

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY CM
DEPUTY

NO. 36983-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SEGHON D. RORIE, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
III.	STATEMENT OF THE CASE.....	3
IV.	ARGUMENT	10
	ISSUE 1: THE TWO CONVICTIONS INVOLVING THE ASSAULT OF DOUGLAS WERE PART OF THE SAME UNIT OF PROSECUTION FOR PURPOSES OF DOUBLE JEOPARDY AND SHOULD MERGE.....	10
	ISSUE 2: THE TWO CONVICTIONS INVOLVING THE ASSAULT OF JACKSON WERE PART OF THE SAME UNIT OF PROSECUTION FOR PURPOSES OF DOUBLE JEOPARDY AND SHOULD MERGE.....	16
	ISSUE 3: THE TWO CONVICTIONS INVOLVING THE ASSAULT OF DOUGLAS OCCURRED AT THE SAME TIME AND PLACE WITH THE SAME OBJECTIVE INTENT AND SHOULD BE TREATED AS THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING RORIE’S OFFENDER SCORE.....	17
	ISSUE 4: THE TWO CONVICTIONS INVOLVING THE ASSAULT OF JACKSON OCCURRED AT THE SAME TIME AND PLACE WITH THE SAME OBJECTIVE INTENT AND SHOULD BE TREATED AS THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING RORIE’S OFFENDER SCORE.....	20
	ISSUE 5: THE PROSECUTOR IN THIS CASE COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE TOLD THE JURY THAT IT OFFENDED JUSTICE AND “WOULD BE AN INSULT TO THE VICTIMS” TO “GIVE HIM THE BENEFIT OF THE DOUBT”.....	21
V.	CONCLUSION.....	26

TABLE OF AUTHORITIES

TABLE OF CASES

United States Supreme Court Cases

<i>Bell v. United States</i> , 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955)	10, 12
<i>Berger v. United States</i> , 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).....	21

Washington Cases

<i>State v. Adel</i> , 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).....	10, 11, 12, 14
<i>State v. Bautista-Caldera</i> , 56 Wn. App. 186, 783 P.2d 116 (1989).....	25
<i>State v. Belgarde</i> , 110 Wn.2d 504, 507, 755 P.2d 174 (1988).....	24
<i>State v. Bobic</i> , 140 Wn.2d 250, 260, 996 P.2d 610 (2000).....	10, 11
<i>State v. Brett</i> , 126 Wn.2d 136, 175, 892 P.2d 29 (1995).....	22
<i>State v. Brown</i> , 74 Wn.2d 799, 803, 447 P.2d 82 (1968).....	22
<i>State v. Case</i> , 49 Wn.2d 66, 71, 298 P.2d 500 (1956).....	22
<i>State v. Chenoweth</i> , 127 Wn. App. 444, 111 P.3d 1217 (2005).....	14
<i>State v. Echevarria</i> , 71 Wn. App. 595, 598, 860 P.2d 420 (1993).....	24
<i>State v. Freeman</i> , 118 Wn. App. 365, 377, 76 P.3d 732 (2003).....	18
<i>State v. Lessley</i> , 118 Wn.2d 773, 778, 827 P.2d 996 (1992).....	18
<i>State v. Neidigh</i> , 78 Wn. App. 71, 79, 895 P.2d 423 (1995).....	24
<i>State v. Perez-Mejia</i> , 134 Wn. App. 907, 920, 143 P.3d 838 (2006).....	25
<i>State v. Porter</i> , 133 Wn.2d 177, 183, 942 P.2d 974 (1997).....	18, 19
<i>State v. Reed</i> , 102 Wn.2d 140, 144, 683 P.2d 699 (1984).....	22
<i>State v. Russell</i> , 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).....	22
<i>State v. Tili</i> , 139 Wn.2d 107, 116-17, 985 P.2d 365 (1999).....	12, 13
<i>State v. Torres</i> , 16 Wn. App. 254, 263, 554 P.2d 1069 (1976).....	21

<i>State v. Varnell</i> , 162 Wn.2d 165, 168, 170 P.3d 24 (2007).....	11
<i>State v. Vike</i> , 125 Wn.2d 407, 410, 885 P.2d 824 (1994)	17, 19
<i>State v. Westling</i> , 145 Wn.2d 607, 40 P.3d 669 (2002)	13, 14
<i>State v. Womac</i> , 160 Wn.2d 643, 649, 160 P.3d 40 (2007).....	10

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. 5.....	10
U.S. Const., amend. 6.....	21
Wash. Const., art. 1, sec. 9	10
Wash. Const., art. I, sec. 22 (amend.10)	21

STATUTES

RCW 9.94A.589	17
RCW 9A.36.021	11
RCW 9A.48.030	13
RCW 69.50.401	15

I. ASSIGNMENTS OF ERROR

1. The prosecutor committed prosecutorial misconduct when he argued to the jury that to give the defendant “the benefit of the doubt” would be an insult to the victims and justice.
2. The trial court violated double jeopardy when it rendered judgment on two convictions for second degree assault for the same conduct against Douglas.
3. The trial court violated double jeopardy when it rendered judgment on two convictions for second degree assault for the same conduct against Jackson.
4. The trial court erred when it declined to treat the two second degree assault convictions involving Douglas as the same criminal conduct when they occurred in the same time and place and with the same objective intent.
5. The trial court erred when it declined to treat the two second degree assault convictions involving Jackson as the same criminal conduct when they occurred in the same time and place and with the same objective intent.
6. The trial court erred when it found in the findings of fact and conclusions of law for exceptional sentence that “the current

convictions were not the same criminal conduct” and that “they did not occur at the same time.”

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do the two convictions involving the assault of Douglas constitute the same unit of prosecution for purposes of double jeopardy, requiring merger?
2. Do the two convictions involving the assault of Jackson constitute the same unit of prosecution for purposes of double jeopardy, requiring merger?
3. Were the two convictions involving the assault of Douglas the same criminal conduct where they occurred at the same time and place, with the same objective intent?
4. Were the two convictions involving the assault of Jackson the same criminal conduct where they occurred at the same time and place, with the same objective intent?
5. Did the prosecutor commit prosecutorial misconduct when he told the jury that it offended justice and “would be an insult to the victims” to “give [the defendant] the benefit of the doubt”?

III. STATEMENT OF THE CASE

Factual History:

Kim Douglas and Seghon Rorie had known each other since they were teenagers. RP4 121. They began a romantic relationship in 2005 and by 2006 they were living together. RP4 122. Rorie suffers from serious psychological issues—he is bi-polar, being treated by medication. RP4 183. Despite this, Rorie had formed a close relationship with Kim's 9-year-old daughter Adriana and Kim's mother, Jeanne Jackson. RP4 123-24, 133.

On August 23, 2006, Rorie suffered some kind of break with reality. RP4 125. On the way back from the store, Rorie asked Douglas to pull over. RP4 128. Rorie told Douglas "the devil was stealing his joy," got out, and began to pray. RP4 129. He returned to the car, and then got out to pray again. RP4 129. He finally returned to the car and they drove home. RP4 131.

Rorie continued to act strangely once back at the apartment. RP4 131. Douglas said Rorie's behavior was very strange for him. RP4 184. He had never before made any statements about the devil. RP4 184.

Understandably concerned about Rorie's behavior, Douglas took her daughter and went to a nearby restaurant, leaving Rorie at the

apartment. RP4 132. Rorie tried to convince them to return, repeating that the devil was trying to “steal his joy.” RP4 132.

Douglas called her mother from the restaurant and asked her to come over to talk to Rorie—to ask him to leave the apartment until he calmed down. RP4 133-34.

Douglas, Jackson and Adriana returned to the apartment after 9 p.m. RP4 135. Jackson noticed that Rorie was not acting normally—was saying things about the devil getting into him. RP4 219. Jackson asked Rorie to leave and took his key. RP4 136. Rorie was upset, did not want to go, and said he had no place to go. RP4 136-37. Eventually, Rorie walked away. RP4 139.

Douglas, Jackson and Adriana went upstairs and got ready for bed. RP4 140. Jackson had decided to spend the night. RP4 140. Douglas and Rorie spoke several times on the phone. RP4 140. Rorie told Douglas he was unhappy and wanted to come home. RP4 140. They last spoke around 11 p.m. RP4 141. Rorie called a few more times, but Douglas did not answer. RP4 141.

Douglas went to sleep around midnight. RP4 143. Although she usually slept in her own room, Adriana slept that night in Douglas’ bed. RP4 151, RP5 267.

Around 6:30 a.m., Rorie returned to the apartment and broke the kitchen window. RP6 529. Douglas woke to the sound of breaking glass. RP4 143. She went to investigate and saw someone breaking through the kitchen window. RP4 144. Shortly after, Rorie kicked in the front door and immediately began to punch her. RP4 145. The first punch caused Douglas to fall into Jackson, who was standing behind her, causing Jackson to hit the doorframe. RP4 228-29.

As he attacked Douglas, Rorie kept saying the devil was in her and he had to stop the devil. RP4 232. After a short skirmish, Rorie released Douglas and she went to her bedroom. RP4 148.

During the course of events, Rorie seemed calm and normal one moment, then angry the next. RP4 232. Jackson said that Rorie never attacked her, but rather was focused on Douglas. RP5 259.

As Douglas left the room, Rorie calmly turned to Jackson and explained that he did not have a problem with her and she should leave. RP4 232. Then, Rorie turned from her and went to the bedroom. RP4 233.

Jackson entered the bedroom and attempted to shield Douglas' body with her own. RP4 150. Rorie repeated, "the devil had gotten into" Douglas and she had ruined his family by kicking him out. RP4 235. Rorie continued to hit Douglas, all the while saying that the devil was in

Douglas and that “needed to be taken care of.” RP4 150, 235. Jackson was struck on the hands and wrists as she tried to shield Douglas. RP4 150.

After a few minutes of this, Rorie suddenly stopped and said that the devil was in Douglas and she needed to die, and that he had to “go get his weapon of choice.” RP4 152, 235. Rorie was gone for just 20-30 seconds, returning with the small hammer usually stored on the kitchen counter. RP4 153, 159, 237. When he returned to the room, Rorie said, “The devil has gotten into you, you must die,” RP4 239, and, “Oh, you called the police, now you’re going to die,” RP4 159, 238. All of this occurred in mere seconds. RP5 278.

During the incident, Adriana was quiet under the covers. RP4 237. When Rorie got onto the bed, Adriana screamed and Rorie immediately stopped, throwing the hammer down. RP4 162, 194, 209.

Immediately after Rorie threw down the hammer, the police rushed into the room and took Rorie into custody. RP4 162. The entire incident had lasted only a few minutes from the time the window was broken until the police arrived.¹ RP6 537, 547.

¹ The CAD report shows 6 minutes from the 911 call (made when the window was broken) to the arrival of police. RP14 986.

State asked for an exceptional sentence on Count VI, conceding that there were not grounds for an exceptional on the other counts. RP14 969-70.

The trial court adopted the State's sentencing recommendations and set an exceptional sentence for Count II. RP14 1001-2, CP 269, 234.

Judgment and sentence was entered as follows:

	<u>Conviction</u>	<u>Victim</u>	<u>Off. Score</u>	<u>Sentence</u>	<u>DW Enh.</u>	<u>Exceptional</u>
II	Assault 2	Jackson	10	84m, Consecutive	12m	
IV	Felony Harassment	Jackson		12m Suspended		
V	Assault 2-DV	Douglas	10	84m		
VI	Assault 2-DV	Douglas	10	84m	12m	X
VII	Assault 2	Jackson	10	84m		

(CP 253-58)²

This appeal timely followed.

² The parties agreed and the court found that count I merged into count VI—judgment was not entered. CP 233.

IV. ARGUMENT

ISSUE 1: THE TWO CONVICTIONS INVOLVING THE ASSAULT OF DOUGLAS WERE PART OF THE SAME UNIT OF PROSECUTION FOR PURPOSES OF DOUBLE JEOPARDY AND SHOULD MERGE.

The legal foundation for the unit of prosecution analysis rests on double jeopardy protections. The double jeopardy clauses of the U.S. Constitution amend. 5, and the Washington Constitution, art. 1, sec. 9, provide three different protections for defendants, “one of which protects against multiple punishments for the same offense.” *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). This is a question of law, which is reviewed de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). The remedy for convictions that violate double jeopardy is vacating the offending conviction(s). *See Womac*, 160 Wn.2d at 658-60.

The proper question is to determine what act or course of conduct the legislature has defined as the punishable act. When the legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects against multiple convictions for committing just one unit of the crime. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) (citing *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955)). While the unit of prosecution issue is one of constitutional magnitude on double jeopardy grounds, the analytical framework centers

on a question of statutory interpretation and legislative intent. *See Adel*, 136 Wn.2d 629.

The first step is to analyze the statute in question to determine the legislative intent as to unit of prosecution. *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24 (2007). Then, the court looks to the facts of the case in question “because even where the legislature has expressed its view on the unit of prosecution, the facts in a particular case may reveal more than one ‘unit of prosecution’ is present.” *Varnell*, at 168 (*citing State v. Bobic*, 140 Wn.2d 250, 263-66, 996 P.2d 610 (2000)). If the Legislature fails to designate the unit of prosecution within the criminal statute, any resulting ambiguity must be construed in favor of lenity. *State v. Adel*, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998) (*citing Bell v. United States*, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L.Ed. 905 (1955), Doubt is resolved against turning a single transaction into multiple offenses).

The relevant portion of the statute at issue, RCW 9A.36.021(1), defines Assault in the second degree as follows:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and

unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

The statute does not specifically define the unit of prosecution. Since the statute defining second degree assault does not define the unit of prosecution, the rule of lenity must be applied, resolving any ambiguity in Mr. Rorie's favor. *Adel*, 136 Wn.2d at 635; *Bell*, 349 U.S. at 84.

Appellant could not find any direct precedent defining the unit of prosecution for assault in the second degree. Therefore, this appears to be an issue of first impression. However, the state Supreme Court did publish dicta stating that all acts occurring during the course of an assault are part of the same unit of prosecution. In *State v. Tili*, 139 Wn.2d 107, 116-17, 985 P.2d 365 (1999), the court held that the rape statute explicitly provided for separate convictions for each act of penetration. In explaining its reasoning, the *Tili* court distinguished the rape statute from the assault statute in this regard:

Tili argues that if he can be charged and convicted for three counts of first-degree rape based on three separate penetrations, then a defendant could also be charged and convicted for every punch thrown in a fistfight without violating double jeopardy. Tili's argument, however, ignores key differences between the crimes of rape and assault. Unlike the rape statute, the assault statute does not define the specific unit of prosecution in terms of each physical act against a victim. Rather, the Legislature defined "assault" only as that occurring when an individual "assaults" another. *See RCW 9A.36.041*. A more extensive definition of "assault" is provided by the common law, which sets out many different acts as constituting "assault," some of which do not even require touching. *See, e.g.*, 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 35.50 (2d ed. 1994) (WPIC). Consequently, the Legislature clearly has not defined "assault" as occurring upon *any* physical act.

Tili, 139 Wn.2d at 116-17. Thus, under *Tili*, Mr. Rorie was only guilty of assault once for each victim, though he may have committed it through alternative means.

In *State v. Westling*, 145 Wn.2d 607, 40 P.3d 669 (2002), our Supreme Court was asked to determine the unit of prosecution for the crime of arson when the defendant was convicted of three counts, one for each automobile damaged in a single fire. The court cited the arson statute, RCW 9A.48.030(1), which provides that:

[a] person is guilty of arson in the second degree if he [or she] knowingly and maliciously causes a fire or explosion which damages a building, *or* any structure or erection appurtenant to or joining any building, *or* any wharf, dock, machine, engine, automobile, *or* other motor vehicle, watercraft, aircraft, bridge, *or* trestle, *or* hay, grain, crop, *or*

timber, whether cut or standing or any range land, *or* pasture land, *or* any fence, *or* any lumber, shingle, *or* other timber products, *or* any property.

Analyzing the language of the statute, the *Westling* court concluded that the unit of prosecution for that crime is the defendant's act of setting the fire, not each item of property damaged by the fire, because the statute "refers, in relevant part, to the causing of 'a fire' that damages 'any automobile.' 'Any means 'every' and 'all.'" *Westling*, 145 Wn.2d at 611.

Like the arson statute, the assault statute delineates alternative means with the conjunction "or." And, like the arson statute, it is the act of assault, not the means of committing it, which composes the unit of prosecution.

In *State v. Chenoweth*, 127 Wn. App. 444, 111 P.3d 1217 (2005), *aff'd on different grounds*, 160 Wn.2d 454 (2007), the court was asked to decide if a person could be convicted for multiple counts of possession of a controlled substance where he had multiple stashes of methamphetamine. The Court examined the relevant statute and found that it "prohibits possession, regardless of intent or source." 127 Wn. App. at 462.

Likewise, in *Adel*, the Court held that two separately located "stashes" of marijuana--one found in the defendant's convenience store (less than 0.2 grams) and the other found in the defendant's car parked in

front of the store (0.1 grams)--constituted one statutory unit of prosecution under Washington's simple possession statute. *Adel*, 136 Wn.2d at 631, 636. The statute at issue, RCW 69.50.401(e), provides that "any person found guilty of possession of forty grams or less of marijuana shall be guilty of a misdemeanor." RCW 69.50.401(e). Because this statute "fails to indicate whether the Legislature intended to punish a person multiple times for simple possession based upon the drug being stashed in multiple places," the rule of lenity favored a conclusion that Adel had committed "only one count of simple possession." *Adel*, 136 Wn.2d at 635.

The State's theory of the case, argued to the jury, was that Rorie committed one assault on Douglas when he hit her, and another when he brandished the hammer, scaring her; that he committed a third assault when he, with recklessness, caused injury to Jackson, and another when he brandished the hammer, scaring her. RP11 854, 856. Yet, the events in this case took place over a very short period of time as part of one continuous series of actions. It is clear that both Douglas and Jackson were in fear of injury throughout the entire six-or-so minutes the incident lasted. RP6 537, 547, RP14 986. Rorie's stated intent, as delusional as it was, never changed—he was trying to "get the devil out of" Douglas. The jury rejected the finding that Rorie threatened to kill Douglas and

Jackson,³ which was how the State attempted to distinguish the two charges for each victim. CP 164, 193.

Taken to its logical result, the approach taken by the State in breaking this single series of events up into separate charges would allow the State to charge each individual punch as a separate assault, or to separately charge one assault for the fear felt by these women seeing Rorie break the window, in addition to the fear they felt when he hit Douglas. This is exactly what the Supreme Court was talking about when it held that “the Legislature clearly has not defined ‘assault’ as occurring upon any physical act.” *Tili*, 139 Wn.2d at 116-17.

Rorie committed one unit of prosecution of assault against Douglas, which encompasses his various punches and threats during the short but intense incident involved here. Therefore, it offends double jeopardy to convict him of two assaults involving Douglas.

ISSUE 2: THE TWO CONVICTIONS INVOLVING THE ASSAULT OF JACKSON WERE PART OF THE SAME UNIT OF PROSECUTION FOR PURPOSES OF DOUBLE JEOPARDY AND SHOULD MERGE.

As argued above with regard to Douglas, Rorie has committed only one unit of prosecution of assault against Jackson. This is one continuous series of events and it offends double jeopardy to artificially

³ The jury was asked: “Did the defendant’s threat to cause great bodily harm consist of a threat to kill the person threatened?” CP 193. The jury replied:

break it into multiple convictions. Therefore, the two assault convictions involving Jackson should also merge.

ISSUE 3: THE TWO CONVICTIONS INVOLVING THE ASSAULT OF DOUGLAS OCCURRED AT THE SAME TIME AND PLACE WITH THE SAME OBJECTIVE INTENT AND SHOULD BE TREATED AS THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING RORIE'S OFFENDER SCORE.

At sentencing, the defense argued that the two offenses for each victim constituted the same criminal conduct. RP14 986. The court found that they were not the same criminal conduct because they did not occur at the same time. CP 269. All four assault convictions were counted in calculating Rorie's offender score. CP 234. Because these offenses occurred at the same time and place and with the same objective intent, it was error for the trial court to find they were not the same criminal conduct.

If concurrent offenses encompass the same criminal conduct, they are treated as one crime for the purposes of calculating the offender's sentence. RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). Same criminal conduct "means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). All three prongs must be met, and the absence of any one prong prevents a finding

"No." CP 193.

of “same criminal conduct.” *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). The trial court’s finding on same criminal conduct is reviewed for abuse of discretion. *State v. Freeman*, 118 Wn. App. 365, 377, 76 P.3d 732 (2003).

Whether crimes occurred at the same time depends on whether they were committed sequentially as part of a continuous, uninterrupted sequence of events over a short period of time—the statute does not require that the crimes be committed at the exact same moment in time. *See State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

In *State v. Porter*, the defendant pled guilty to three counts of delivery of a controlled substance, two of which arose from a single incident in which an undercover officer purchased methamphetamine from the defendant and then ten minutes later, purchased marijuana from the same defendant. 133 Wn.2d at 180. On review, the Supreme Court concluded that the “sales were part of a continuous, uninterrupted sequence of conduct over a very short period of time” and held that “immediately sequential drug sales satisfy the ‘same time’ element of the statute.” *Porter*, at 183. The Court further held that the defendant’s “criminal intent [could not] be segregated into distinct present and future intents to commit criminal activity.” *Porter*, at 184.

In this case, as in *Porter*, the events occurred over a very short period of time—around 6 minutes total. RP6 537, 547, RP14 986. The only break was when Mr. Rorie left the room for less than a minute to get a hammer, which he brandished during the assault, never actually hitting anyone with it. RP4 152-3, 235, 237. This did not break the sequence of events because the assault was continuous. In fact, Ms. Douglas and Ms. Jackson had not even had time to get up and close the door while Mr. Rorie was gone. Therefore, these separate charges occurred in the same time and place for purposes of the statute.

Moreover, Rorie's objective intent remained the same during the entire assault. The relevant inquiry for finding the objective criminal intent is "the extent to which the criminal intent, objectively viewed, changed from one crime to the next. . . . This, in turn, can be measured in part by whether one crime furthered the other." *State v. Vike*, 125 Wn.2d at 411 (citations omitted). The jury found that Rorie's intent was to assault in all four counts. The jury specifically rejected the State's argument that Rorie had the intent to kill, acquitting Rorie of attempted murder and finding he had not threatened to kill Douglas and Jackson. CP 164, 193. Rorie's stated intent the entire time, as delusional as it was, was to "get the devil" out of Douglas. RP4 150, 235. On these facts, Rorie's

objective intent was the same for all four offenses. Therefore, the intent was the same for purposes of same criminal conduct.

Because the two convictions for assault 2 involving Douglas occurred in the same time and place and with the same intent, the trial court erred by failing to treat them as the same criminal conduct for sentencing purposes.

ISSUE 4: THE TWO CONVICTIONS INVOLVING THE ASSAULT OF JACKSON OCCURRED AT THE SAME TIME AND PLACE WITH THE SAME OBJECTIVE INTENT AND SHOULD BE TREATED AS THE SAME CRIMINAL CONDUCT FOR PURPOSES OF CALCULATING RORIE'S OFFENDER SCORE.

Likewise, for the same reasons as above, the two convictions for second degree assault involving Jackson should have been treated as the same criminal conduct. Further, it was never shown that Rorie ever intended to hurt Jackson, but rather that her injuries occurred when she protected Douglas and was accidentally struck when Rorie hit Douglas. Thus, it is even clearer in these two convictions that Rorie's objective intent did not change between these two offenses. Therefore, because these offenses occurred in the same time and place and with the same objective intent, the trial court erred in failing to treat Rorie's two assault convictions involving Jackson as the same criminal conduct.

ISSUE 5: THE PROSECUTOR IN THIS CASE COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE TOLD THE JURY THAT IT OFFENDED JUSTICE AND “WOULD BE AN INSULT TO THE VICTIMS” TO “GIVE HIM THE BENEFIT OF THE DOUBT”.

A prosecutor has a dual role in a criminal trial: first, he or she acts as an advocate for the State’s position; second, and more important, is the prosecutor’s duty to serve the causes of justice and fairness. *See Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

A prosecutor must always remember that he or she does not conduct a vendetta when trying any case, but serves as an officer of the court and of the state with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided. We recognize that the conduct of a trial is demanding and that if prosecutors are to perform as trial lawyers, a zeal and enthusiasm for their cause is necessary. However, each trial must be conducted within the rules and each prosecutor must labor within the restraints of the law to the end that defendants receive fair trials and justice is done. If prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means. Courts must not permit this to happen, for when it does the freedom of each citizen is subject to peril and chance.

State v. Torres, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976).

Both the Washington and United States constitutions guarantee a defendant the right to trial by an “impartial jury.” U.S. Const. amend. 6; Wash. Const. art. I, sec. 22 (amend.10). These provisions entitle the defendant to a “fair trial,” one “in which the attorney representing the state does not throw the prestige of his public office, information from its

records, and the expression of his own belief of guilt into the scales against the accused.” *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956) (citation omitted).

To obtain reversal of a conviction on the basis of prosecutorial misconduct, a defendant must show that the prosecutor’s conduct was improper and that the conduct had a prejudicial effect, which means there must be a substantial likelihood that the conduct affected the verdict. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996). Either an objection or a requested instruction is sufficient to preserve such error for appeal. *State v. Brown*, 74 Wn.2d 799, 803, 447 P.2d 82 (1968). *See also State v. Reed*, 102 Wn.2d 140, 144, 683 P.2d 699 (1984). The cumulative effect of repeated instances of prosecutorial misconduct may be so prejudicial and flagrant that a new trial is required, even if individual instances, standing alone, would not. *Torres*, 16 Wn.App. at 262-63.

Where, as here, defense counsel objected, this court must evaluate the trial court’s ruling for abuse of discretion. *Pirtle*, 136 Wn.2d at 481-82. The allegedly improper arguments are reviewed in the context of (1) the total argument; (2) the issues in the case; (3) the instructions, if any, given by the trial court; and (4) the evidence addressed in the argument. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).

During closing argument, the prosecutor made the following statements to the jury:

[Prosecutor]: The defendant assaulted these people repeatedly. He injured them severely, some of it temporary, some if it permanent. He scared them to death, he made them believe that they were going to die; he told them they were going to die. And to give him a break, to give him the benefit of the doubt that the defense is asking for—

[Defense Counsel]: Your Honor, that is the law, that he does get the benefit of the doubt. So I would object to his argument that somehow tries to shift the burden onto the defendant.

[Prosecutor]: Your Honor, I'm almost done. It's argument.

The Court: Well, please follow the law—

[Prosecutor]: I am.

The Court: --Mr. Ericksen, and finish up in two minutes.

[Prosecutor]: Yes, Your Honor. To give him the breaks the defense counsel is requesting, that would be an insult to the victims, that would be an insult to what happened to them, that would be an insult to the notion of justice.

[Defense Counsel]: And, Your Honor, I again object to that argument. That is not proper argument. This is the golden rule thing and shifting the burden. The burden is to prove every element of the crime beyond a reasonable doubt.

The Court: The jury has been instructed on the law and they will follow the law. That's my ruling.

RP11 928-29.

The prosecutor's argument that the jury should not give the defendant "the benefit of the doubt" was prosecutorial misconduct because it shifted the burden of proof. In the law, the jury is REQUIRED to give the defendant the benefit of the doubt—it is called reasonable doubt. Therefore, the prosecutor not only misstated the law, he shifted the burden of proof.

Further, the prosecutor went on in this theme, appealing to the passions and prejudices of the jury by telling them that to follow the defense's recommendations "would be an insult to the victims, that would be an insult to what happened to them, that would be an insult to the notion of justice." RP11 929. It was the jury's job to decide what crimes had been committed, not to give revenge to the victims or to worry about insulting them.

Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). Accordingly, a prosecutor engages in misconduct when making inflammatory remarks, incitements to vengeance, exhortations to join a war against crime or drugs, or appeals to prejudice or patriotism. *State v. Neidigh*, 78 Wn. App. 71, 79, 895 P.2d 423 (1995).

Just as the prosecutor in this case improperly asked the jury to send a message to the victim and society, the prosecutor in *State v. Bautista-Caldera*, 56 Wn. App. 186, 783 P.2d 116 (1989), was found to have improperly told the jury:

Do not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe them and enforce the law on their behalf.

56 Wn. App. at 195. The court found the prosecution's plea improper. *Id.* Likewise, it was improper for the prosecutor in this case to tell the jury that any verdict other than that the State had asked for would be an "insult" to the victims and to justice.

Moreover, the trial court has "augmented the argument's prejudicial impact" when it overrules the objection and fails to give a curative instruction, as the court did in this case. *See State v. Perez-Mejia*, 134 Wn. App. 907, 920, 143 P.3d 838 (2006). The prejudice in this case was magnified by the court's failures to curtail the prosecutor's argument, or instruct the jury to disregard it.

Because the prosecutor's closing argument in this case shifted the burden of proof to the defendant and appealed to the jury's passion and prejudice, Rorie was deprived of his constitutional right to a fair trial. Therefore, his convictions should be reversed and the case remanded for

new trial.

V. CONCLUSION

Rorie has consistently admitted that he assaulted Douglas and Jackson while in the grips of his delusions. However, his actions in this case constituted one unit of prosecution of second degree assault for each of these women. Therefore, it violated double jeopardy for him to be convicted of two counts of assault two for each. Two of his second degree assault convictions must be vacated.

Secondly, if the Court does not find that double jeopardy was violated, then it should find that the trial court erred by failing to treat the two assault convictions for each victim as the same criminal conduct for purposes of calculating the offender score. These offenses occurred in the same time and place, with the same objective intent, and therefore constitute the same criminal conduct. The remedy for this error is remand for resentencing.

Finally, the prosecutor in this case committed misconduct when he argued to the jury that to give Rorie the “benefit of the doubt” was an insult to the victims and justice. This argument shifted the burden of proof to the defendant and appealed to the passion and prejudice of the jury.

Consequently, Rorie was deprived of a fair trial and is entitled to a reversal of his convictions and a new trial.

DATED: May 7, 2008

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CERTIFICATE OF SERVICE

I certify that on May 7, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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