

61728-1

61728-1

NO. 61728-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JIMMIE YORK,

Appellant.

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2009 JUN 11 PM 3:37

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHRISTOPHER WASHINGTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANDREA R. VITALICH
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. In any prosecution for a threatening language crime such as felony harassment, the defendant's threat must be a "true threat." Under this Court's decision in State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007), the jury should be given a definitional instruction that explains what constitutes a "true threat.," but this definition need not be in the "to convict" instruction. In this case, York argues that the trial court erred by not putting the definition of a "true threat" in the "to convict" instruction, although the court gave two separate instructions defining a "true threat." Should York's claim be rejected under Tellez?

2. A defendant has the right to a unanimous verdict as to the act charged in the information. If the evidence proves multiple acts that may support a conviction, either the court must instruct the jury to be unanimous as to the act forming the basis for conviction, or the prosecutor must make an election as to the act relied upon for conviction. However, if only one act supports the crime charged, no unanimity issue arises. In this case, York argues that multiple acts could have supported his conviction for felony harassment, and that there was no unanimity instruction or election.

But the evidence in this case proved only one act that could have supported a conviction. Should York's unanimity claim be rejected?

3. A defendant who claims that prosecutorial misconduct deprived him or her of a fair trial must show both improper conduct and prejudice resulting from that improper conduct. In this case, York claims that the prosecutor committed misconduct by eliciting testimony from a witness that York was facing his "third strike." But the remarks in question were made by York himself when he was threatening the witness. These comments were relevant and probative of the witness's fear of and intimidation by York, which were elements of two of the crimes charged. Moreover, York was acquitted of these two crimes. Should York's claim be rejected because he has failed to show either misconduct or prejudice?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Jimmie York, was charged with the following crimes as a result of a series of events that occurred on December 2, 2007, and as a result of his contact with one of the victims following his arrest:

Count I: Domestic Violence Felony Violation of a Court Order (victim Lashae Hawkins);

Count II: Felony Harassment - Domestic Violence, with a deadly weapon allegation (victim Lashae Hawkins);

Count III: Unlawful Possession of a Firearm in the First Degree;

Count IV: Felony Harassment, with a firearm allegation (victim Eric Peoples);¹

Count V: Tampering with a Witness (victim Lashae Hawkins);

Count VI: Domestic Violence Felony Violation of a Court Order (victim Lashae Hawkins);

Count VII: Unlawful Imprisonment, with a firearm allegation (victim Eric Peoples).

CP 1-7, 71-72.

York's jury trial on these charges occurred in March 2008 before the Honorable Christopher Washington. At the conclusion of the trial, the jury convicted York of counts I, II and III as charged, and returned a special verdict that York was armed with a deadly weapon during the commission of count II. CP 18-22, 25. The jury acquitted York of counts IV, V, VI and VII. CP 23-26.

¹ Based on the evidence produced at trial, the jury was ultimately instructed on the lesser crime of harassment rather than felony harassment with a firearm allegation as to count IV. CP 55-56.

York received a standard-range sentence totaling 95 months in prison. CP 77-85; RP (5/16/08) 23-24. York now appeals. CP 75-76.

2. SUBSTANTIVE FACTS

York and Lashae Hawkins began dating in 2005 and had a child in 2006. RP (3/11/08) 6-8, 48. The relationship was rocky, and York was very abusive. RP (3/11/08) 8, 36-37. In fact, as of December 2007, there were two court orders prohibiting York from contacting Hawkins; nonetheless, their relationship continued. RP (3/11/08) 9-10.

On December 2, 2007, York and Hawkins were staying at the south Seattle home of Melissa Hubbard, a family friend of Hawkins's. RP (3/11/08) 11-12. Also in the home were Hubbard's daughters Nicole (age 26) and Mikala (age 14), Hubbard's son Cody (age 13), and Nicole's son Michael (age 2). RP (3/11/08) 12-13, 93. Hubbard's friend Eric Peoples was visiting as well. RP (3/11/08) 115.

