

NO. 35579-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOHN EDWARD KAZMIERCZAK, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 06-1-00822-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was it error for the State to offer defendant's statements to Officer Lien in rebuttal to impeach defendant and refute his claim that he had not formed the intent to deprive Ms. Parkhurst of her property?

2. Did defendant's convictions for both first degree robbery and third degree assault violate double jeopardy?

B. STATEMENT OF THE CASE.

1. Procedure

On February 21, 2006, the Pierce County Prosecutor's Office filed an information charging JOHN EDWARD KAZMIERCZAK, hereinafter, "defendant," with first degree robbery. CP 1-2. This information was later amended to add one count of second degree assault. CP 3-4. The matter proceeded to a jury trial on November 7, 2006. RP(2) 16.¹

¹ The Verbatim Report of Proceedings is contained in five volumes. The first volume is numbered through page 7; the rest of the volumes are numbered consecutively beginning with page one of volume two and ending on page 320 of volume five. Citations to the first volume will be preceded by "RP;" citations to volumes two through five will be preceded by "RP(2)."

After the State rested its case-in-chief, defendant testified that he did not remember the events underlying the robbery and assault charges.²

RP(2) 206-207. The State then cross examined defendant as follows:

[State:] Do you recall [Officer Scott Lien] telling you you were under arrest?

[Defendant:] Yes.

[State:] And do you recall asking him what he was arrested – what you were arrested for?

[Defendant:] No.

[State:] Do you recall the officer telling you what you were arrested for?

[Defendant:] No.

[State:] Isn't it true he told you that you were arrested for robbery?

[Defendant:] Not to my knowledge.

[State:] And isn't it true that you told him, quote, I'm not in possession of anything so how could this be?

[Defendant:] I don't remember making that statement.

² Defendant claims the State agreed midtrial not to introduce any of defendant's statements. Br. of Appellant at 6. The State actually objected only to defendant adducing his statements made to Officer Lien, as those statements would be hearsay. RP(2) 157; see ER 801(d)(2) (a party's out of court statement is not hearsay if it is offered against that party).

RP(2) 225-226. Defendant rested, and the State called Officer Lien in rebuttal:

[State:] Officer, do you recall advising the defendant what he was arrested for?

[Officer Lien:] Yes, sir.

[State:] What did you advise him of?

[Officer Lien:] Robbery.

[State:] And what was his response?

***³

[Officer Lien:] He said, "How could he be arrested for that, I'm not in possession of anything."

RP(2) 226-227. Defendant did not object to this testimony. RP(2) 227. After a recess, defendant moved for a mistrial, arguing that offering defendant's statement through Officer Lien violated an oral agreement with the State to hold a CrR 3.5 hearing before offering any of defendant's statements into evidence. RP(2) 231. The State argued that defendant failed to object to the statement when it was offered and that the statement was offered in rebuttal. RP(2) 231-232. The court denied the motion for a mistrial. RP(2) 232.

³ Witness asks a clarification question.

The jury found defendant guilty of first degree robbery and third degree assault. CP 47-50. The court found that the robbery conviction was defendant's third most serious offense, making defendant a persistent offender. RP(2) 311-316; CP 47-50. The court sentenced defendant to serve a life sentence without the possibility of parole for that conviction. RP(2) 311-316; CP 47-50. The court sentenced defendant to 29 months plus 9-18 months community custody for the assault conviction. RP(2) 316; CP 47-50. The court also ordered defendant to pay monetary damages and gave defendant credit for serving 274 days of confinement. CP 47-50. From entry of this judgment and sentence, defendant filed a timely notice of appeal. CP 107.

2. Facts

On the morning of February 16, 2006, Jaymie Parkhurst parked her vehicle at the Sounder transit station in Puyallup, Washington, and boarded a train to Seattle, where she worked for U.S. Pretrial Services. RP(2) 30-34. She worked late that evening and missed the last train from Seattle to Puyallup, so she took a bus to Tacoma, where she boarded another bus for the Puyallup transit station. RP(2) 34-36. She arrived at the Puyallup transit station at 7:00 p.m.; when she got off the bus, she noticed defendant standing nearby. RP(2) 37.

