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72066-0

No. 72066-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LESTER THOMPSON,

Appellant.

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COURT OF APPEALS
SUPERIOR COURT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to support the conviction for first-degree kidnapping as charged in count five.

2. The trial court erred in admitting evidence of two prior assaults Mr. Thompson allegedly committed against the complaining witness to show her “state of mind,” because the complainant’s state of mind was not a material issue in the case.

3. Prosecutorial misconduct deprived Mr. Thompson of his Fourteenth Amendment right to a fair trial.

4. The trial court erred in overruling Mr. Thompson’s repeated objections to prosecutorial misconduct.

5. Cumulative error deprived Mr. Thompson of his Fourteenth Amendment right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict a defendant of first-degree kidnapping, the State must prove the person intentionally abducted another with the intent to facilitate the commission of a felony or flight therefrom. Here, the State presented evidence that Mr. Thompson assaulted the passenger in a car he was driving, later ordered her into the trunk of the car, and ultimately drove her home. Did the State present insufficient evidence to prove the

additional intent necessary to elevate the crime of kidnapping to first-degree kidnapping?

2. The Supreme Court has held that there is no “DV exception” to ER 404(b)’s prohibition on propensity evidence, and that prior violent acts are not admissible to show a victim’s “state of mind” in an assault case. Here, Mr. Thompson was charged with two counts of assault against Destinie Gates, and the trial court admitted evidence of two prior assaults he allegedly committed against the same victim, to show her “state of mind.” Did the trial court err in admitting this evidence?

3. A prosecutor commits misconduct by arguing facts not in evidence, misstating the law, and trivializing its burden of proof. Here, the prosecutor told the jury Mr. Thompson had been in prison before and also told the jury Mr. Thompson threatened to kill Ms. Gates even though no such evidence had been presented. She also mischaracterized the elements of first-degree kidnapping, and told the jury that its decision for each count was a simple “either he did or he didn’t” determination. Did the prosecutor commit misconduct and did the trial court err in overruling Mr. Thompson’s timely objections to this misconduct?

4. Under the cumulative error doctrine, a conviction should be reversed when the combined effect of errors during trial effectively denied the defendant his right to a fair trial. Did the combination of the erroneous

ER 404(b) ruling and prosecutorial misconduct deprive Mr. Thompson of a fair trial, requiring reversal of the convictions and remand for a new trial?

C. STATEMENT OF THE CASE

Lester Thompson was charged with various crimes he allegedly committed after Destinie Gates picked him up from work one night in November, 2013. After the events of that night, Ms. Gates first told her mother what happened, and subsequently told the same story to a doctor, a social worker, and a police officer. CP 5-6; RP (3/10/14) 123; RP (3/11/14) 11-12, 38-39.

Ms. Gates said that after she picked Mr. Thompson up, she let him drive the car while she rode in the passenger seat. He apparently had errands to run at friends' houses, and made several stops. RP (3/10/14) 29-30.

As they started driving again, they began arguing about their relationship. RP (3/10/14) 31-32. The argument escalated into a physical fight. According to Ms. Gates, Mr. Thompson pulled the car over, strangled her, and hit her head against the console. RP (3/10/14) 33-35. He took her cash and cell phone. RP (3/10/14) 39. He then continued driving. RP (3/10/14) 41. She eventually jumped out, but Mr. Thompson grabbed her, put her back into the car, and held onto her arm while half of

her body was hanging outside the car. He drove slowly while dragging her, thereby breaking her shoulder. RP (3/10/14) 42-43; RP (3/11/14) 14.

He stopped the car and put her into the back seat, and they drove again. RP (3/10/14) 45-47. He later pulled over and ordered her to climb into the trunk. She complied. RP (3/10/14) 50. He continued driving, made more stops, and eventually parked at Ms. Gates's home. RP (3/10/14) 52-53.

Mr. Thompson warned Ms. Gates not to tell anyone what happened or his friends would "come after" her. He told her to bathe and to come to bed with him. She did so, but after he fell asleep, she went to her mother's house and told her what happened. RP (3/10/14) 55-57.

Her mother took her to the hospital, where Ms. Gates described the events of the evening to a doctor, a social worker, and a police officer. Medical tests revealed Ms. Gates's shoulder blade was broken. Ms. Gates never changed her story about the events of the evening. CP 5-6; RP (3/10/14) 123; RP (3/11/14) 11-12, 38-39.

The State eventually charged Mr. Thompson with six crimes, including one count of assault based on strangulation and one count of assault based on the broken shoulder. It charged Mr. Thompson with one count of first-degree kidnapping based on his ordering Ms. Gates into the

trunk, alleging that he did so with the intent to facilitate the broken-shoulder assault and flight thereafter.¹ CP 31-34, 80; RP (3/11/14) 87.

At trial, the State sought to admit evidence of prior assaults Mr. Thompson allegedly committed against Ms. Gates, for the purpose of showing Ms. Gates's "credibility" and "state of mind." RP (3/5/14) 10-12. Mr. Thompson objected on the basis that this was mere propensity evidence prohibited by ER 404(b), and was not relevant to an element of the crimes charged. RP (3/5/14) 21-23. The prosecutor acknowledged that the complaining witness's state of mind was not an element of any crime charged, but insisted the prior bad acts were admissible "to explain her state of mind given the dynamics of a DV relationship." RP (3/5/14) 19-20; RP (3/10/14) 12. The court admitted the evidence for this purpose. RP (3/10/14) 12-13.

During opening statements, the prosecutor told the jury Mr. Thompson had been in prison before. RP (Opening Statements)² 8. Mr. Thompson objected outside the presence of the jury. RP (3/10/14) 20-21.

¹ The State also charged Mr. Thompson with one count of tampering with a witness, one count of intimidating a witness, and one count of first-degree robbery. CP 31-34. The jury convicted Mr. Thompson on the tampering and intimidating counts. On the robbery count, the jury convicted Mr. Thompson of the lesser included offense of third-degree theft. CP 96-97, 100.

² The cover page for the report of proceedings of opening statements says it occurred on March 5, but it actually occurred on March 10.

The court agreed the statement was improper, and ordered the State to tell its witnesses not to mention any prior prison terms or DOC involvement. RP (3/10/14) 22.

The prosecution called Ms. Gates as its first witness. Early in the direct examination, the prosecutor asked Ms. Gates about other times Mr. Thompson had hurt her. Ms. Gates told the jury that in August of 2013 she had to go to Swedish Hospital for a “busted lip” Mr. Thompson caused, and that in the summer of 2012 when she was pregnant Mr. Thompson had scratched and shoved her. RP (3/10/14) 25-26. After discussing these prior alleged incidents, Ms. Gates told the jury about the events charged in this case. RP (3/10/14) 26-72. Contrary to the court’s order, Ms. Gates also testified that Mr. Thompson had a probation officer. RP (3/10/14) 60. Mr. