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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY


DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

KHA DANH MAGERS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 04-1-00246-1

Brief of Respondent

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Appendix "B"

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

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B. STATEMENT OF THE CASE.

1. Procedure

On January 20, 2004, the State charged defendant with second degree assault with a deadly weapon enhancement, in count I, and

unlawful imprisonment with a deadly weapon enhancement, in count II. CP 1-3. The State also filed a Persistent Offender Notice which advised defendant that counts I and II are most serious offenses and that if he were to be convicted of either one, he would be sentenced to life without possibility of parole. CP 4. On March 30, 2004, the State filed the First Amended Information adding count III, violation of a no contact order pre-sentence. CP 8-10.

Pretrial motions began on April 15, 2005. RP 5. The State intended to introduce Ms. Ray's statements to police on the night of the incident under the excited utterance exception to the hearsay rule. RP 38, 190. The court deferred ruling until the State had been able to lay the proper foundation through the testimony of Officer Lang at trial. RP 190. After hearing Officer Lang's testimony regarding Ms. Ray's demeanor and condition on the night in question, the court ruled that her statements to police were admissible as excited utterances. RP 427-429.

The State moved under ER 404(b) to admit evidence that (1) Ms. Ray knew defendant had prior violent convictions, (2) had spent time in prison, (3) had been recently arrested and released from jail for assaulting her six weeks before the day in question, and (4) there was a no contact order in effect on the day in question. RP 168. After hearing testimony from Ms. Ray, the trial court found by a preponderance of evidence that the 404(b) incidents occurred and that the probative value of the evidence outweighed any unfair prejudice. RP 174-182. The State would not be

allowed to go into any specifics regarding the charges or facts of underlying convictions. RP 179.

Not all of this evidence was admitted at trial, however. Ms. Ray did not testify to a single prior conviction, or specifics as to any prior charges sentences, except to say that defendant was in jail for “fighting” at the time their first child was born. RP 263. She also testified that defendant had been arrested in December of 2003 because the police said she and defendant were fighting. RP 270. Ms. Ray denied any memory of what happened on that day, but later admitted she told police that defendant shoved her. RP 276. She testified that defendant was released from jail the next day. RP 279. Ms. Ray testified that a no contact order had been issued as a result of the incident in December. RP 279.

Defendant then moved to introduce evidence through Ms. Ray that defendant is facing his “third strike” offense. RP 174, 219. The trial court ruled that defendant could not introduce evidence that the case involved a third strike or that defendant was facing life without the possibility of parole. RP 221-224. However, it did allow defense to inquire of Ms. Ray about her knowledge that defendant was facing a “lengthy sentence”. RP 224.

The jury was sworn on April 19, 2005. The jury found defendant guilty as charged and found that he was armed with a deadly weapon at the time of the offenses. RP 618.

2. Facts

On the day in question, defendant argued with his fiancée, Carissa Ray, with whom he has two children in common. RP 438. Ms. Ray went into the bathroom and defendant grabbed her by her right arm and drug her out. Id. Defendant forcefully set Ms. Ray on the couch. Id. He held her head down and put a sword to the back of her neck. Id. While holding her in this position, defendant told Ms. Ray, “If you listen to me and do what I say, we’ll be happy. But if you do not, I’m going to be mean and I will cut your head off.” RP 442-43. Defendant kept Ms. Ray there and continued to threaten to cut her head off and to hurt her. RP 443. He would not let her leave. Id. These threats continued throughout several hours while Ms. Ray was confined. Id. Ms. Ray eventually convinced defendant to let her go to the store. RP 447. He kept the children hostage to ensure her return. Id. Ms. Ray called her mother and step-father from a store down the street. RP 286. They in turn called police. RP 289.

Tacoma police officers responded to Ms. Ray’s residence. RP 407. Initially no one answered when they knocked on the door. Id. After about twelve minutes, Ms. Ray answered the door. RP 408. One of her children was at the door with her. RP 409. Ms. Ray told police defendant was not there. Id. She looked scared. Id. Her eyes were huge and she kept looking behind her. RP 409. Officer Lang noticed Ms. Ray and the child were both uneasy and he could tell something was terribly wrong. RP 409. He got Ms. Ray and the child out of the house and again asked if

defendant was inside. RP 410. This time Ms. Ray admitted defendant was inside the house. Id. Ms. Ray was crying and unfocused. RP 430. She begged the officer not to tell defendant that she had said disclosed that he was in the house. RP 430. Ms. Ray said, "He's going to hurt me. He's violent." RP 430. She kept saying that; she was unfocused and appeared to be in shock. RP 432. Officer Lang put Ms. Ray and the child in the police car and backed up to take cover behind a garage while he tried to figure out what happened and if a crime had been committed. RP 432.

Speaking in a monotone with tears running down her face, Ms. Ray told Officer Lang how defendant had grabbed her by the arm, forcing her to the couch, held her head down, held a sword to her neck, and threatened to cut her head off. RP 434-435, 438. Officer Lang observed the mark on Ms. Ray's arm where defendant grabbed her when he drug her out of the bathroom. RP 438. She kept saying how defendant was going to hurt her and how violent he was. RP 435. Defendant had just been released from jail for domestic violence. RP 432. Ms. Ray filled out a written statement about the incident while she was in the back of the patrol car. RP 448. At the time of the incident, there was a no contact order in effect prohibiting contact between defendant and Ms. Ray. RP 292.

While Officer Lang met with Ms. Ray, other officers attempted to get defendant to come out of the house. He did not comply. RP 495. A K-9 officer arrived with his dog. Defendant was warned that a dog was

present and would be released into the house. RP 499. The dog barked at the closed bedroom door. RP 499. The officer opened the door and saw defendant in bed with his hands up, saying, "I give up. I give up." RP 499.