That evening, Nicole decided to walk to the store and invited Lashae Hawkins to come with her. York was sleeping on the couch. Hawkins woke him up to tell him she was going to the store with Nicole. RP (3/11/09) 14-15. This made York angry for some

reason, so he began following Nicole and Hawkins as they walked down the street. RP (3/11/08) 14-15. When York caught up to them, he tried to hit Hawkins and she fell down. York said, "bitch, you're not going nowhere. I'll hurt you. You're playing with me." York then dragged Hawkins back toward Hubbard's house and banged Hawkins's head against a parked car along the way. RP (3/11/08) 16-17.

Nicole ran back into the house and told Hubbard what York was doing. Hubbard told Eric Peoples to go get her neighbor, Melvin Talley, who is also Lashae Hawkins's cousin. RP (3/11/08) 99. As soon as Peoples left, however, Talley drove up in front of the house, so Hubbard flagged him down. RP (3/11/08) 99-100. Nicole and Hawkins walked up to the car, and Hawkins told Talley that she was afraid. RP (3/11/08) 72.

Talley told Hawkins to get in the car, but Hawkins initially refused. Talley said, "get in the car, girl." RP (3/11/08) 73. When Hawkins then told York she was leaving with her cousin, York said, "bitch, you're not going nowhere." York threw Hawkins to the

ground. He stood over her, pulled out a pocket knife,² pointed it at her, and said, "girl, I'll kill you." RP (3/11/08) 27-39, 74-75.

Talley got out of his car and was planning to punch York; however, when Talley saw that York had a knife, Talley went to the trunk of his car and retrieved a golf club. RP (3/11/08) 76. Hawkins got off the ground at that point and ran away. York chased her around the house a couple of times, and then turned his attention back to Talley. RP (3/11/08) 76-79. Talley and York had a brief stand-off in the street, holding their respective weapons. RP (3/11/08) 80. Talley then decided to get back in his car, so he started moving toward the driver's door. RP (3/11/08) 80. York told Talley that he had a gun. York then threw the knife down and challenged Talley to fight. Talley took that opportunity to get in his car and drive away. RP (3/11/08) 81-82.

In the meantime, Lashae Hawkins ran to Talley's house and Talley's wife, Saluom Yoeun, let her in. RP (3/11/08) 33-34. Shortly thereafter, York came to the front door and pounded on it, yelling, "tell that bitch to come out. I'm going to kill her. Tell that bitch to come out." He also said, "if you put me in jail you're not

² The pocket knife was also described as a box cutter. RP (3/11/08) 129.

going to see your daughter again." RP (3/11/08) 34, 52. Yoeun did not open the door. RP (3/11/08) 34. Just then, Melvin Talley pulled up in his car. York walked up to the car and started pounding on the hood. RP (3/11/08) 53. Talley noted that York was carrying a camouflage backpack. York told Talley, "now I'm ready for you," and said that he had a gun. RP (3/11/08) 84-86. Talley drove to the store and called the police. RP (3/11/08) 86.

York went back to Hubbard's house and walked inside, where he encountered Eric Peoples. York was "very, very upset[.]" RP (3/11/08) 125. York and Peoples then saw that the police had arrived. York told Peoples that he had a gun; he opened the camouflage backpack and showed the gun to Peoples. RP (3/11/08) 128-29. Peoples told York he had to leave because there were children in the house, but York refused to leave. RP (3/11/08) 128, 131.

The police surrounded the house and ordered everyone to come outside. RP (3/11/08) 131. York told Peoples not to open the door, and said, "I'm going to hurt somebody." RP (3/11/08) 132. York also told Peoples that he was facing a "third strike," and that he "didn't care, you know, what happened[.]" RP (3/11/08) 133. York said that he was going to "smoke everybody," and that

he was going to "take that bitch out." RP (3/11/08) 139-40. After several minutes of trying to reason with York, Peoples finally told him, "you do what you got to do, but I'm opening up this door[.]" Peoples then walked out of the front door with the children and surrendered to the police. RP (3/11/08) 134.

York tried to escape via the back door, but two officers were stationed in the back yard, and they took York into custody. RP (3/12/08) 75-77. The arresting officers found the pocket knife or box cutter in York's pants pocket. RP (3/12/08) 78. Other officers performed a protective sweep of the house and located York's camouflage backpack in a kitchen cabinet. RP (3/12/08) 65. The backpack contained a Ruger .22 revolver with two rounds loaded in the cylinder. RP (3/12/08) 65-66.

