

NO. 44891-2-II

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

STATE OF WASHINGTON, Respondent

v.

ERIC CHRISTOPHER MARTIN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01274-1

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. THE STATE AGREES MARTIN'S TWO CONVICTIONS FOR ASSAULT IN THE SECOND DEGREE VIOLATE DOUBLE JEOPARDY
- II. THE DEFENDANT'S CONVICTIONS FOR ASSAULT IN THE SECOND DEGREE AND ASSAULT IN THE FOURTH DEGREE DO NOT VIOLATE DOUBLE JEOPARDY
- III. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE
- IV. THE PROSECUTOR DID NOT COMMIT MISCONDUCT
- V. MARTIN'S CONVICTIONS FOR ASSAULT IN THE SECOND DEGREE AND HARASSMENT DO NOT CONSTITUTE SAME CRIMINAL CONDUCT

B. STATEMENT OF THE CASE

Malory Wilson was working and living in Vancouver, Washington in July 2012. 2 RP at 209. She lived with her young daughter. 2 RP at 209. Ms. Wilson had previously dated Eric Martin (hereafter 'Martin') on and off for 4 years. 2 RP at 211. In July 2012 she was trying to work things out with Martin. 2 RP at 211. Ms. Wilson spent the day of July 16, 2012 with Martin, ending the evening at her apartment to watch a movie and spend a romantic evening together. 2 RP at 212-13. They had consumed alcohol and cocaine that evening. 2 RP at 214. Ms. Wilson and Martin went to

bed, which was located in the living room of the apartment. 2 RP at 215-16.

At approximately 4am Ms. Wilson woke up and found Martin was not beside her in bed. 2 RP at 216. She found him in the bathroom holding tinfoil and a lighter with a straw in his mouth. 2 RP at 217. Ms. Wilson believed him to be smoking crack. 2 RP at 217. This upset Ms. Wilson and she asked him to leave her apartment. 2 RP at 218. Wilson became angry and grabbed Ms. Wilson by the neck with two hands and slammed her up against the shower door. 2 RP at 219. Martin's hands were on the side of her neck and he had her feet off the ground. 2 RP at 220. Ms. Wilson was trying to get Martin off of her, telling him to stop, but he wouldn't. 2 RP at 220-21. Her vision was going blurry and she felt he was going to kill her. 2 RP at 221. Martin then suddenly dropped her, and instantly grabbed her around the front of her neck with one hand. 2 RP at 221. Ms. Wilson was trying to push Martin off of her and thinking of getting to her cell phone to get help. 2 RP at 222. Ms. Wilson couldn't breathe as Martin had one hand around her neck. 2 RP at 221. During this incident Ms. Wilson does not remember Martin saying anything to her. 2 RP at 220.

Martin suddenly let go of Ms. Wilson's neck and she tried to grab her phone off the bathroom window sill, but Martin knocked it out of her hand, and grabbed her by the hair at the back of her head and lifted her up.

2 RP at 222. Ms. Wilson said she was calling the police and Martin told her she wasn't and knocked the phone out of her hands. This happened multiple times. 2 RP at 223. Martin told Ms. Wilson he was not going to jail and was not going to let her call the police. 2 RP at 223. At this point in time Martin was not making any threats towards Ms. Wilson. 2 RP at 224. Martin left the room and then came back. This time Martin grabbed Ms. Wilson again by the neck and said he would kill her before he went to jail. 2 RP at 224. Ms. Wilson believed Martin when he made the threat and thought he would kill her. 2 RP at 225, 231. Martin had been violent with Ms. Wilson several times in the past. 2 RP at 225-31.

Martin left Ms. Wilson's home after hiding her cell phone, taking her mace and her keys. 2 RP at 232. Ms. Wilson locked the door with the deadbolt and within seconds Martin kicked in the door and grabbed Ms. Wilson and threw her to the ground. 2 RP at 232. Martin was yelling at Ms. Wilson and accused her of calling the police. 2 RP at 232. He hit Ms. Wilson while she laid on the floor. 2 RP at 232. Martin then grabbed something out of Ms. Wilson's purse and left. 2 RP at 232. Ms. Wilson believes he took money out of her purse. 2 RP at 233. Martin left, but Ms. Wilson went after him because she needed the money he took to pay her rent. 2 RP at 237-38. Martin then threw her to the ground outside. 2 RP at

238. A neighbor called out to them and Martin got into his vehicle and fled. 2 RP at 238.

Ms. Wilson was scared and did not immediately call police, but attempted to contact a close friend instead. 2 RP at 239-40. Ms. Wilson did call 911 later and the 911 call was admitted and played for the jury. 2 RP at 242-51. Throughout the call Ms. Wilson was coughing because her throat hurt from the attack. 2 RP at 254-55. Ms. Wilson's neck was red, she had marks on her arms from the attack. 2 RP at 255-56. Photographs of Wilson's injuries were taken and admitted into evidence. 2 RP at 256-57; 266-69. Police came that night and took Ms. Wilson's statement, and the next day her neck hurt and she was having trouble breathing so she went to the hospital. 2 RP at 258-59. Ms. Wilson was very sore and could not stop coughing; she had pain while swallowing. 2 RP at 260. Ms. Wilson was sore for several weeks and her neck still hurt at the time of trial. 2 RP at 274-75. She had to wear a neck brace for a time to help with her neck pain. 2 RP at 276.

Martin was arrested and tried to contact Ms. Wilson at least 3 times from the Clark County jail. 2 RP at 261. One of the calls was admitted into evidence and played for the jury. 2 RP at 262-64.

The State charged Martin with two counts of Assault in the Second Degree, Burglary in the First Degree, Robbery in the First Degree, Felony

Harassment, Assault in the Fourth Degree and Malicious Mischief in the Third Degree. CP 4-6. The case proceeded to trial and at trial, there was discussion regarding a limiting instruction for the ER 404b evidence that was admitted of Martin's prior acts of violence against Ms. Wilson. 1 RP at 59; 2 RP at 320-25. From the record it is clear Martin proposed an instruction which the Court modified before giving to the jury. 2 RP at 322-25. Defense proposed language including, "This evidence consists of prior allegations that may be considered by you for the purpose of understanding potential domestic violence." 1 RP at 71, 2 RP at 320-25. The Court gave an instruction which stated,

Certain evidence has been admitted in this case for a limited purpose. This evidence consists of prior allegations and may be considered by you only for the purpose of understanding potential domestic violence and the victim's state of mind. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation."

2 RP at 340-41. Martin did not object to this instruction. 2 RP at 333.

During closing arguments, the State indicated the two counts of Assault in the Second Degree occurred when the defendant first used two hands to strangle the victim in the bathroom and then used one hand to strangle her in the bathroom. 2 RP at 362. The State elected the crime of Assault in the Fourth Degree as occurring for the acts that occurred in the

bedroom, pointing out evidence of the victim's multiple bruises caused by the defendant's assault on her. 2 RP at 368-70.

In his closing argument, defense counsel pointed out Ms. Wilson's inconsistencies in her trial testimony and her prior statements. 3 RP at 373-80. Defense counsel argued that Ms. Wilson's claims were not supported by the facts. 3 RP at 377. He argued her claims of strangulation were "unfounded based on the evidence." 3 RP at 379. Defense counsel stated that they could not rely on Ms. Wilson to give the correct answers. 3 RP at 380.

In rebuttal, the State argued in part,

And he says she's a liar-can't believe her because she didn't disclose to the cops that she was using cocaine the day before. That is ridiculous. It is ridiculous to think that she's a liar because when the cops come to her house, she's been assaulted, she's been threatened, she thinks he's coming back. The first think [*sic*] she should do is say Officer, by the way-I illegally used drugs yesterday. Why on earth would she do that?

3 RP at 82.

The jury convicted Martin of Burglary in the First Degree, two counts of Assault in the Second Degree, Felony Harassment, Assault in the Fourth Degree and Malicious Mischief in the Third Degree. CP 110-16. The jury found Martin not guilty of Robbery in the First Degree and

did not return the special verdict finding Martin and Ms. Wilson were family or household members. CP 111, 117.

At sentencing, Martin did not ask the trial court to consider any of the present convictions as same criminal conduct. 3 RP at 423-26. Martin was sentenced to a standard range sentence. CP 147.

C. ARGUMENT

I. THE STATE AGREES MARTIN'S TWO CONVICTIONS FOR ASSAULT IN THE SECOND DEGREE VIOLATE DOUBLE JEOPARDY

Martin argues his two convictions for assault in the second degree violate double jeopardy because the two assaults occurred at the same time, place and against the same victim and thus constitute a single unit of prosecution. The State agrees and concedes the two convictions for assault in the second degree

Whether convictions violate double jeopardy is a question this Court reviews de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Double jeopardy prevents a defendant from being twice convicted under the same statute for committing just one unit of the crime. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). “If a defendant is convicted of violating a single statute multiple times, the proper inquiry is ‘what “unit of prosecution” has the Legislature intended as the

punishable act under the specific statute.” *State v. Tili*, 139 Wn.2d 107, 113, 985 P.2d 365 (1999) (quoting *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) (citing *Bell v. U.S.*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L.Ed. 905 (1955) and *State v. Mason*, 31 Wn. App. 680, 685-87, 644 P.2d 710 (1982), *superseded on other grounds as stated in State v. Elliott*, 114 Wn.2d 6, 16, 785 P.2d 440 (1990))).

The first step in a unit of prosecution analysis is to look at the criminal statute. *Adel*, 136 Wn.2d at 635. In *State v. Smith*, 124 Wn. App. 417, 102 P.3d 158 (2004), this Court found for purposes of Assault in the Second Degree by assaulting another with a deadly weapon, the ‘unit of prosecution’ is assaulting another with a deadly weapon. *Smith*, 124 Wn. App. at 432. In *Smith*, the question was whether one act of firing a gun towards three individuals was one or three units of prosecution. The Court found the defendant was properly convicted of three counts of assault. *Id.*

As the proper ‘unit of prosecution’ in Assault with a deadly weapon is assaulting another with a deadly weapon, the proper ‘unit of prosecution’ for strangulation is assaulting another by strangulation or suffocation. Therefore in analyzing case law and the statute, it is clear that a defendant commits assault in the second degree when one assaults another by strangulation or suffocation. So the inquiry becomes whether a person who twice strangles a person in quick succession as part of an

overall assaultive incident commits the crime of assault by strangulation once or twice.

In *State v. Soonalole*, 99 Wn. App. 207, 992 P.2d 541 (2000), the Court found that two convictions for acts of child molestation did not violate double jeopardy because the two incidences were separated only by a period of time. In *Soonalole*, the defendant molested the victim while driving in a car by touching the victim on her breasts and thighs for a period of time, then the defendant stopped touching her for an undisclosed period of time, and recommenced touching her in the same way after pulling the car over and parking, but this time also attempting to touch the victim underneath her clothes. *Soonalole*, 99 Wn. App. at 210. The Court upheld the defendant's two convictions and found that these were not a single act under a unit of prosecution analysis as the defendant completed one act of molestation, retreated from the victim, and then molested her a second time, evidencing a separate intent for each charged act. *Id.* at 215 n. 13.

Here, there is nothing in the record to support the argument that Martin's actions against the victim constituted two, separate and distinct acts of strangulation. From the victim's testimony, it is clear the first time Martin put his hands around her neck occurred "instantly" before the second time he put his hands around her neck. 2 RP at 22. From a

thorough review of this State's and other states' case law it is evident the issue turns on whether or not, factually, these constituted two separate transactions. In *State v. Scanlon*, 982 A.2d 1268, 1277-78 (R.I. 2009), the Supreme Court of Rhode Island found that in a case in which the victim was attacked first with a screwdriver, and then by the defendant's hands in dislocating her shoulder, two convictions for assault based on the two separate means of committing assault were appropriate. In coming to this decision, the Court noted,

On their face, the facts alleged in each count do not constitute the "same act or transaction," because each assault arises from a different act. Nothing in the record indicates that the use of the screwdriver caused the complainant's right arm to dislocate.

Scanlon, 982 A.2d at 1278.

In discussing this opinion in *Scanlon*, the Rhode Island Supreme Court discussed another Rhode Island case, *State v. Bolarinho*, 850 A.2d 907 (R.I. 2004) wherein the defendant was convicted for two assaults based on the singular act of kicking the victim (based on deadly weapon ("shod foot") and serious bodily injury). The Court in that case found the two convictions violated double jeopardy because they were not two separate offenses supported by different evidence. *Bolarinho*, 850 A.2d at 911.

One of the most on point cases found by the State is from the State of Colorado. In *People v. Berner*, 42 Colo.App. 520, 600 P.2d 112 (1979), the Colorado Court of Appeals found that two separate convictions for assault violated double jeopardy where those convictions arose from an incident that occurred over a 10 minute period and the defendant twice struck the victim during that period. The Court held,

The two blows were delivered to the same person within a short period of time as part of a continuous harangue to extract information. Under these circumstances, we agree with defendant that these two blows were not separate transactions but were part of a single criminal transaction arising from a single impulse.

Berner, 42 Colo. App. at 521-22.

Another case close to on point is *State v. Mendoza*, 41 Kan.App.2d 996, 207 P.3d 1072 (2009) a case from the Court of Appeals of Kansas. In this case, the defendant stabbed the victim multiple times in his leg, stomach, arm and penis. This stabbing occurred in the same room as part of the same altercation-the victim testified the attack never stopped, it was ongoing until it was over. The defendant was convicted of two separate counts of aggravated battery, one count for the injury to the victim's leg, the second for the injury to his penis. The Court held that in considering whether convictions arise from the same conduct the courts should consider 1) whether the acts occurred at or near the same time; 2) whether

the acts occurred at the same location; 3) whether there is a causal relationship between the acts, particularly whether there was an intervening event; and 4) whether there was a fresh impulse motivating some of the conduct. The Court found the evidence did not support two separate convictions for battery in this case as the separate injuries occurred by the same conduct (although there were multiple stabs).

Following the logic in *Berner* and *Mendoza*, the short time period involved in Martin's case, the fact the two convictions are for conduct that occurred in the same place, the bathroom, against the same victim, and with the same criminal intent, with one act occurring "instantly" after the first, these convictions appear to be the same in law and the same in fact and thus violate a defendant's right to be free from twice being put in jeopardy for the same offense. This Court should remand this case for resentencing and direction to vacate one count of Assault in the Second degree and resentence accordingly.

II. THE DEFENDANT'S CONVICTIONS FOR ASSAULT IN THE SECOND DEGREE AND ASSAULT IN THE FOURTH DEGREE DO NOT VIOLATE DOUBLE JEOPARDY

Martin also claims his conviction for Assault in the Fourth Degree violates double jeopardy because of his conviction for Assault in the

Second Degree. However, Martin's convictions were based on different facts and the evidence properly supports his two convictions.

The convictions in this case for Assault in the Fourth Degree and Assault in the Second Degree were clearly based on two distinct acts: the defendant grabbed the victim by the neck, cutting off her blood and air supply, and the defendant later assaulted her in another room and then also grabbed her, threw her to the ground and hit her while she was on the ground. 2 RP at 232. There is no danger, nor is there any suggestion by Martin, that the jury actually returned verdicts of assault in the second degree and assault in the fourth degree based on the singular act of strangling the victim. The double jeopardy inquiry rests on whether assault in the fourth degree and assault in the second degree are the same in fact. Martin has not shown how the assault in the fourth degree conviction could have supported the conviction for assault in the second degree. The information and the to-convict instruction for second degree assault show the offense had to have been committed "by strangulation." CP 5, 95. Closing arguments clearly referred to the assault in the second degree as the incidents of strangulation, and assault in the fourth degree as separate conduct. 2 RP at 362, 368-70. Neither defense nor prosecution argued the assault in the fourth degree could be an attempt to commit assault by

strangulation. Here, there is no possibility that Martin was twice punished for the “same offense.”

As discussed above, in *State v. Soonalole*, 99 Wn. App. 207, 992 P.2d 541 (2000), the Court found that two convictions for acts of child molestation did not violate double jeopardy because the two incidences were separated by a period of time. In *Soonalole*, the defendant molested the victim while driving in a car by touching the victim on her breasts and thighs for a period of time, then the defendant stopped touching her for an undisclosed period of time, and recommenced touching her in the same way after pulling the car over and parking, but this time also attempting to touch the victim underneath her clothes. *Soonalole*, 99 Wn. App. at 210. The Court upheld the defendant’s two convictions and found that these were not a single act under a unit of prosecution analysis as the defendant completed one act of molestation, retreated from the victim, and then molested her a second time, evidencing a separate intent for each charged act. *Id.* at 215 n. 13.

Here, as in *Soonalole*, Martin committed an assault, then retreated from the victim by leaving the house, and formed new intent to assault her again when he forcibly entered her house and physically assaulted her.

These incidences are not the same in law or the same in fact.¹ The constitutional provisions against double jeopardy were not offended by Martin's convictions for both assault in the second degree based upon strangulation and assault in the fourth degree based on separate and distinct assaultive conduct. Martin's claim fails.

III. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE

Martin contends the trial court's limiting instruction on the ER 404b evidence was improper as it constituted a comment on the evidence. Martin requested a very similar instruction, including the language Martin now complains of. The invited error doctrine applies and precludes Martin from now complaining of an error he invited.

Martin is barred from arguing this jury instruction is improper and a basis for reversal under the invited error doctrine. The invited error doctrine prevents a party who sets up an error at trial from claiming that very action as error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In the case of *City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2002), the defendant proposed an instruction that was missing

¹ Division One of the Court of Appeals has recently held that assault in the fourth degree and assault in the second degree are always the same in law and same in fact in *State v. Villanueva-Gonzales*, 175 Wn. App. 1, 304 P.3d 906 (2013). This case has been accepted for review by the Supreme Court and is currently pending review.

an essential element of the crime, the court accepted the instruction and the jury convicted the defendant. *Patu*, 147 Wn.2d at 719. On appeal, Patu sought reversal of the conviction based on the trial court's failure to include an essential element of the offense in the instruction. *Id.* The Supreme Court affirmed Patu's conviction and held the invited error doctrine applied because a party may not request an instruction and later complain on appeal that the requested instruction was given. *Id.* at 721. In a similar case, *State v. Studd*, the Court held that the invited error doctrine applied to defendants who proposed an erroneous instruction at trial and found the defendants could not raise the issue on appeal. *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

As Martin proposed the language in the instruction that he now complains of, the invited error doctrine prevents him from complaining about it now on appeal.

Further, even if it weren't invited error, though it clearly is, the court did not comment on the evidence. Martin's claim fails. Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This prevents the jury from being influenced by a judge's opinion on the evidence. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). A comment on the evidence arises when "the court's

attitude toward the merits of the cause are reasonably inferable from the nature or manner of the questions asked and the things said. *State v. Cerny*, 78 Wn.2d 845, 855, 480 P.2d 199 (1971), *judgment vacated in part*, 408 U.S. 939, 92 S. Ct. 2873, 33 L.Ed.2d 761 (1972).

Martin argues the limiting instruction to the jury using the words “potential domestic violence” are an impermissible comment on the evidence. However, this clearly does not communicate the judge’s opinion on the evidence, or his attitude on the merits of the cause. The word “potential” was used. This language was agreed to by the judge, the prosecutor and Martin. It is clear no one at the trial court considered this to be a comment on the evidence. 3 RP at 325.

In *State v. Hagler*, 150 Wn. App. 196, 208 P.3d 32 (2009), the trial court informed the jury that the crimes before them were designated as domestic violence offenses. *Hagler*, 150 Wn. App. at 202. However, the Court of Appeals found that if there was any error, it was harmless as the domestic violence designation clearly did not influence the jury’s consideration of certain charges, and Hagler conceded many points. *Id.* Further, there was no reasonable probability of a different verdict. *Id.* at 203.

The same situation applies to Martin’s case. Even if this was error, it was harmless beyond a reasonable doubt. Error is not prejudicial unless,

within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *Id.* As in the *Hagler* case, there was overwhelming evidence presented here. Further, defense agreed the parties had been in a dating relationship and that there was some violence between them. 3 RP at 378. Finally, the jury’s acquittal on the robbery charge, and failure to return the family or household member special verdict shows they did not use the term “domestic violence” to unfairly consider the evidence. Any error was harmless. Martin’s claim fails.

IV. THE PROSECUTOR DID NOT COMMIT MISCONDUCT

Martin alleges the prosecutor committed misconduct in her rebuttal argument because she argued that defense’s theory was the victim was lying. Martin cannot establish misconduct, let alone misconduct that was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been cured by an instruction to the jury. Martin’s claim of prosecutorial misconduct fails.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the

prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.*

The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

In arguing the law, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Burton*, 165 Wn. App. 866, 885, 269 P.3d 337 (2012) (citing *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972)). It can be misconduct for a prosecutor to misstate the court's instruction on the law, to tell a jury to acquit you must find the State's witnesses are lying, or that they must have a reason not to convict, or to equate proof beyond a reasonable doubt to everyday decision-making. *Id.* (citing to *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984), *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), and *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008)). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn. App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63. This court should inquire as to whether any improper argument influenced the jury and whether it could have been cured by instructing the jury to disregard the remark. *Id.* at 762 (citing *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983)). If there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, the defendant was denied a fair trial. *State v. Wheeler*, 95 Wn.2d 799, 807, 631 P.2d 376 (1981). But if a curative instruction would have obviated any prejudicial effect on the jury, then the case should not be reversed. *See State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2011) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

In Martin's case, the defense did not object to the prosecutor's argument he now complains of. In order for this Court to reverse, it must find the prosecutor's comments were so flagrant and ill-intentioned as to

cause enduring prejudice which could not have been cured by a jury instruction. The closing argument must be taken in the entire context of which it was given. The complained-of argument must be reviewed in the entire context of the surrounding comments and the entire argument. *State v. Fisher*, 165 Wn.2d at 747. Defense counsel had just ended his argument in which he told the jury that the victim's claims were not supported by the facts and that her claims of strangulation were unfounded based on the evidence and that they could not rely on the victim to give them correct answers to the questions she was posed. 3 RP at 377-80. The prosecutor correctly came to the conclusion that defense was arguing to the jury that they could not believe the victim, that she was lying and that if things had happened the way she said they did she would have reacted differently. It is not misconduct to argue the theory of the case and to point out in rebuttal how the defense's arguments do not make sense or are meritless. Though defense counsel did not use the words "lie," "liar" or "lying," the gist of his argument was loud and clear to the jury: the victim was lying.

Further, if it was improper for the prosecutor to make this comment, it surely could have been cured by an instruction to the jury to disregard her statements. However, no objection was made, and this perceived error was not brought to the trial court's attention at the time in order to correct it. The prosecutor's statement was brief, a few lines out of

her entire rebuttal argument. Throughout both her arguments she was clear on what the evidence showed and what the law was and what the jury was to consider. There is no allegation the prosecutor misstated the law or mislead the jury.

Martin's reliance on *State v. Casteneda-Perez*, 61 Wn. App. 354, 810 P.2d 74 (1991) is misplaced. This case is inapposite to the issue at hand. In *Casteneda-Perez*, the prosecutor asked witnesses on cross-examination whether they believed the officers and other witnesses were lying. *Casteneda-Perez*, 61 Wn. App. at 359. This cross-examination was found to be improper because it asked a witness to invade the province of the jury and may mislead the jury into believing that an acquittal requires the conclusion that the witnesses were lying. *Id.* at 362. Martin argues that the prosecutor's argument here amounted to her telling the jury that in order to acquit they must find the victim was lying. However her argument never suggested any such thing and it is not possible the jury would have come to that conclusion. The substance of the prosecutor's statements was argument that the victim was credible and could be believed.

The opinion in *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991) is of some guidance here. In *Barrow*, the prosecutor did exactly what Martin claims the prosecutor in his case did: told the jury that in order to acquit they must believe a witness was lying. *Barrow*, 869 Wn.

App. at 874. Though the Court found this statement by the prosecutor was improper, it was not reversible error. The Court found a curative instruction could have obviated any prejudice sustained by the prosecutor's argument. *Id.* at 876. Further, the Court found that the comments were not so inflammatory or prejudicial as to require reversal. *Id.* at 877. The Court concluded that the jury had heard the testimony of the witnesses and was able to draw its own conclusions about the credibility of the witnesses. *Id.* at 878.

Here, the prosecutor's statements were significantly less prejudicial or inflammatory than the prosecutor's in *Barrow*. Further, it is evident these brief remarks did not prejudice the defendant or inflame the jury improperly. Further, the instructions given to the jury were proper. The court must presume, absent any contrary showing, that the jury followed the court's instruction. *State v. Cerny*, 78 Wn.2d 845, 480 P.2d 199 (1971), *vacated*, 408 U.S. 939 (1972). There is no evidence, as there was in *Davenport, supra*, that the jury was misled by the prosecutor's argument. The evidence of the defendant's guilt was overwhelming, and he was properly convicted after a fair trial. Martin's claim of prosecutorial misconduct should be denied.

V. MARTIN'S CONVICTIONS FOR ASSAULT IN THE SECOND DEGREE AND HARASSMENT DO NOT CONSTITUTE SAME CRIMINAL CONDUCT

Martin argues his convictions for Assault in the Second degree and Harassment should have been considered as same criminal conduct by the trial court for sentencing purposes. Martin did not raise this issue at the trial court level, agreed to his offender score, and has waived any argument these crimes should constitute same criminal conduct.

Generally, issues not raised at the trial court may not be raised for the first time on appeal. RAP 2.5(a); *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). In *State v. Nitsch*, the Court of Appeals found the defendant could not raise the issue of same criminal conduct for the first time on appeal because he affirmatively acknowledged his standard sentencing range. *State v. Nitsch*, 100 Wn. App. 512, 521, 997 P.2d 1000 (2000). As in *Nitsch*, here, Martin agreed to his standard sentencing range. Martin did not argue his crimes were same criminal conduct, nor argue his standard range was lower.

The Court in *Nitsch* stated,

...the effect of permitting review for the first time on appeal is to require sentencing courts to search the record to ensure the absence of an issue not raised. In the same criminal conduct context, such a search requires not just a review of the evidence to support the State's calculation, or a review to ensure application of the correct legal rules, but an examination of the underlying factual context in every

sentencing involving multiple crimes committed at the same time. Because this is not the legislature's directive, the trial court's failure to conduct such a review sua sponte cannot result in a sentence that is illegal. The trial court thus should not be required, without invitation, to identify the presence or absence of the issue and rule thereon.

Nitsch, 100 Wn. App. at 525.

Further the Court in *Nitsch* found the trial court's offender score calculation was an implicit rejection of a same criminal conduct argument. *Id.* This decision can be reviewed for abuse of discretion. *Id.* Here, as in *Nitsch*, the record supports the court's implicit finding that the Assault in the Second Degree and Harassment convictions do not constitute same criminal conduct.

Offenses are same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). Courts narrowly construe this rule and if any of the three elements is missing, the offenses are not same criminal conduct. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Though it is clear from the record that Martin committed the assault and harassment against the same victim and in the same place, the record does not support that these incidents occurred at the same time. From the victim's testimony, Martin committed the assault in the bathroom, and then committed the harassment after leaving the house and returning into the home. Thus the event did not occur at the same time.

D. CONCLUSION

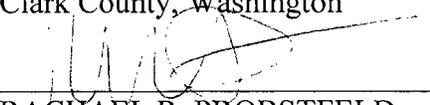
The State agrees this case should be remanded for vacation of one of the counts of Assault in the Second Degree as the two counts arose from the same offense and two convictions of the same crime for the same act violates double jeopardy. However, Martin is incorrect in his assertion that his convictions for Assault in the Fourth Degree and Assault in the Second degree violate double jeopardy. They do not as they do not stand for the same offense. Further, Martin's crimes of harassment and assault in the second degree occurred at a different time and he had different intent in committing the crimes and they should not merge for purposes of a same criminal conduct analysis. The prosecutor's argument was proper and she did not commit misconduct. The court's instructions to the jury were requested and agreed to by Martin and were proper.

DATED this 21st day of February, 2013.

Respectfully submitted:

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