Police collected the sword as evidence. RP 320, 452, 540. Although the sword was not very sharp, it was heavy enough to cause serious injury. RP 515.

Five days later, Ms. Ray wrote the first of two letters recanting the statements she made to police on January 16, 2004, the night of the incident. RP 326, 329. In the first letter, dated January 21, 2004, Ms. Ray claimed that "she lied about everything". RP 326. In the second letter, dated February 18, 2004, Ms. Ray states that she was under pressure by the police and her parents to make the statements she made on the night of the incident. RP 329. During trial testimony, Ms. Ray stated that the police intimidated her, but she was completely unable to explain how she was intimidated. RP 330. She later said they did not intimidate her into making the first statement, but intimidated her if she changed her story. RP 331.

In spite of a no contact order, defendant arranged for Ms. Ray to visit him while he was in jail. RP 519, 524-525. Defendant and another inmate signed up each other's visitors to try to get around the no contact order between defendant and Ms. Ray. RP 527. Ms. Ray's mother visited defendant six times while he was in jail prior to trial. RP 532.

At trial, Ms. Ray recanted her statements to police. RP 269, 286, 309. She told the jury that she loves defendant, that it has been very difficult for her with him in jail, and that she still wants to marry him. RP 341, 343. She testified that defendant never assaulted her and never threatened her with a weapon. RP 354. She said she is not afraid of defendant. RP 366. When asked about her state of mind on the night in question, Ms. Ray testified that she did not know. RP 398. She stated she did not know if she was crying or if she was scared. Id.

The jury found defendant guilty as charged. RP 618.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF DEFENDANT'S PRIOR BAD ACTS WHEN THE EVIDENCE WAS RELEVANT TO MS. RAY'S CREDIBILITY AND STATE OF MIND, WHICH WERE BOTH CENTRAL ISSUES AT TRIAL.

Evidence of other crimes, wrongs, or acts is inadmissible to prove character and show action in conformity therewith. ER 404(b). However, when demonstrated, such evidence may be admissible for other purposes.

The rule states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). The list of purposes for which evidence of defendant's prior misconduct may be admitted is not exclusive. State v. Lane, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952), overruled on other grounds by State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

If admitted for other purposes, a trial court must identify that purpose and determine whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged. Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable.

State v. Powell, 126 Wn.2d 244, 258-59, 893 P.2d 615 (1995)(citations omitted). Such evidence is admissible if its probative value outweighs its prejudicial effect. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

The admission or refusal of ER 404(b) evidence lies largely within the sound discretion of the trial court. State v. Turner, 29 Wn.App. 282, 289, 627 P.2d 1324 (1981), review denied, 95 Wn.2d 1030 (1981). The trial court's decision will not be reversed absent an abuse of discretion. State v. Powell, 126 Wn.2d at 258. A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. Id.

a. Credibility of Ms. Ray

In State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996), the Court of Appeals held that evidence of Grant's prior domestic assaults against his wife were admissible under ER 404(b) because it was relevant and necessary to assess the wife's credibility as a witness. Id. at 105-106. The prosecution sought to admit prior conviction evidence under ER 404(b). The trial court refused to admit the evidence under ER 404(b) but ruled that the evidence could be admitted under ER 609 if the defendant took the stand and testified in his own defense. Id. at 103. The Court of Appeals held that the evidence was admissible under ER 404(b) rather than ER 609. Id. at 109.

With respect to ER 404(b), the court noted:

[V]ictims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others. The Grant's history of domestic violence thus explained why Ms. Grant permitted Grant to see her despite the no-contact order, and why she minimized the degree of violence when she contacted Grant's defense counsel after receiving a letter from Grant, sent from jail. Ms. Grant's credibility was a central issue at trial. The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.

Grant, 83 Wn. App. at 108 [footnote omitted].

The Grant court made additional observations about domestic violence cases:

A victim's apparently inconsistent response to abuse may stem from any number of reasons. Some victims minimize or deny abuse because they fear retaliation by the abuser ... Other victims minimize or deny abuse out of a sense of hopelessness or mistrust of the ability of the judicial system to protect them.

Id. at 107-108 n.5.

Victims may know from past experience that the violence gets worse whenever they attempt to get help. Research shows that domestic violence tends to escalate when the victim leaves the relationship.

Id. at 108 n.5 (quoting A. Ganley, PhD, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Domestic Violence Cases* (1992)). Additionally, domestic violence tends to recur and to intensify in frequency and degree of violence over time. Id. at 109.

The Grant court agreed with the trial court's finding that evidence of prior domestic violence is highly relevant where there was a prior history of assaultive conduct against the same victim. Therefore, the history of domestic violence is properly admissible to explain a victim's inconsistent statements and conduct. State v. Grant at 109.

Because Ms. Ray recanted her statements to police, her credibility was at issue and was a critical factor in the jury's verdict. Evidence having a bearing on the credibility of the victim is both relevant and admissible, even if it concerns a prior incident. Grant, 83 Wn. App. at 106-107.

The present case is remarkably similar to Grant. The credibility of Ms. Ray's testimony on the witness stand that nothing happened the day of the assault cannot be evaluated by the jury unless it hears the full story of a relationship marked by power, control, violence, and reconciliation. The evidence of the prior assault just six weeks before this incident, the breaking of the no contact order, the defendant's violent past, and the fact he was just released from jail all explain Ms. Ray's recantation and reasons therefore. This evidence provides the jury with the nature of this relationship and enables them to evaluate Ms. Ray's credibility. Credibility is central here where the jury has only Ms. Ray's conflicting statements upon which to determine whether the charged acts occurred. Thus, the 404(b) evidence was relevant and necessary.