On the way to the precinct, York told the arresting officers that they should arrest Lashae Hawkins because "she was making a false report." RP (3/12/08) 80. At the precinct, a detective asked York what had happened to his backpack. In response, York said, "You didn't get me with a gun or a knife," and he claimed that he didn't have a backpack. RP (3/12/08) 135. York also claimed he had found a box cutter in a yard. RP (3/12/08) 134. York

acknowledged that he was aware of a court order prohibiting contact with Hawkins. RP (3/12/08) 133.

After York was arrested and charged with these crimes, another court order was issued prohibiting him from having contact with Lashae Hawkins. RP (3/12/08) 108-13. Nevertheless, a day or two after Christmas 2007, York called Hawkins and told her he would pay her \$1000 to say he "didn't do it." RP (3/11/08) 37-38. Hawkins refused, and hung up on him. RP (3/11/08) 38.

At trial, York stipulated that he had a prior conviction for violating a protective order and at least two prior convictions for violating a no-contact order for purposes of counts I, II, and VI (two counts of felony violation of a court order and felony harassment). York further stipulated that he had been convicted of a serious offense for purposes of count III (first-degree unlawful possession of a firearm). CP 28.

York also testified at trial. He claimed that he did not assault or threaten Lashae Hawkins, that the camouflage backpack did not belong to him, and that he pulled his pocket knife solely to protect himself from Melvin Talley, who was assaulting him with the golf

club at the time.³ RP (3/13/08) 35-43. He also denied calling Hawkins and offering her money to lie for him. RP (3/13/08) 58. He admitted that he knew about the court orders prohibiting him from having contact with Hawkins. RP (3/13/08) 60-62.

C. **ARGUMENT**

1. **YORK'S CLAIM THAT THE DEFINITION OF A "TRUE THREAT" IS AN ESSENTIAL ELEMENT OF FELONY HARASSMENT IS CONTROLLED BY THIS COURT'S DECISION IN STATE V. TELLEZ.**

York first claims that the "to convict" instruction for felony harassment as charged in count II did not include all of the essential elements of the crime as required. More specifically, York contends that the definition of a "true threat" must be included in the "to convict" instruction. Brief of Appellant, at 5-13. But as York acknowledges, this claim is directly controlled, and defeated, by this Court's decision in State v. Tellez, 141 Wn. App. 479, 170 P.3d 75 (2007). Accordingly, York's claim should be rejected.

In Tellez, the defendant was convicted of felony telephone harassment based on a threat to kill his girlfriend. For the first time on appeal, the defendant made the same claim that York makes

³ York did not continue to try to claim that he'd found the pocket knife in a yard, as he had told the detectives. RP (3/12/08) 134.

here: that the definition of a "true threat" is an essential element of the crime that must be included in the "to convict" instruction.

Tellez, 141 Wn. App. at 481. As in this case, the jury in Tellez was given a separate instruction that defined a "true threat" as "a statement made in a context or under such circumstances where a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to carry out the threat." Id. at 482.⁴

This Court held, in accordance with State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006), that although the jury must be instructed as to what constitutes a "true threat" in order to protect the defendant's First Amendment rights in any case involving an offense that criminalizes threatening language, "the true threat concept itself is not an essential element" of such threatening language crimes. Id. at 483-84. Therefore, giving a separate definitional instruction informing the jury of what constitutes a "true threat" is sufficient; the definition need not be in the "to convict"

⁴ In this case, the jury was actually given two separate instructions that included the definition of a "true threat" for purposes felony harassment as charged in count II. Both of these instructions stated that, "[t]o be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat." CP 47, 49.

instruction. Id. Further, the Court observed in a footnote that the failure to include "true threat" language in the "to convict" instruction was harmless in any event because "it is clear beyond a reasonable doubt that the jury would have found that Tellez made a true threat based on the facts of the case and the definitional instruction provided." Tellez, 141 Wn. App. at 484 n.11.

In this case, the jury was instructed - twice - on the definition of a "true threat" for purposes of felony harassment as charged in count II. CP 47, 49. Moreover, given the trial court's instructions to the jury and the evidence presented, there is no reasonable possibility that the jury did not convict York based on anything other than a "true threat" against Lashae Hawkins.⁵ Therefore, under Tellez, York's claim is without merit and this Court should affirm his conviction for felony harassment as charged in count II.

⁵ As will be discussed further below, count II was based on the evidence that York pushed Hawkins to the ground, stood over her, pulled a pocket knife or box cutter, pointed it at her, and threatened to kill her. RP (3/11/08) 26-29. It is difficult to imagine how a reasonable person would not interpret this as a "true threat" under the circumstances.

2. NO UNANIMITY INSTRUCTION WAS REQUIRED FOR FELONY HARASSMENT BECAUSE ONLY ONE ACT FORMED THE BASIS FOR THIS CHARGE.

York next claims that his right to a unanimous jury was violated because the trial court did not give a unanimity instruction regarding felony harassment as charged in count II. York contends that multiple acts could have supported this charge, and that the trial prosecutor failed to make an election as to the act relied upon for the conviction. Brief of Appellant, at 13-18. This claim should be rejected. The evidence presented at trial established only one act upon which count II and its corresponding deadly weapon enhancement could have been based. Moreover, given that only one act formed the basis for count II, the prosecutor explicitly told the jury to find York guilty based on that act. York's claim is without merit, and this Court should affirm.

A criminal defendant has the right to a unanimous jury verdict as to the act charged in the information. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Accordingly, when the defendant has committed multiple acts that may serve as the basis for the charged offense, the trial court can ensure unanimity by instructing the jurors that they must agree on a specific act as the

basis for a conviction. This is known as a "Petrich instruction." See State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

Alternatively, the State may elect a single act to rely upon as the basis for the defendant's conviction. This ensures unanimity as well. State v. Bland, 71 Wn. App. 345, 351-52, 860 P.2d 1046 (1993).

But if the evidence produced at trial "proves only one violation, then no Petrich instruction is required, for a general verdict will necessarily reflect unanimous agreement that the one violation occurred." State v. Hanson, 59 Wn. App. 651, 657, 800 P.2d 1124 (1990). To determine whether the evidence supports multiple violations or only one, courts must examine the required proof under the applicable statute in light of the evidence presented. Id. at 656-58. When this analysis reveals that the jury could have found only one violation beyond a reasonable doubt, neither a Petrich instruction nor an election is unnecessary. See, e.g., State v. Jones, 71 Wn. App. 798, 822-23, 863 P.2d 85 (1993), rev. denied, 124 Wn.2d 1018 (1994) (no Petrich instruction needed because "we do not believe that there was sufficient evidence to go to the jury with respect to the other acts -- the evidence was simply not sufficiently substantial to raise this matter to a multiple acts

case"); State v. Handyside, 42 Wn. App. 412, 415-16, 711 P.2d 379 (1985) (no unanimity issue presented "because there was only one incident described in the evidence which the jury could have found beyond a reasonable doubt"). Such is the case here.

As charged in count II, the State accused York of committing domestic violence felony harassment by threatening to cause bodily injury to Lashae Hawkins while having been previously convicted of violating a no-contact order protecting Hawkins. In addition, the State alleged for purposes of a sentencing enhancement that York was armed with a deadly weapon during the commission of this crime, "to wit: a knife or box cutter[.]" CP 70. The evidence produced at trial established only one act that could have satisfied the elements of count II as charged: when Hawkins told York she was leaving in Melvin Talley's car, he pushed her down, took the knife or box cutter out of his pocket, pointed it at her, and threatened to kill her. RP (3/11/08) 26-29, 36-37, 62-64, 73-76. The trial prosecutor explained to the jurors in closing argument that this act was the basis upon which the jurors should return a guilty verdict and a special verdict for count II in accordance with their instructions. RP (3/17/08) 11-17; CP 47-50, 67. The jury returned

unanimous verdicts as to guilt and the deadly weapon allegation.

CP 20-21.

Based on this record, there is no possibility that the jury based its general verdict and special verdict for count II on any act other than York threatening to kill Lashae Hawkins while armed with the pocket knife or box cutter after he pushed her down in the street. Therefore, no Petrich instruction or election was required. In short, this simply is not a multiple acts case.

Nonetheless, York suggests that the jury could have found him guilty of felony harassment based on multiple acts. Specifically, York points to testimony from Hawkins that York tried to slap her when she initially told him she was going to the store, and that York pushed her to the ground prior to the incident with the pocket knife. Brief of Appellant, at 15. But the acts York describes in his brief are assaults,⁶ not harassment as defined by statute, and neither of these acts involved a deadly weapon. Therefore, the jury could not have convicted York of count II based on the acts he

⁶ As York notes, the jury was given a Petrich instruction regarding the assault underlying York's conviction for domestic violence felony violation of a court order as charged in count I because there were multiple acts constituting an assault. CP 66.

describes. Moreover, although there were other points during the incident where York made threats, York was not armed with a deadly weapon at those times. In sum, there was no other act upon which the jury's verdict could have been based.

In addition, York suggests that this case presents an issue of unanimity because he contends that Hawkins was not a credible witness, and her "testimony was not entirely believable or believed by the jury." Brief of Appellant, at 15. But whether the jury believed or disbelieved some of Hawkins's testimony has no bearing on whether Hawkins's testimony established multiple acts constituting felony harassment while armed with a deadly weapon. These arguments are without merit.

Finally, York contends that the prosecutor "did not unambiguously elect any particular threat that must serve as the basis of felony harassment." Brief of Appellant, at 16. This argument fails as well. First, and most obviously, there was no need for an election because there was only one act that could have constituted the crime as charged in count II. But furthermore, York's argument belies the record, wherein the prosecutor made it abundantly clear to the jury, based on the evidence and the court's instructions, that York should be convicted based on the act of

pointing the pocket knife at Hawkins and threatening to kill her as he stood over her in the street. RP (3/17/08) 12-14. The prosecutor further explained that the special verdict for count II was based on the pocket knife or box cutter that York pointed at Hawkins while threatening to kill her. RP (3/17/08) 16-17. These arguments were consistent with the charging document alleging the crime, the court's instructions defining the crime, and the evidence supporting a conviction for the crime. See State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) (noting that an election should be based on "the evidence, jury instructions, and closing argument" as well as the charging document). Thus, even if an election had been necessary in this case, the prosecutor clearly made one.

In sum, the record makes it abundantly clear that only one act formed the basis for the jury's guilty verdict and special verdict for felony harassment with a deadly weapon enhancement as charged in count II. York's right to a unanimous jury was ensured, and therefore, this Court should affirm.

3. **THERE WAS NO PROSECUTORIAL MISCONDUCT BECAUSE THE "THREE STRIKES" COMMENTS TESTIFIED TO BY ERIC PEOPLES WERE YORK'S OWN STATEMENTS, WHICH WERE PROBATIVE EVIDENCE OF PEOPLES'S FEAR OF YORK.**

Lastly, York claims that the trial prosecutor committed flagrant and ill-intentioned misconduct by eliciting testimony from Eric Peoples that York was facing life in prison for a "third strike" offense. He claims this testimony was inadmissible, untrue,⁷ unfairly prejudicial, and was emphasized by the prosecutor in order to improperly obtain a conviction based on York's criminal history and prior bad acts. Brief of Appellant, at 18-27. York's claim should be rejected because he cannot meet his burden of showing either misconduct or prejudice.

Peoples's testimony regarding a "third strike" concerned comments that York himself had made in an effort to prevent Peoples from opening the door and surrendering to the police. As such, these remarks were relevant and probative evidence of Peoples's fear of and intimidation by York for purposes of the crimes of harassment and unlawful imprisonment as charged in counts IV and VII. Therefore, this testimony was not improper, as

⁷ The State agrees that York was not actually facing a third strike in this case.

is further evidenced by York's failure to object at trial. Furthermore, the jury acquitted York of counts IV and VI, York's remarks regarding "three strikes" notwithstanding. As a result, York cannot demonstrate prejudice resulting from Peoples's testimony because the testimony had no discernible impact on the outcome of the trial. Accordingly, this Court should affirm.

A defendant who claims that prosecutorial misconduct has deprived him or her of a fair trial bears the burden of showing both the impropriety of the prosecutor's conduct and its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). The propriety of the challenged conduct must be considered in the context of the record as a whole, the issues in the case, the evidence presented, and the instructions given. State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). Moreover, in order to demonstrate prejudice, the defendant must show a substantial likelihood that the misconduct affected the jury's verdict. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

In addition, the defendant's failure to object to alleged misconduct at trial constitutes a waiver of such claims on appeal unless the defendant demonstrates that the conduct at issue is so "flagrant and ill-intentioned" and resulted in such enduring prejudice

that it could not have been ameliorated by a curative instruction to the jury. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Moreover, a defendant's failure to object at trial indicates that the challenged conduct did not seem critically prejudicial to the defendant at the time. See State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

In this case, York claims that the prosecutor committed misconduct during her direct examination of Eric Peoples by purposefully eliciting testimony that York was facing a third strike. These three remarks by Peoples occurred when the prosecutor was attempting to get Peoples to describe exactly what York was saying and doing after he realized the police were outside, and when she was attempting to elicit Peoples's testimony regarding his own state of mind. The first instance occurred as follows:

Q: What did [York] say when he pulled [the gun] out?

A: He said, I got a gun on me. I got a gun on me. I said, you need to leave. You need to leave. There's kids in the house. You need to go. You need to go. You just need to go. He said, I'll hurt somebody. I'll hurt somebody.

Q: Who did he talk about hurting?

A: I can't really say. He just say that. Those are the words he said, you know what I mean?

Q: And he showed you the gun?

A: Yes.

Q: What was he saying specifically, I have got a gun?

A: Yeah, once he found out that the police was out there -- *he is talking about he is on his third strike*. He got a strap on him. I said, man, you need to leave right now. You need to go. There's kids in here. You need to go.

Q: Did he ever talk about using a gun on anybody?

A: I can't recollect that. I can't actually -- I really can't say.

Q: What happened then? Did he leave?.

A: No, he wouldn't go. He wouldn't leave.

RP (3/11/08) 129-30 (emphasis supplied).

The second instance occurred as the prosecutor continued to try to ascertain Peoples's state of mind and the reasons why he did not open the door and leave the house immediately when the police announced their presence outside:

Q: Did you want to leave?

A: Yeah, I wanted to go. I wanted to take the kids and go on out of the house, you know.

Q: But you didn't?

A: No, I didn't. He said, don't open the door, man. I'm not playing. Don't open the door.

Q: You didn't leave because he said that?

A: Yeah.

Q: Did it make a difference to you that you had seen him with a gun?

A: It made a whole lot of difference. *He is somebody that is looking at his third strike.* He didn't care, you know, what happened, you know what I'm saying. Actually I wasn't scared for me. I was scared for the kids because I had him calmed down. I mean, I mean, I mean I had him calmed down. I had him very calmed down to where, you know, in my mind he was calmed down.

Q: Well, when was that because so far you've described to the jury that he was very, very, very upset?

A: Yeah. Yeah, I mean in my mind he was, he was upset, but I was calming him down, you know what I mean.

Q: When was that?

A: Until the police came.

Q: He got upset again when he saw the police?

A: Yeah, he was scared and he was upset, you know what I mean, and he didn't want that door to open.

RP (3/11/08) 133-34 (emphasis supplied).

The third instance occurred when the prosecutor continued to try to elicit testimony from Peoples regarding threats that York was making against the witnesses involved in this case:

Q: If Mel [Talley] had been standing there would you have been worried that [York] would have killed him?

A: Actually, yeah. Word of mouth or reputation.

[Defense counsel] MR. JENSEN: Actually, I'd object to it. It's not part of the fact pattern. It's speculation as far as interjecting a situation that never happened in this case.

THE COURT: Overruled. Get to the witness's state of mind at the time.

Q: (BY [prosecutor] MS. BERLINER) Do you recall him saying I'll take that bitch out?

A: I heard that word, yeah.

Q: Who was he talking about?

A: I don't know who he was talking about. He said I'll take that bitch out.

Q: And was that about the same time?

A: Yeah, all that was during the same time. That was when I was trying to calm him down and tell him it ain't necessary. Just go, you know.

Q: Do you recall him saying he would smoke everybody, he didn't care about anything, when you were trying to leave?

A: Yeah, *because of the strike that he had on him. He told me this is his third strike. He can go to jail for life.* He's not playing. I'm not playing, you know. I'm not playing. There was a lot of words said. A lot of words was said.

Q: When you tried to leave did he say he would smoke everybody?

A: To be honest I can't remember that. I really don't remember that. I remember him saying, don't open the door, Eric. Don't open the door. I'm not playing. I remember that clearly. That I remember very clearly. I'm not playing, I'm not playing, I'm not playing. I said, man, there's kids in this house. There's kids in here. Man, you need to go.

RP (3/11/08) 139-40 (emphasis supplied).

Examining Peoples's testimony in context, as this Court must, it is apparent that no flagrant and ill-intentioned misconduct occurred. First, it is important to note that there was no objection in any of the three instances in which Peoples testified to York's comments regarding a "third strike," although defense counsel *did* object to a different portion of Peoples's testimony on grounds of speculation. Moreover, defense counsel did not make a motion to strike or a motion for a mistrial, and did not request any curative instructions based on these remarks. This strongly indicates that York's trial counsel found nothing improper or unfairly prejudicial about the challenged testimony at the time. It also suggests either that the testimony was not a surprise, and/or that defense counsel decided to let it stand for strategic reasons.⁸ Furthermore, contrary

⁸ Notably, York has not alleged that his counsel was ineffective for failing to object or take any further action with respect to Peoples's testimony.

to what York claims in his brief, the record shows that the prosecutor did not emphasize these remarks, but merely continued with her questioning. In fact, given that Peoples was a difficult witness who often gave nonresponsive and internally contradictory answers to the questions he was asked, there is no indication in the record as to whether these remarks were deliberately elicited. The prosecutor also did not mention these remarks in her closing or rebuttal arguments. RP (11/17/08) 4-35, 50-58.

But more importantly, York's remarks to Peoples that he was facing a "third strike" constituted relevant and probative evidence of necessary elements of two of the crimes charged. Specifically, York's threatening statements were evidence of the basis for Peoples's reasonable fear of injury for purposes of harassment as charged in count IV, and of York's intimidation of Peoples for purposes of unlawful imprisonment as charged in count VII. CP 56, 61. Although Peoples's testimony was contradictory and unclear on many things, Peoples was clear that he believed York was "not playing" when he told Peoples not to open the door for the police. And one of the reasons Peoples believed York was "not playing" were York's statements that he thought he would facing life in prison for a "third strike" if the police apprehended him. These

statements by York, along with the gun and other threatening remarks and behavior, were admissible to show that Peoples's fear of injury was reasonable, and that he was restrained from leaving the house due to intimidation. In sum, because York's remarks regarding a "third strike" were admissible, York cannot show that eliciting these remarks was misconduct, "flagrant and ill-intentioned" or otherwise.

In addition, York cannot meet his burden of showing prejudice resulting from Peoples's testimony. As noted above, in order to show prejudice, York must demonstrate a substantial likelihood that the challenged conduct affected the outcome of the trial. Brown, 132 Wn.2d at 561. But the jury acquitted York of harassment and unlawful imprisonment against Eric Peoples as charged in counts IV and VII. CP 23, 26. In fact, the jury acquitted York of violation of a court order and tampering with a witness against Lashae Hawkins as charged in counts V and VI as well. CP 24-25. If the jury had been unfairly prejudiced against York due to his criminal history and prior bad acts as he contends, the jury would not have acquitted him of these crimes. Therefore, the record demonstrates that the jury's verdicts were not affected by the challenged testimony, and thus, York's claim fails.

Nonetheless, York argues that Peoples's testimony was prejudicial, citing this Court's decision in State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001). He further argues that the prosecutor's failure to obtain a ruling from the trial court regarding Peoples's testimony, coupled with Lashae Hawkins's comments about York being in jail and the prosecutor's closing arguments, constituted cumulative misconduct that deprived him of a fair trial. Brief of Appellant, at 20-25. These arguments should also be rejected.

First, the issue in Freeburg was whether evidence that the defendant possessed a gun when he was arrested was erroneously admitted as evidence of flight, not the defendant's comments regarding "three strikes." Freeburg, 105 Wn. App. at 500. This Court observed that, "[w]hile we agree with the [trial] court's exclusion of Freeburg's statement [to arresting officers that he was facing a third strike], in its absence there was nothing to connect the handgun found in 1997 to [the victim's] death in 1994." Id. Moreover, unlike this case, defendant Freeburg's comments regarding "three strikes" were not relevant with respect to any elements of the crime charged, which was first-degree murder. In sum, Freeburg is inapposite.

