the statements prejudiced his right to a fair trial and that no further curative jury instruction would have eliminated any possible prejudice. As such the argument was proper. Moreover, even if she crossed the line, it cannot be said that the prosecutor's argument was so flagrant and ill-intentioned that it could not have been cured with a timely objection and

request for a curative instruction. This claim should be rejected.

C. BRANT FAILS TO SHOW CUMULATIVE ERROR.

Brant finally claims that he is entitled to a new trial under the doctrine of cumulative error. The cumulative error doctrine applies when several errors occurred at the trial court level, none alone warrants reversal, but the combined errors effectively denied the defendant a fair trial. *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Brant offers only boilerplate language and citation without explanation of how it pertains to any specific claims he has raised. Moreover, as has been discussed, Brant fails to even show multiple trial errors. This contention is without merit.

D. THE STATE WILL NOT BE SEEKING APPELLATE COSTS.

Brant next argues that appellate costs should not be awarded. Given the current state of the law, the State will not be seeking appellate costs.

IV. CONCLUSION

For the foregoing reasons, Brant's conviction and sentence should be affirmed.

DATED July 29, 2016.

Respectfully submitted,

RANDALL K. GAYLORD
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RS', with a long horizontal line extending to the right.

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