Defendant claims that Grant is only applicable to a case when the State is attempting to "bolster" the credibility of the victim. Brief of Appellant at 29. However, the court's opinion does not contain the word "bolster." The Grant court specifically stated that evidence of the prior assaults was "admissible under ER 404(b) because it was relevant and necessary to assess Ms. Grant's credibility as a witness and accordingly to prove that the charged assault actually occurred." Grant at 106. "Ms. Grant's credibility was a central issue at trial. The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim." Id. at 108. Later in the opinion, the Grant

court stated that the history of domestic violence “could properly have been admitted under ER 404(b), at the very least for the purpose offered by the State of explaining Ms. Grant’s inconsistent statements and conduct.” Id. at 109. The crux of the decision goes to the victim’s credibility, not merely to “bolster” credibility.

Ms. Ray, a victim of domestic violence, likely was trying to placate her abuser, just as Ms. Grant may have been in that case. Ms. Ray’s testimony at trial was the opposite of her statements to the police. As in the Grant case, the evidence of domestic violence and other violence was necessary for the jury to evaluate Ms. Ray’s credibility. Full knowledge of the victim and defendant’s relationship would assist the jury in making these determinations. The trial court did not abuse its discretion in admitting this evidence.

b. Ms. Ray’s state of mind.

The 404(b) evidence should be admitted because it is highly probative and relevant to Ms. Ray’s state-of-mind. The victim’s state-of-mind is an essential element of the crime charged. RCW 9A.36.021(1)(c). WPIC 35.50. The defendant was charged with second degree assault. CP 8-10. When a defendant is charged with assault, the jury is given an instruction that defines the word “assault” three different ways. The text of the instruction provides:

An assault is an intentional touching or striking or cutting or shooting of another person, with unlawful force, that is

harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting or shooting is offensive, if the touching or striking or cutting or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

WPIC 35.50.

Using the third alternative, the State is burdened with proving the victim's state of mind using an objective standard. ER 404(b) evidence is admissible when used to prove a victim's state of mind and also when necessary to prove an essential element of the charged crime. State v. Ragin, 94 Wn. App. 407, 972 P.2d 519 (1999). In Ragin, the court was mindful that a jury may not objectively believe that a victim was placed in reasonable fear and apprehension unless the entire context of the relationship is disclosed. Id. at 412. The court also recognized that the evidence was prejudicial to Ragin, and noted: "Although the stories may have put Ragin in a bad light before the jury, the evidence was necessary

to prove an essential element of the charged crime, so its probative value outweighed its prejudicial effect.” Id.

In the case at bar, evidence that Ms. Ray knew that defendant had previously been in jail for fighting, that he had assaulted her in the past, was recently released from jail, and that fact that he had been staying with her despite a no contact order, all tend to make her apprehension reasonable. The fact that Ms. Ray repeated over and over to police that defendant was violent and that he had just been released from jail shows that she was in fear because she made a point of telling the police about it. Therefore, this evidence provides proof of a necessary element of the crime charged.

The same result was reached in State v. Barragan, 102 Wn. App. 754, 759, 9 P.3d 942 (2000), where the court ruled that the victim’s knowledge of the defendant’s prior violent acts was relevant to determining whether the victim had a reasonable fear that the threat would be carried out. Because the victim’s state of mind was an essential element of the crime charged, the probative value of the evidence outweighed the prejudicial effect. Id.

In the case at bar, the trial court provided a limiting instruction which was proposed by the defense:

Evidence has been introduced in this case on the subject of the defendant’s prior bad acts for the limited purpose of the victim’s state of mind and her credibility. You must not consider this evidence for any other purpose.

CP 124 (Instruction No. 5), CP 171 (Defense Additional Instruction [proposed]). See Appendix B. Jurors are presumed to follow the court's instructions. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). Any perceived prejudice to the defendant would have been eliminated by such an instruction.

c. Police report as evidence

Defendant claims that the basis for the prior domestic assault on Ms. Ray was established through police reports which contained hearsay statements of police officers who did not testify at trial, thus depriving defendant of his right to confront witnesses. Appellant's Brief at 26.

Defendant is mistaken as to the content of the record on this issue. First, the police report itself, was never admitted into evidence. The portion of the report containing Ms. Ray's handwritten statement, which was signed by her, was shown to her to refresh her memory. RP 272. Ms. Ray testified that she recognized her own handwriting and signature. RP 275. Ms. Ray then read her statement to herself and indicated it refreshed her memory. RP 275. She was then asked if she had told police that defendant shoved her to which she responded that she did. RP 275-76. (At the time of trial, Ms. Ray was denying that defendant had pushed her. The prosecutor was impeaching her testimony.) Ms. Ray was asked what the police saw when they arrived. RP 277. Ms. Ray responded that the police saw she and defendant "getting into the car." RP 277. Second, Ms.

Ray testified to a portion of what police said to her which was not wholly responsive to the prosecutor's question which was: "So the police would just arrest him because he put his hand on your back?" RP 278. Ms. Ray's response: "**I remember** them [the police] saying that he was pushing me and I explained to them that he wasn't..." RP at 278-79 [emphasis added]. From the record, it is evident that Ms. Ray was testifying from her memory and not reading from the police report. The record shows that she was only shown her own handwritten statement. RP 272, 275. Defense counsel at trial did not object to this hearsay, nor did she move to have it stricken from the record with an instruction for the jury to disregard it. No error occurred.

2. THE TRIAL COURT DID NOT ERR IN ITS
LIMITING INSTRUCTION TO THE JURY
WHICH WAS REQUESTED AND PROPOSED
BY THE DEFENSE.

Defendant claims that the limiting instruction, Instruction No. 5, is a comment on the evidence because to tell the jury that evidence may be considered to evaluate Ms. Ray's credibility, is tantamount to an opinion that the evidence "undermines her testimony that he did not assault her". Appellant's Brief at 34.

Trial counsel for defendant proposed the language for the limiting instruction that was ultimately given to the jury. She filed with the court two versions of WPIC 5.30. RP 553, CP 170 and 171. See Appendix A

and B. Defense counsel requested that the jury be instructed to limit the use of the evidence to the victims state of mind.¹ RP 553. Later on in the same discussion, defense counsel orally asked the court to instruct the jury to limit the use of the 404(b) evidence to credibility only, for which she had not proposed an instruction. RP 561.

Trial court judges are forbidden from commenting upon the evidence presented at trial. Wash. Const. Art. IV, §16. A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046, 112 L. Ed. 2d 772, 111 S. Ct. 752 (1991). The purpose of prohibiting judicial comments is to prevent the judge's opinion from influencing the jury. Lane, 125 Wn.2d at 838. In assessing whether a statement constitutes an improper comment, courts consider whether the comment was directed at counsel, as opposed to the jury, and whether it was said in legal terms or to explain a ruling. State v. Knapp, 14 Wn. App. 101, 107-08, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975). A jury instruction that does no more than accurately state

¹ The defense proposed instruction limiting use of the 404(b) evidence to victim's state of mind only was filed on April 19, 2005. Appendix A. The defense proposed instruction limiting use of the 404(b) evidence to victim's state of mind **and credibility** was filed on April 21, 2005. Appendix B. The court gave the jury the latter instruction. CP 124, RP 562.

the law pertaining to an issue, however, does not constitute an impermissible comment on the evidence by the trial judge. See Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988).

In this case, defendant asserts that Instruction No. 5 constituted an improper judicial comment on the evidence. Again, that instruction reads:

Evidence has been introduced in this case on the subject of the defendant's prior bad acts for the limited purpose of the victim's state of mind and her credibility. You must not consider this evidence for any other purpose.

CP 124 (Instruction No. 5).

The challenged instruction did not convey the judge's personal opinion as to the credibility, sufficiency, or weight of the evidence; it simply instructed the jury on the law. The instruction is consistent with and is an accurate statement of the law. Moreover, the jury was instructed to disregard any comment on the evidence by the judge that it perceived during the course of the trial. CP 120 (Instruction No. 1).

Defendant's claim that the instruction was a comment on the evidence lacks merit. The instruction does not imply to the jury that trial testimony was not credible. In fact, the instruction does not refer specifically to trial testimony or out of court statements. Therefore, even if jury inferred that court was implying that Ms. Ray's statements were not

credible, the jury was not told which of two opposite versions was not credible.

The trial court properly instructed the jury on the narrow purpose for which the evidence could be considered and did so in a manner that did not convey the judge's personal opinion on the merits of the case.

The trial court properly found that the 404(b) evidence was admissible for the limited purpose of determining Ms. Ray's credibility and state of mind. See discussion above. Upon request, a trial court must "restrict the evidence to its proper scope and instruct the jury accordingly." ER 105. In this case, defendant requested a limiting instruction. CP 170-171, RP 553. Because the evidence was admitted, in part, to evaluate Ms. Ray's credibility, the court was required to so state in the instruction to the jury. ER 105. Defendant is precluded from now claiming he was prejudiced by a limiting instruction that he requested. The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 312, 979 P.2d 417 (1999). Defendant's claim fails.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING MS. RAY'S STATEMENTS TO POLICE AS EXCITED UTTERANCES WHEN MS. RAY WAS CRYING, OBVIOUSLY SCARED AND APPEARED TO BE "IN SHOCK".

An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2).

Three closely connected requirements must be satisfied for a hearsay statement to qualify as an excited utterance. First, a startling event or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement must relate to the startling event or condition. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

The key determination is "whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." State v. Strauss, 119 Wn.2d 401, 416-417, 832 P.2d 78 (1992)(quoting Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

The passage of time between the startling event and the declarant's statement is a factor to be considered in determining whether the statement

is an excited utterance. State v. Woodward, 32 Wn. App. 204, 206-07, 646 P.2d 135, review denied, 97 Wn.2d 1034 (1982). The passage of time alone, however, is not dispositive. State v. Thomas, 46 Wn. App. 280, 284, 730 P.2d 117 (1986)(trial court did not err in determining that statements made after a 6 to 7 hour time span qualified as excited utterances), affd, 110 Wn.2d 859, 757 P.2d 512 (1988); State v. Flett, 40 Wn. App. 277, 699 P.2d 774 (1985)(a statement made 7 hours after a rape was properly admitted as an excited utterance because of the declarant's "continuing stress" during that time period).

Moreover, an excited utterance may also be given in response to a general question, such as asking what happened. State v. Owens, 128 Wn.2d 908, 913, 913 P.2d 366 (1996). For instance, in State v. Strauss, 119 Wn.2d 401, 405-406, 832 P.2d 78 (1992), the defendant picked up a 17 year-old girl, took her back to his apartment where he repeatedly raped her at knifepoint. When the officer took the victim's statement, she was very distraught, very red in the face, crying, and appeared to be in a state of shock three and half-hours after the incident. Id. at 416. The court found that the victim was still under the influence of the incident when she made her statement to the police. Id.

A trial court's determination that a statement falls within the excited utterance exception will not be disturbed absent an abuse of discretion. State v. Thomas, 150 Wn.2d 821, 854, 83 P.3d 970 (2004). In this case, the prosecution sought to introduce, as excited utterances,

statements Ms. Ray made to Officer Lang, a Tacoma police officer. RP 411-12. Ms. Ray did testify at trial. RP 257. Defense counsel objected arguing the statements were impermissible hearsay. RP 427. After a hearing outside the presence of the jury, the court found that the statements qualified as excited utterances. RP 413-28.

The jury heard Officer Lang testify to the following out of court statements by Ms. Ray:

I mean, she was scared. Her eyes were huge. ... She kept looking behind her. ... Ray was very uneasy. Just her demeanor I know something was terribly wrong, so I had her and the child step outside.

RP 409. At that point, the jury was excused, and outside the presence of the jury, Officer Lang testified to the trial court as follows:

[Ms. Ray was t]errified, scared. ...[S]he's just staring straight ahead. She's crying. She's begging me. After she said, "Yes, he's in there," she's begging me not to tell him, Magers, that she's the one that told me that he was in there. ... RP 413

And then after that, she just started going in, "he's violent. He's going to hurt me. He's going to hurt me. Please don't tell him that I told you he's in there." ... RP 413

She was pretty monotone. She was just – the tears coming down. She wasn't hysterical. It looked like to me, her brain was kind of overloaded with what was going on, she was obviously scared and she was – just kept saying, over and over, "he's going to hurt me. He's going to hurt me. Don't tell him that I told you he was in there." She was just crying. Just the tears coming down. ... RP 413-414.

She was not really looking any place in particular... she's not really focused on anything... RP 414

She was just – just looked very confused. ... RP 414

[S]he was like shutting down, and it was very hard to get her focused on my questions, and it took a while. ... RP 415

It was just – like she was in shock, and it's almost like she's giving up. RP 417.

After argument by counsel, the trial court ruled Ms. Ray's statements were admissible as excited utterances. RP 428. In front of the jury, Officer Lang continued his testimony which was essentially the same as the offer of proof quoted above. RP 429-436. He told the jury how Ms. Ray was crying, staring off, unfocused, and that she appeared to be in shock and was giving up. Id. He said that she was obviously traumatized. RP 436.

Officer Morris also testified before the jury regarding Ms. Ray's demeanor. RP 536. He stated: "She seemed a little distraught. She seemed frightened and apprehensive." RP 538. While Ms. Ray was still inside the residence, Officer Morris asked her if she was okay. She said that she was. RP 539. After police had her step away from the residence, Officer Morris again asked her if she was okay. At that point she stated, "No," she wasn't okay". Id. She said she was upset. Id.

During pretrial motions and trial testimony, Ms. Ray recanted her statements to police that defendant had assaulted her. RP 269, 286, 354. Her testimony was equivocal at best on the issue of her demeanor when police arrived. RP 398. When asked what was her state of mind when

police arrived, she stated that she did not know. Id. When asked if she was scared, she stated that she did not know. Id. When asked if she was crying, she again stated that she did not know. Id. The trial court found her testimony “very inconsistent and not believable”. RP 428.

The trial did not abuse its discretion in finding that the statements were excited utterances. There was evidence that Ms. Ray made her statements to Officer Lang while she still under the influence of a startling event. The 9-1-1 call reporting this incident was made at 6:40 p.m. RP 457. Officer Lang arrived at the residence at 6:54 p.m. RP 406. His contact with Ms. Ray was approximately 12 minutes after that. RP 408.

Under Owens and Strauss, the fact that Ms. Ray’s statements were in response to Officer Lang asking her “What happened?” does not preclude her responses from being excited utterances. Officer Lang said that he attempted to get Ms. Ray to focus and tell him what happened, but said that it took a while. RP 415. As Ms. Ray spoke, her demeanor did not differ and she did not calm down. RP 416-417. She remained unfocussed, staring, and crying. Id. Even after defendant was arrested, her demeanor did not change. RP 417. There is nothing to indicate that Officer Lang engaged in detailed questioning. Ms. Ray’s statement was that defendant had held a sword to her neck, threatening to sever her head. RP 434, 438. Defendant also held her at the residence against her will. RP 443. She was still under the influence of this incident when police arrived. She could not say defendant was in the house until the police had

her safely outside, out of defendant's control. RP 410. This record supports the trial court's determination that Ms. Ray's statements to Officer Lang were properly characterized as excited utterances.

Defendant argues that Ms. Ray was not under the stress of the incident because she initially lied to police about whether defendant was inside the residence. Appellant's brief at 35-36. In support of this argument, defendant relies on State v. Brown, 127 Wn.2d 749, 903 P.2d 459 (1995). In Brown, the victim fabricated her report of the incident itself. She told police that her attacker had a knife during the rape, but later admitted that she never saw a knife. The Supreme Court reversed Brown's conviction because the trial court admitted the victim's report to police as an excited utterance. Id. at 759. The facts of Brown differ from the case at bar. In Brown, the evidence showed that the victim discussed with her boyfriend what she would tell police before she made the call and had decided on the fabrication at that point. Id. at 753. The Supreme Court reasoned that "she had the opportunity to, and did in fact, decide to fabricate a portion of her story" prior to calling police. Id. at 759.

Defendant's reliance on Brown is misplaced for two reasons. First, there was no evidence that Ms. Ray fabricated a portion of her story prior to police arrival as the victim did in Brown. Second, when Ms. Ray told police defendant was not in the residence, it was not an untruth on the merits of the incident itself. Rather, Ms. Ray, who had just had a sword held to her neck, responded to police on an instinctive level, that of self-

preservation. As soon as she was outside with police, where she was out of defendant's control, where defendant could not hear her, and she was safe, she told police that defendant was in the house. The defendant claims that this manifested an ability to "reflect and respond" and therefore precludes her statements from being excited utterances. Appellant's brief at 37. That Ms. Ray would not tell police defendant was there initially, actually goes to show how much she feared him and that her response likely came from an automatic avoidance of angering her abuser than from reflection or manipulating the situation. In contrast, the victim in Brown went home, and was well away from her attacker when she discussed with her boyfriend what to make up to tell police. Brown at 753. She was safe at that point. Ms. Ray was still in the residence with her attacker. Self-preservation dictates that a repeat victim of domestic violence would automatically protect the abuser to avoid retaliation in the future. See State v. Grant, 83 Wn. App. 98, 108 n.5 (quoting A. Ganley, PhD, *Domestic Violence: The What, Why and Who, as Relevant to Civil Court Domestic Violence Cases* (1992)).

Here, the trial court considered the Brown decision and rejected its applicability, properly finding that Ms. Ray's statements to police were excited utterances. RP 427-429. Defendant has failed to show an abuse of discretion on this determination.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING EVIDENCE OF DEFENDANT'S LIFE SENTENCE IF CONVICTED.

Defendant contends that the trial court erred in denying him the opportunity to tell the jury that he faced life imprisonment without the possibility of parole. Appellant's brief at 37. He argues that he has a constitutional right to present this evidence to the jury. Id. However, he cites no authority for the proposition that the jury should be allowed to hear what defendant's sentence would be, if convicted.

Appellate courts accord the trial court great deference in making discretionary evidence rulings. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). A court abuses its discretion when it bases a decision on untenable grounds or gives unreasonable reasons. Neal, 144 Wn.2d at 609.

The jury finds facts and it does not determine punishment. State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001); State v. Bunting, 115 Wn. App. 135, 138-39, 61 P.3d 375 (2003). Only in capital cases does the jury learn about sentencing options and then, only after determining the defendant's guilt. Townsend, 142 Wn.2d at 846; Bunting, 115 Wn. App. at 138-39. Defendant wanted to demonstrate that if Ms. Ray were truly afraid of defendant as theorized by the State, she would not lie to protect him, rather she would testify such that he would be convicted and thus imprisoned for life, whereupon she would be safe from him. RP

223. The trial court ruled that defendant could cross-examine Ms. Ray regarding her knowledge that defendant was facing a “lengthy sentence”. RP 224. This allowed defendant to pursue his theory of the case without violating the jury function. The trial court did not abuse its discretion and defendant’s argument fails.

5. ANY ERROR CLAIMED IN OFFICER LANG’S TESTIMONY WAS NOT PRESERVED FOR APPELLATE REVIEW. THE TESTIMONY DID NOT CONTAIN OPINION EVIDENCE AS TO DEFENDANT’S GUILT.

Defendant claims that Officer Lang’s testimony that Ms. Ray was “obviously traumatized” and that he could tell that “something was terribly wrong” amounted to “impermissible opinion testimony” that defendant was guilty of assault and unlawful imprisonment. Appellant’s brief at 41. No objection of this nature was made to the trial court.

In order to preserve an evidentiary challenge on appeal, a party must make a specific objection to the admission of the evidence before the trial court. ER 103. Failure to do so precludes appellate review. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). But if the error is a manifest error affecting a constitutional right, an appellate court may consider the issue for the first time on appeal. RAP 2.5(a)(3).

Opinion testimony is “based on one’s belief or idea rather than direct knowledge of facts at issue.” State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001)(quoting Black’s Law Dictionary at 1486 (7th

ed.1999)). Allowing a witness to opine as to the guilt of the defendant invades the exclusive province of the trier of fact and is an error of constitutional magnitude. State v. Demery, 144 Wn.2d at 760.

"[T]estimony that is not a **direct comment** on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993) [emphasis added]. Where a witness does not **expressly** state his belief regarding the guilt or veracity of another witness, there is no manifest constitutional error. State v. Jones, 71 Wn. App. 798, 813, 863 P.2d 85 (1993)(*relying on* State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989)) [emphasis added].

Officer Lang did not expressly state his belief that defendant was guilty, nor did he directly comment on defendant's guilt. Therefore, there was no manifest constitutional error. Because there was no objection at trial and the error was not manifest, any alleged error was not preserved for appellate review.

Defendant relies on State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994). In that case, the Court of Appeals found it was error for the State's expert to testify that the victim suffered from post-traumatic stress syndrome secondary to sexual abuse where defendants were charged with sex crimes against the child. Id. at 74. Such testimony, that the child had been sexually abused, was an ultimate fact for the jury alone to decide. Id.

However, the convictions in Florczak were affirmed because the Court of Appeals found the error harmless. Id. at 75.

It is important to note that in Florczak, testimony that the child victim had been “sexually abused” was impermissible because that was an ultimate issue for the jury to determine. To allow a witness to testify to it implies that defendant abused the victim. “Sexual abuse,” by itself, is a crime. However, being “traumatized” or having “something terribly wrong” could be the result of many things, not necessarily being the victim of a crime. Officer Lang did not assert that defendant was guilty, nor did he testify that he believed Ms. Ray. Therefore, this testimony could not be used by the jury as the officer’s opinion that defendant committed a crime.

In State v. Allen, 50 Wn. App. 412, 416, 749 P.2d 702 (1988), an officer testified that the defendant “appeared to be sobbing . . . [but] the lack of tears, the lack of any redness in her face did not look genuine or sincere.” The court held that this was not impermissible opinion testimony because the statement was “prefaced with a proper foundation: personal observations . . . that directly and logically supported his conclusion.” Id. at 418.