Second, although the best practice would be to obtain a ruling in limine regarding testimony of this nature, the failure to do so in this case is not a basis to find prosecutorial misconduct or prejudice in light of the record. Notably, York also did not seek a ruling in limine regarding Peoples's testimony. Furthermore, York did not object, move to strike, request a curative instruction, or move for a mistrial based on Peoples's testimony. Indeed, the subject was simply never discussed. This record belies York's claim that flagrant and prejudicial misconduct occurred.

With respect to Lashae Hawkins's references to York serving time in jail, the record reveals that this testimony was not deliberately elicited by the prosecutor. To the contrary, it was nonresponsive to the prosecutor's question. RP (3/11/08) 8. The trial court immediately instructed the jury to disregard the remark at defense counsel's request. RP (3/11/08) 8-9. In addition, the second time Hawkins mentioned York being in jail was during *cross-examination*. In this instance, Hawkins specifically acknowledged that she had "been instructed multiple times not to talk about Mr. York being in jail[.]" RP (3/11/08) 46. York's claim that this was additional misconduct is wholly without merit.

Lastly, the prosecutor's closing argument was entirely proper, and York's claims to the contrary should be rejected. As an initial matter, York asserts that the prosecutor's introductory remarks "encourag[ed] the jury to view York as a dangerous person based on a history of violating the law." Brief of Appellant, at 25. To the contrary, the remarks were proper because they were fully grounded in the evidence:

Good morning. Ladies and gentlemen, no matter what, Jimmie York does whatever he wants. *No matter what the court orders, no matter what the law says, no matter who he hurts or who he scares it's all about what he wants. The defendant does anything he wants.*

RP (3/17/08) 4 (emphasis supplied).⁹ These remarks constituted an appropriate theme for this case, given the nature of the charges and the evidence presented, which included the fact that there were three court orders prohibiting York from having contact with Lashae Hawkins. These remarks did not improperly invite the jury to convict based on York's criminal history and prior bad acts as he contends.

⁹ York omits the italicized language from his brief, thus taking the prosecutor's remarks completely out of context. See Brief of Appellant, at 25.

York also argues that the prosecutor improperly vouched for the witnesses in this case, focusing on one comment regarding Melissa Hubbard's testimony in particular. Brief of Appellant, at 25. But the prosecutor's comment that Melissa Hubbard "has no motive to lie because she's here telling the truth" immediately followed a more lengthy argument that Hubbard had no bias against York, was minimizing York's behavior, and was plainly displeased with having to testify against him at all. RP (3/17/08) 31-32. There is nothing improper in arguing that a witness has no motive to lie when that is what the evidence shows. See State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1996) (it is proper to argue inferences from the evidence, including inferences regarding the credibility of witnesses).

In sum, York fails to carry his burden of showing either that flagrant and ill-intentioned prosecutorial misconduct occurred or that there was any prejudicial effect on the jury's verdict. This Court should reject York's claims, and affirm.

D. CONCLUSION

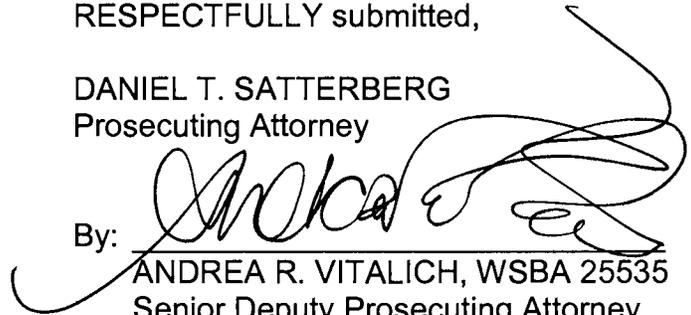
For all of the foregoing reasons, this Court should affirm York's convictions for felony violation of a court order, domestic violence felony harassment with a deadly weapon enhancement, and unlawful possession of a firearm in the first degree.

DATED this 11th day of June, 2009.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By:



ANDREA R. VITALICH, WSBA 25535
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JIMMIE YORK, Cause No. 61728-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

6/11/09

Date

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