Ms. Parkhurst walked to nearby 2nd Avenue Northwest, where she typically parked her car in the morning. RP(2) RP(2) 40-41. Defendant followed her. RP(2) 41. When Ms. Parkhurst reached 2nd Avenue Northwest, she recalled that she had parked her vehicle in a parking lot that was in the opposite direction. RP(2) 43. She turned to retrace her steps toward the parking lot and passed defendant, who continued to walk toward 2nd Avenue Northwest. RP(2) 43-45.

At some point, Ms. Parkhurst noticed that defendant had turned and was following her. RP(2) 42-46, 68. She began to worry about her safety, so she called her mother on her cell phone and spoke to her as she walked toward the car. RP(2) 42-46, 68. When Ms. Parkhurst reached her car, she turned and saw that defendant was in the parking lot with her. RP(2) 46-47.

Defendant moved quickly toward her and demanded her keys. RP(2) 47. Ms. Parkhurst punched defendant twice, but these blows did not deter defendant, so she gave defendant her keys. RP(2) 48-49. Defendant then demanded Ms. Parkhurst's cell phone. RP(2) 50. Ms. Parkhurst refused to give the phone to defendant, so he grabbed Ms. Parkhurst's hair and began struggling with her. RP(2) 50-53. In the struggle, defendant pulled a large patch of Ms. Parkhurst's hair out of her scalp. RP(2) 54-55. Ms. Parkhurst dropped her belongings, screamed,

and tried to pull away from defendant. RP(2) 50-52. She then fell into the street. RP(2) 52-53. Ms. Parkhurst's injuries were painful to touch for several days. RP(2) 54-56, 72.

Jaesung Ji was driving his two friends, Jason Choi and Nathan Merz, past the parking lot as defendant was attacking Ms. Parkhurst. RP(2) 53, 81-82, 109-111, 124. Ms. Parkhurst saw the car passing, stood up, and waved to them. RP(2) 53, 83, 111, 126. When the car stopped, defendant began to run away. RP(2) 53, 83-85, 111, 127. Ms. Parkhurst told the men that defendant had attacked her, and she asked for their help. RP(2) 53, 83-84, 111, 126. Mr. Choi stayed with Ms. Parkhurst while Mr. Ji and Mr. Merz followed defendant in the car. RP(2) 54, 85, 112-113, 129. Ms. Parkhurst went to a nearby Eagles' Lodge and called the police. RP(2) 54, 57, 114.

Mr. Ji and Mr. Merz reached defendant and drove alongside him as he jogged away. RP(2) 86, 129, 141-147. Mr. Merz called the police from the car, and Mr. Ji yelled for defendant to stop. RP(2) 85, 144. Defendant told the two men that he could "take" them, so they followed defendant at a distance until police officers could arrive. RP(2) 87-88, 147. Eventually, Mr. Ji and Mr. Merz abandoned the vehicle. RP(2) 86. Mr. Ji chased defendant on foot while Mr. Merz remained at the car to direct the police to defendant. RP(2) 86, 141, 144. Sometime during the pursuit, defendant threw Ms. Parkhurst's keys over a fence topped with razor wire in an alleyway. RP(2) 102-105.

Officer Lien soon arrived, found defendant, and arrested defendant. RP(2) 117, 169, 227. Officer Lien informed defendant that he was under arrest for robbery, and defendant replied, “How could [I] be arrested for that, I’m not in possession of anything.” RP(2) 227.

Defendant testified at the trial that he was working in Seattle on February 16, 2006. RP(2) 198. He said that he drank alcohol with his coworkers in Seattle after work that day. RP(2) 200-204. Defendant said he became very intoxicated and boarded the Sounder transit train for Tacoma, but mistakenly disembarked in Puyallup. RP(2) 204-210. He claimed he did not remember anything that occurred from the time he disembarked to the time Officer Lien was chasing him. RP(2) 206-207, 216. Defendant called Officer Lien to testify that defendant appeared intoxicated on February 16, 2006. RP(2) 167-180. Defendant also called Susan Watts, a private investigator who testified that before defendant went to the bar on February 16, 2006, he withdrew a large amount of money from the bank. RP(2) 181-192. Defendant argued in closing that he was not guilty of robbery because he was too intoxicated to form the intent to deprive Ms. Parkhurst of her keys. RP(2) 264-269.

C. ARGUMENT.

1. THE ADMISSION OF DEFENDANT'S STATEMENTS TO OFFICER LIEN WAS NOT ERROR.

Defendant assigns three errors to the statement, "How could [I] be arrested for that, I'm not in possession of anything," which the State elicited from Officer Lien during its rebuttal case. RP(2) 227. Defendant claims (1) that Officer Lien's testimony violated defendant's protections against self-incrimination, (2) that the State committed prosecutorial misconduct when it offered the statement, and (3) that the court should have granted defendant's motion for a mistrial.

a. The State did not violate defendant's rights against self-incrimination.

Officer Lien's rebuttal testimony did not violate defendant's protection against self-incrimination under the Fifth Amendment to the United States Constitution, or his rights under CrR 3.5.

i. Defendant's Fifth Amendment rights were not violated when the State offered his spontaneous statement in impeachment.

The Fifth Amendment states that, "[n]o person shall be...compelled in any criminal case to be a witness against himself." The Fifth Amendment to the United States Constitution and article I, section 9

of the Washington State Constitution are equivalent and receive the same definition and interpretation. State v. Templeton, 148 Wn.2d 193, 207-208, 59 P.3d 632 (2002).

There is no requirement under the Fifth Amendment that law enforcement stop a person who wishes to make a statement to a police officer or even confess to a crime. "Volunteered statements of any kind are not barred by the Fifth Amendment." Miranda v. Arizona, 384 U.S. 436, 478, 726, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). Miranda involves the protection of an individual's privilege against self incrimination when being questioned while in police custody. Miranda, 384 U.S. at 478. When a person is taken into custody he must be advised of the well known summary of his constitutional rights. Miranda, 384 U.S. at 479. The advisement is not required when the individual is not taken into custody. State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), citing Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). The standard for determining whether a person is in custody is whether his freedom of action is curtailed to a "degree associated with formal arrest."

Whether a person was in custody for Miranda purposes depends on "whether the suspect reasonably supposed his freedom of action was curtailed." State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989) (citing State v. Watkins, 53 Wn. App. 264, 274, 766 P.2d 484 (1989)); see Berkemer, 468 U.S. at 442, 104 S. Ct. at 3151 ("[T]he only relevant

inquiry is how a reasonable man in the suspect's position would have understood his situation."). It is irrelevant whether: 1) the police had probable cause to arrest the suspect, Harris, 106 Wn.2d at 789-90, 725 P.2d 975; 2) the suspect was a "focus" of the police investigation, Beckwith v. United States, 425 U.S. 341, 347, 96 S. Ct. 1612, 1616-17, 48 L.Ed.2d 1 (1976); 3) the officer subjectively believed the suspect was or was not in custody, Berkemer, 468 U.S. at 442, 104 S. Ct. at 3151-52; or, 4) the suspect was or was not psychologically intimidated, State v. Sargent, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988). As stated by the Washington Supreme Court "[g]enerally, in defining custody the Supreme Court has looked at the circumstances surrounding the interrogation and whether a reasonable person would have felt that person was not at liberty to terminate interrogation and leave." State v. Templeton, 148 Wn.2d 193, 208, 59 P.3d 632 (2002).

"Statements which are freely given are voluntary and if they are likewise spontaneous, unsolicited, and not the product of custodial interrogation, they are not coerced within the concept of Miranda." State v. Miner, 22 Wn. App. 480, 483, 591 P.2d 812 (1979). Custodial interrogation is "**questioning** initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." State v. Daniels, ___ Wn.2d ___, P. 19, ___ P.3d ___ (2007) (quoting Berkemer v. McCarty, 468 U.S. 420, 428, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984)) (emphasis added).