Here, Officer Lang had direct knowledge of the facts at issue. His testimony may have contained inferences or conclusions, however, they were supported by ample foundation: Crying, staring, unfocused,

monotone, repeating over and over defendant was violent, eyes huge, terrified.

Defendant's assumption that the jury would take this testimony as the officer's belief that defendant assaulted Ms. Ray is without merit. Officer Lang went on to testify that he "didn't know what was going on." RP 431. He did testify that judging by Ms. Ray's demeanor, something terrible had happened, but told the jury he didn't know if a crime had been committed or if the police even had grounds to enter the residence. RP 432. In other words, the officer observed Ms. Ray's demeanor, *before* she told him that defendant assaulted and unlawfully imprisoned her. Therefore, any prejudice would have been negated by the testimony of the officer that he didn't know if a crime had even been committed. Defendant's claim fails.

6. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN OPENING STATEMENT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 93 L.Ed.2d 599, 107 S. Ct. 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 did 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)).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The court will disturb the trial court's exercise of discretion only

when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Defendant first claims that the prosecutor committed misconduct by stating the elements of each offense in opening statement. Appellant's brief at 48. The prosecutor prefaced her comments by stating that she would only be giving the jury a "nutshell view" of the elements. RP 248. She twice told the jurors that at the end of the trial they would be receiving a "big packet of jury instructions" that would contain more definitions and more detail. RP 248, 250. Defendant has cited no case law in support of his claim that this was improper opening statement. Nor has he provided authority with his version of the proper definition of assault. The State is unable to respond to bald assertions and vague, unsupported argument.

Next, defendant complains that the prosecutor committed misconduct by telling the jury what defendant said to Ms. Ray during the assault. Appellant's brief at 48. Defendant overlooks the fact that trial counsel did not object to this statement and that the statement was ultimately admitted during the course of the trial. RP 443. Therefore, defendant has failed to show that the alleged misconduct prejudiced him, thus affecting the outcome of the trial.

7. THE PROSECUTOR DID NOT COMMIT
MISCONDUCT IN CLOSING ARGUMENT.

In closing argument, the deputy prosecutor asked the jury to consider how Ms. Ray could not get the facts of her post-incident story straight. RP 580. She stated:

Also consider the dynamics of domestic violence relationships, and this was spoken of in voir dire quite a bit. A number of you have experience with relationships involving domestic violence being a friend or family or yourself, some of you don't, but remember that as stated in voir dire the dynamics of domestic violence include—

RP 580-581. At that point, defense counsel objected. RP 581. The trial court sustained the objection. Id. Defense counsel did not request a curative instruction, presumably because the objection was made and sustained before the prosecutor stated what the “dynamics of domestic violence include”. RP 581. The prosecutor began again, stating:

Ask yourself, knowing what you know about domestic violence, whether or not the traits and dynamics of those types of relationships—

RP 581. Defense counsel again objected. The court decided to allow it when the deputy prosecutor stated she was not arguing specific theories.

Id. The prosecutor concluded her comments on this topic by stating,

Ask yourself if the case before you is an example of domestic violence relationships and the dynamics within them.

RP 581. The prosecutor did not “testify” or impart any information on domestic violence to the jury. Nor did she present any evidence that the

defense was unable to confront. She was merely asking the jury to use their common experience in evaluating Ms. Ray's testimony.

Defense counsel did not request a curative instruction, nor did she move for a mistrial at the time of the objection or at the end of the trial.

On this topic, the Washington Supreme Court has stated:

We have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting there from so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection **and request a curative instruction**. Thus, in order for an appellate court to consider an alleged error in the State's closing argument, the defendant must ordinarily move for a mistrial or request a curative instruction. **The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial** to an appellant in the context of the trial. Moreover, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal."

State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)(citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960); State v. Atkinson, 19 Wn. App. 107, 111, 575 P.2d 240, review denied, 90 Wn.2d 1013 (1978))
[footnotes omitted] [emphasis added].

The absence of a motion for mistrial and lack of request for curative instruction, coupled with fact that no information was imparted on domestic violence by the prosecutor, demonstrate that defendant was not prejudiced by any alleged misconduct in closing argument.

8. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR
DOCTRINE.

Under the cumulative error doctrine, a defendant may be entitled to a new trial or reversal where errors cumulatively produced a trial that is fundamentally unfair. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). This doctrine is employed where “the combined effect of an accumulation of errors ... may well require a new trial.” State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963). The defendant bears the burden of proving an accumulation of errors of sufficient magnitude that retrial is necessary. Lord, 123 Wn.2d at 332. Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). As argued above, there was no error in the proceedings below. Assuming, arguendo, that error occurred, it was not of such magnitude as to warrant a retrial or reversal. Defendants’ claims under the cumulative error doctrine thus fail.

9. BLAKELY DOES NOT APPLY TO
SENTENCING UNDER THE PERSISTENT
OFFENDER ACCOUNTABILITY ACT.

Defendant asserts he is entitled to relief from his life sentence under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004). However, Blakely does not apply to sentencing under the

Persistent Offender Accountability Act (POAA). State v. Ball, 127 Wn. App. 956, 959, 113 P.3d 520 (2005). The holding in Blakely is specifically directed at exceptional sentences under RCW 9.94A.535. Id. See also State v. Wheeler, 145 Wn.2d 116, 124, 34 P.3d 799 (2001), cert. denied, 535 U.S. 996, 152 L.ed.2d 482, 122 S. Ct. 1559, cert. denied sub nom. Sanford v. Wash., 535 U.S. 1037, 152 L.ed.2d 654, 122 S. Ct. 1796 (2002). Here, as in Ball, defendant was not given an exceptional sentence, therefore his argument is without merit.

10. DEFENDANT'S LIFE SENTENCE IS NOT
CRUEL AND UNUSUAL PUNISHMENT.

Defendant contends that his sentence of life in prison without parole is cruel and unusual punishment in violation of the federal and Washington constitutions. Appellant's brief at 55.

Washington courts review four factors in deciding whether a defendant's punishment is cruel: (1) the nature of the offense; (2) the legislative purpose behind the habitual criminal statute; (3) the punishment defendant would have received in other jurisdictions for the same offense; and (4) the punishment meted out for other offenses in the same jurisdiction. State v. Fain, 94 Wn.2d 387, 397, 617 P.2d 720 (1980). No one factor is dispositive. State v. Gimarelli, 105 Wn. App. 370, 380-81, 20 P.3d 430 (2001). The Washington constitutional provision barring cruel punishment provides more protection than the federal constitution.

State v. Thorne, 129 Wn.2d 736, 772, 921 P.2d 514 (1996). Thus, a finding that defendant's sentence passes muster under the Washington provision negates the need for a federal constitutional analysis. Id. at 129.

Under the first prong, the court must consider the nature of the offense. State v. Fain, 94 Wn.2d at 397. Under this prong, courts consider whether the crime was violent and whether it was committed against a person. State v. Gimarelli, 105 Wn. App. at 381. Second degree assault is a violent offense. RCW 9.94A.030(45)(a)(viii). Defendant's crime was a crime against a person, Ms. Ray. The first prong is satisfied.

Under the second prong, the court must consider the purpose of the POAA. State v. Fain, 94 Wn.2d at 397. The purposes of the POAA include the improvement of public safety and the reduction of serious repeat offenders. Thorne, 129 Wn.2d at 765-66; RCW 9.94A.555. Defendant has now committed four offenses² that are classified as "violent offenses" under RCW 9.94A.030(45)(a)(viii), which are also "most serious offenses" (or "strike" offenses) under RCW 9.94A.030(28)(b). This last incident involved domestic violence with two young children present in the home at the time of the crimes. Defendant armed himself with a sword, a deadly weapon and threatened to cut off Ms. Ray's head. At the time of the incident, defendant was the subject of a no contact order

² Defendant has prior convictions for first degree burglary, sentenced on July 20, 1998; second degree assault, two counts, sentenced on November 16, 2000; and the current second degree assault. CP 154 (Judgment and Sentence, page 2).

prohibiting contact with Ms. Ray, which he violated, demonstrating his contempt for the court's orders and the law. He had recently been released from jail on a prior domestic violence incident against the same victim. Therefore, his sentence is in accord with improvement of public safety and reduction of serious repeat offenders. The second prong is satisfied.

Under the third prong, the court looks at the sentence defendant would have received in other jurisdictions. State v. Fain, 94 Wn.2d at 397. Defendant has not claimed any disparity under this prong and this prong alone is not dispositive. See State v. Gimarelli, 105 Wn. App. at 381-82; State v. Morin, 100 Wn. App. 25, 32-34, 995 P.2d 113 (2000).

Washington courts have upheld the life sentence in "two strikes" cases while recognizing the harshness of Washington's law. Id. Defendant's sentence is not as harsh as a sex offender who falls under the "two strikes" law because he was afforded three "strikes" instead of just two. The third prong is met.

Under the fourth prong, the court reviews the punishment meted out for other offenses in the same jurisdiction. State v. Fain, 94 Wn.2d at 397. Defendant argues that his sentence is cruel because most felonies are "more serious" than assault in the second degree. Appellant's brief at 55. This is without merit. A Class C felony, even a level I offense, is a strike if the perpetrator was armed with a deadly weapon at the time of the

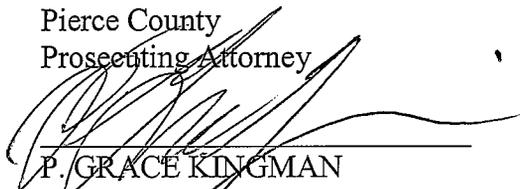
offense. RCW 9.94A.030(28)(t). Thus, contrary to defendant's assertion, there are many felonies that are less serious than second degree assault that could result in the same sentence if there are at least two prior strike convictions. The fourth factor is met. Thus, defendant's sentence is not cruel under the Washington constitution, and need not be analyzed under the federal constitution.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence.

DATED: January 9, 2006.

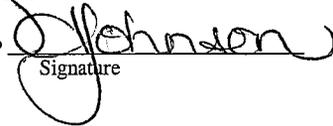
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Deputy Prosecuting Attorney
WSB # 16717

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.

1/10/06 
Date Signature

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DIVISION II
06 JAN 10 PM 2:15
STATE OF WASHINGTON
BY 
DEPUTY

APPENDIX “A”

Additional Defense Proposed Instruction

04-1-00246-1



04-1-00246-1 22935614 INS 04-26-05

INSTRUCTION NO. _____

Additional proposed instructions

Evidence has been introduced in this case on the subject of the defendant's prior bad acts for the limited purpose of the victim's state of mind. You must not consider this evidence for any other purpose.



APPENDIX “B”

Defense Additional Jury Instruction

15138 4/26/05 04-1-00246-1

Defense
additimal Jury Instruction



04-1-00246-1 22935648 INS 04-26-05

INSTRUCTION NO. _____

Evidence has been introduced in this case on the subject of the defendant's prior bad acts for the limited purpose of the victim's state of mind and her credibility. You must not consider this evidence for any other purpose.