It is well established that a defendant's voluntary statements, even those obtained in violation of Miranda, may be introduced to impeach the defendant if he or she testifies. United States v. Havens, 446 U.S. 620, 100 S. Ct. 1912, 64 L.Ed.2d 559 (1980); Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971); State v. Holland, 98 Wn.2d 507, 516, 656 P.2d 1056 (1983). The State may use a statement in impeachment this way even if the statement would not be admissible in the State's case in chief. Michigan v. Harvey, 494 U.S. 344, 350, 110 S. Ct. 1176, 108 L.Ed.2d 293 (1990).

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . .

The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.

Harris, 401 U.S. at 224-26. The exclusionary rule's goal of deterrence is satisfied "**when the evidence in question is made unavailable to the prosecution in its case in chief.**" Harris, 401 US at 225 (emphasis added).

A party may impeach a witness by offering that witness's inconsistent statement if the witness "cannot remember making a prior inconsistent statement [and] testifies at trial to an inconsistent story." State v. Newbern, 95 Wn. App. 277, 293, 975 P.2d 1041 (1999). Such

impeachment is allowed where the witness “remember[s] the prior event, [but does not] remember making the prior statement. State v. Newbern, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999) (citing State v. Hancock, 109 Wn. 2d 760, 748 P.2d 611 (1988)).

A defendant may waive his right to remain silent provided such waiver is made knowingly, voluntarily and intelligently. Miranda, 384 U.S. 436. The State must establish a knowing, voluntary and intelligent waiver by a preponderance of the evidence. State v. Gross, 23 Wn. App. 319, 323, 597 P.2d 894 (1979). The determination of waiver must be made on the basis of the whole record before the court. State v. Cashaw, 4 Wn. App. 243, 247, 480 P.2d 528 (1971). A trier of fact may draw all reasonable inferences from the evidence and circumstances. State v. Gross, 23 Wn. App. at 324. “[A] defendant who testifies in his own behalf waives his privilege against self-incrimination with respect to the relevant matters covered by his direct testimony and subjects himself to cross-examination by the government.” United States v. Hearst, 563 F.2d 1331, 1339 (9th Cir. 1977) (citing Brown v. United States, 356 U.S. 148, 154-55, 78 S. Ct. 622, 2 L.Ed.2d 589 (1958)).

Appellate courts do not review issues that are not preserved with a timely objection at trial unless the claimed error is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). In the federal court system, unpreserved constitutional errors are only reviewed if the error seriously affects a defendant’s substantial constitutional rights and the

defendant is prejudiced by that error at trial. United States v. Hutson, 843 F.2d 1232, 1238 (9th Cir. 1988). Washington Courts similarly refuse to review unpreserved constitutional errors unless the error is “manifest.” State v. Kirkman, ___ Wn.2d ___, 155 P.3d 125 (2007); State v. Scott, 110 Wn. 2d 682, 685, 757 P.2d 492 (1988). To prove that an error is a manifest error affecting a constitutional right, “[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” Kirkman, ___ Wn.2d ___.

Here, defendant has failed to preserve his alleged error under the Fifth Amendment for review. To raise this unpreserved error, defendant must point to a constitutional error at trial that prejudiced his case. Kirkman, ___ Wn.2d ___. Defendant’s Fifth Amendment rights were not implicated at trial, however, because (1) defendant testified at trial, thus waiving his Fifth Amendment rights, (2) the State offered the statements in rebuttal to impeach defendant’s claim that he could not have formed the intent to deprive Ms. Parkhurst of her keys, and (3) defendant’s statement was spontaneous, not the product of custodial interrogation.

First, defendant waived his Fifth Amendment protection against self-incrimination by voluntarily testifying. The State did not mention the statements until defendant took the stand during defendant’s case in chief. RP(2) 226-227. Because defendant refused to acknowledge the statement,

the statement was not on the record until the State only offered it in the State's rebuttal case. RP(2) 226-227. Thus, by the time defendant had offered the statement, defendant had waived his Fifth Amendment rights regarding that statement by testifying. Hearst, 563 F.2d at 1339.

Second, defendant's statement was not offered in the State's case-in-chief, but was rather offered in rebuttal to impeach defendant's credibility and rebut in part the defense of intoxication. When the State cross examined defendant, defendant claimed that he did not remember taking Ms. Parkhurst's keys and making a statement about the keys to Officer Lien. RP(2) 206-207, 224-226. In closing, defendant then argued that he was so intoxicated on February 16, 2006, that he could not have formed the intent necessary to commit first degree robbery. RP(2) 260, 264, 266-269. The State offered defendant's statement in rebuttal to impeach defendant's claim that, while he remembered the arrest generally, he did not recall making the statement. RP(2) 224-227; see Havens, 446 U.S. 620; Harris, 401 U.S. 222.

The State also used the statement to refute defendant's claim that he was too intoxicated to form the intent to deprive Ms. Parkhurst of her keys. As the State argued in closing, defendant's statement suggested that, while he had taken Ms. Parkhurst's keys, he had disposed of them, so the officer could not prove that he had committed robbery. RP(2) 253, 280. This statement thus revealed defendant's thought process on the night he was arrested: he took the keys, knew that taking the keys was wrong, and

shrewdly disposed of the keys in the alley before he was caught. RP(2) 253, 279-280. The statement shows that defendant acted intentionally from the time he took the keys to the time he was arrested, refuting his claim that he could not form the requisite intent to deprive.

Third, the statement did not implicate defendant's Fifth Amendment rights because the statement was spontaneous, not the product of custodial interrogation. Before defendant made the statement, Officer Lien merely informed defendant that he was under arrest. RP(2) 226-227. Officer Lien did not ask defendant any question before the statement. Neither defendant, nor Officer Lien, testified that Officer Lien ever made any statement that could be expected to elicit the statement that defendant made. RP(2) 167-180, 194-227. Defendant gave a spontaneous and unsolicited statement to Officer Lien, not a response to custodial interrogation, so defendant's Fifth Amendment rights were not implicated. See Miner, 22 Wn. App. at 483.

This case is similar to State v. Miner, 22 Wn. App. 480, 485, in which this Court found that the Fifth Amendment did not prohibit the State from impeaching a defendant. Miner was charged with the second degree murder of his brother. Id. at 481. On the night his brother died, Miner called a 911 operator and said, "I stabbed my brother. He was going to kill me." Id. at 482. At trial, Miner testified that he had not stabbed his brother. Id. at 484. The State then laid foundation for impeachment by cross examining Miner about his statements to the

operator. Id. at 483-484. Miner rested, and the State called the operator in rebuttal, and the operator testified as to defendant's statements. Id. at 484. This Court held that the Fifth Amendment does give a defendant the right to perjure himself, so the State may offer a defendant's statements in rebuttal to impeach that defendant's testimony. Id. at 484-485.

Because defendant's Fifth Amendment rights were not implicated in this case, the admission of his statements does not constitute manifest error implicating a constitutional right. This issue is not properly before this Court.

ii. Defendant's rights under CrR 3.5 were not violated when the State offered defendant's voluntary statement in rebuttal.

Under CrR 3.5(a), "[w]hen a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible." If a defendant fails to object to the admission of a statement that is offered without a CrR 3.5 hearing, that defendant impliedly waives his rights under CrR 3.5 with respect to that statement. State v. Rice, 24 Wn. App. 562, 566-567, 603 P.2d 835 (1979). A CrR 3.5 hearing does not have to be held pretrial; it can be held during the trial. State v. Thompson, 73 Wn. App. 122, 128, 867 P.2d 691 (1994).

CrR 3.5 only excludes involuntary, incriminating statements that will be offered into evidence. State v. Williams, 137 Wn.2d 746, 975 P.2d 963(1999); State v. Mustain, 21 Wn. App. 39, 42, 584 P.2d 405 (1984). The phrase “statements that will be offered into evidence” does not include “statements used for **impeachment** purposes.” State v. Thompson, 73 Wn. App. 122, n. 5, 867 P.2d 691 (1994) (emphasis in original).

If a defendant does not object to a trial court’s failure to hold a CrR 3.5 hearing, the appellate court may examine the record and make its own determination of voluntariness. Mustain, 21 Wn. App. at 42-43; State v. McKeown, 23 Wn. App. 582, 585, 596 P.2d 1100 (1979).

Whether a statement is voluntary is determined by ascertaining whether the statement was “extracted by any sort of threats, violence, or direct or implied promises, however slight.” State v. Riley, 17 Wn. App. 732, 735, 565 P.2d 105 (1977). “A confession that is the product of coercion, physical or psychological, is involuntary and not admissible.” State v. Riley, 17 Wn. App. 732, 735, 565 P.2d 105 (1977). An appellate court will remand the case for a CrR 3.5 hearing if the trial court was required to conduct such a hearing, the trial court failed to conduct the hearing, and the appellate court cannot determine from the record whether or not the statement was voluntarily given. State v. Porter, 5 Wn. App. 460, 464, 488 P.2d 773 (1971).

Defendant's claim that his CrR 3.5 rights were violated is not properly before this court. Defendant did not object when the State asked either defendant or Officer Lien about defendant's statement. RP(2) 225-227. While defendant mentioned the lack of a CrR 3.5 hearing when he moved for a mistrial, he did not ask the court to conduct a mid-trial CrR 3.5 hearing to establish whether the statements were voluntary. RP(2) 231; see Thompson, 73 Wn. App. at 128. Moreover, CrR 3.5 is not a constitutional provision, and so the failure to hold a CrR 3.5 hearing cannot constitute a manifest error affecting a constitutional right. See RAP 2.5(a)(3); see, e.g., State v. Greenwood, 57 Wn. App. 854, 860, 790 P.2d 1243 modified on other grounds, 120 Wn.2d 585, 845 P.2d 971 (1993) (while CrR 3.3 is designed to protect the constitutional right to a speedy trial, violation of CrR 3.3 is not necessarily an error of constitutional magnitude). This court should not review this issue when defendant failed to object to this statement, defendant did not seek a CrR 3.5 hearing, and there is no constitutional right to a CrR 3.5 hearing.

Even if this issue were properly before this court, any alleged error is harmless because, if the court had held a midtrial CrR 3.5 hearing, it would have found that the statement was voluntary. When Officer Lien approached defendant, he drew his weapon according to police procedure. RP(2) 175. Officer Lien then ordered defendant to lie on the ground. RP(2) 175. Defendant complied, and Officer Lien informed defendant that he was under arrest for robbery. RP(2) 175-176, 227. It was at this

point that defendant made the statement that he did not have any property in his possession. RP(2) 227. Nothing in the record suggests that Officer Lien solicited this statement, let alone that Officer Lien used coercive measure to extract the statement in such a way that the statement was involuntary. Even though defendant had an opportunity to testify and to cross examine Officer Lien, he still did not offer any evidence that defendant was coerced into making the statement. RP(2) 167-180, 226-227. As argued above, the statement in this case did not implicate the Fifth Amendment, so the court would not have suppressed the statement on constitutional grounds either. From the record adduced at trial, defendant's statement was given voluntarily and was not in response to any questioning by Officer Lien or the product of coercion. Had a CrR 3.5 hearing been held, the court would have allowed the statement to be adduced in rebuttal.

Defendant has failed to preserve the alleged violation of his Fifth Amendment because admitting defendant's statement did not implicate defendant's constitutional protection against self-incrimination. Defendant's claim that his CrR 3.5 rights were violated has not been preserved for appeal because he failed to object or request a midtrial CrR 3.5 hearing. Even if this court does review defendant's claim that he should have been granted a CrR 3.5 hearing, any possible error is harmless because the court would have found the statement admissible in rebuttal.

- b. State did not commit prosecutorial misconduct when it adhered to the omnibus hearing order.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); State v. Binkin, 79 Wn. App. 284, 902 P.2d 673 (1995), review denied, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-294. Where the defendant does not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” Id.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require “that [the] burden of showing essential unfairness be sustained by him who claims such injustice.” Beck v. Washington, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L.Ed.2d 834 (1962).

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004 (1998). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. Russell, 125 Wn.2d at 87.

On appeal, defendant contends that the prosecutor committed misconduct by violating the court's omnibus hearing order and by violating an agreement with the defendant to hold a CrR 3.5 hearing before any of defendant's statements came before the jury. Neither assertion is supported by the record.

i. The State adhered to the Omnibus Hearing order.

The State adhered to the Omnibus Hearing order when it admitted defendant's statements to Officer Lien. The Omnibus Order stated, "the statements of defendant will be offered in the State's case in rebuttal only." CP 110-111. Although the State asked defendant about his statement to Officer Lien, defendant did not admit he made the statement, so the statement was not yet on the record. RP(2) 226-227. The State was only able to offer the statement when it called Officer Lien in its rebuttal

case. RP(2) 227. Because the Omnibus Hearing order authorized the State to offer defendant's statements in a rebuttal case, the State adhered to the order in admitting the statement. CP 110-111.

ii. Defendant cannot support his claim that he had a separate pretrial agreement with the State.

RAP 10.3(a)(5) requires parties to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990). An appellate court need not consider claims that are insufficiently argued. State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440 (1990).

Defendant cannot support his claim that he and the State reached a pretrial agreement that the State would not offer any of defendant's statements until a CrR 3.5 hearing was conducted. It is true that, while arguing his motion for a mistrial, defendant said that he and the State had reached such an agreement. RP(2) 231. The State did not acknowledge an agreement, however, and defendant cannot point to anything in the record that suggests this agreement ever existed. Although the State said, "I thought we did address this on the record before we started with the testimony," this statement does not admit that the State made any agreement about CrR 3.5 hearings. RP(2) 232. Defendant's bare,

unsubstantiated assertion at trial is not sufficient to support his claim that this agreement was ever made.

Even if there had been an agreement between the State and defendant, violation of such an agreement would not have prejudiced defendant in this case. As noted in subsection “a” above, the court would have found the statement admissible if it had conducted a CrR 3.5 hearing, because the statement did not implicate defendant’s Fifth Amendment rights and was not involuntary. RP(2) 175-176, 26-227. Without prejudice, there can be no prosecutorial misconduct. See Mak, 105 Wn.2d at 726.

The State did not commit prosecutorial misconduct. The State adhered to the requirements of the Omnibus Hearing order. There was no agreement between the State and defendant regarding CrR 3.5 hearings. Even if such an agreement existed, any violation of that agreement would have been harmless.

c. The Court properly denied the motion to dismiss.

A trial court generally has wide discretion in granting or denying a motion for a mistrial. State v. Avendano-Lopez, 79 Wn. App. 706, 721, 904 P.2d 324 (1995). An appellate court reviews a denial of a motion for mistrial for abuse of discretion. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Carter, 77 Wn. App. 8, 11, 888 P.2d 1230 (1995). Discretion is abused when the judge's decision is manifestly

unreasonable or based upon untenable grounds. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). An appellate court will overturn a trial court's denial of a motion for mistrial only when there is a "substantial likelihood that the error prompting the request for a mistrial affected the jury's verdict." State v. Rodriguez, 146 Wn.2d 260, 269-270, 45 P.3d 541 (2002) (internal citations omitted).

Only errors which may have affected the outcome of the trial are prejudicial. State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). A mistrial or new trial should only be given when "nothing the trial court could have said or done would have remedied the harm done to the defendant," State v. Gilcrist, 91 Wn.2d at 612, and "nothing short of a new trial can insure that the defendant will be tried fairly." State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002) (quoting State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995 (1986)). When an error can be obviated by jury instruction, the error is waived by failing to request such an instruction. Rodriguez, 146 Wn.2d at 271.

- i. **The court did not err in denying the motion for a mistrial because the circumstances did not call for a CrR 3.5 hearing and defendant waived the right to challenge the lack of CrR 3.5 hearing.**

Defendant's motion for a mistrial was based on his claim that the State offered defendant's statement without a CrR 3.5 hearing. RP(2) 231.

A CrR 3.5 hearing does not have to be held pretrial; it can be held during the trial. State v. Thompson, 73 Wn. App. 122, 128, 867 P.2d 691 (1994).

The court properly denied the mistrial in this case. Defendant waived his right to raise a complaint about the CrR 3.5 hearing when he failed to object to the use of the statement in court. RP(2) 225-227; see Rice, 24 Wn. App. at 566-567. Because the statement was not offered until rebuttal, no CrR 3.5 hearing was necessary. RP(2) 225-227; see Harvey, 494 U.S. 344, 350; Thompson, 73 Wn. App. at n.5. Even if the court had conducted a CrR 3.5 hearing, the statement was voluntary and the court would have denied the mistrial. RP(2) 226-227; see Williams, 137 Wn.2d 746. Finally, defendant did not request a CrR 3.5 hearing before asking for the mistrial. Such a hearing would have given the court an opportunity to remedy the lack of CrR 3.5 hearing. See Thompson, 73 Wn. App. at 128 (holding that a CrR 3.5 hearing does not necessarily have to be held pretrial). Because defendant did not offer the court an opportunity to remedy the error that defendant perceived, a mistrial would have been inappropriate. See Gilcrist, 91 Wn.2d at 612.

- ii. **Defendant was not prejudiced by the lack of a CrR 3.5 hearing because the statement was voluntary and there was ample evidence that defendant intentionally deprived Ms. Parkhurst of her keys.**

Defendant was not prejudiced by the lack of CrR 3.5 hearing. If the Court held a CrR 3.5 hearing, it would have found that the statement was admissible because it was voluntarily given. See Williams, 137 Wn.2d 746. Officer Lien indeed ordered defendant to the ground before the statement was made, but Officer Lien did not coerce defendant in any way. RP(2) 117, 169, 227. In fact, Officer Lien did not ask defendant any questions; defendant gave the statement voluntarily to Officer Lien when he learned he was being arrested for Robbery. RP(2) 226-227.

2. **DEFENDANT'S THIRD DEGREE ASSAULT CONVICTION VIOLATES DOUBLE JEOPARDY AND SHOULD BE VACATED.**

The double jeopardy clause “protects against multiple punishments for the same offense.” Missouri v. Hunter, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983) (quoting North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969)); State v. Brown, 113 Wn.2d 520, 554, 782 P.2d 1013 (1989). Washington's guaranty against double jeopardy under art. 1, § 9, has traditionally received the same interpretation as the federal double jeopardy clause.

State v. Harris, 102 Wn.2d 148, 160-61, 685 P.2d 584 (1984), overruled in part by State v. McKinsey, 116 Wn.2d 911, 914, 810 P.2d 907 (1991).

The Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended when analyzing punishment stemming from a single trial. Hunter, 459 U.S. at 366. Where the legislature intended to impose multiple punishments, imposing such sentences does not violate the Constitution. Hunter, 459 U.S. at 368.

Petitioner claims that sentencing him on both of his convictions, assault in the third degree and robbery in the first degree, violates the prohibition against multiple punishments found in the double jeopardy clause. He relies upon State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).

The State concedes that defendant's third degree assault conviction violates double jeopardy under the facts of this case. Freeman holds that when first degree robbery and third degree assault charges arise out of the same conduct, the two convictions will generally violate double jeopardy unless they have an independent purpose or effect. Freeman, 153 Wn.2d at 780. Here, the fact that defendant pulled Ms. Parkhurst's hair was used to prove both charges. This Court should vacate the third degree assault charge.

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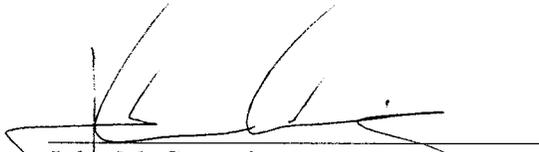
D. CONCLUSION.

For the foregoing reasons, the state requests that this Court affirm defendant's first degree robbery conviction.

DATED: June 11, 2007.

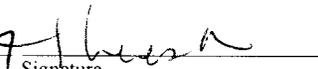
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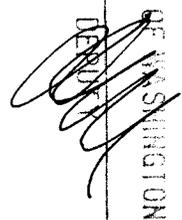

John M. Cummings
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/12/07 
Date Signature

Neilson

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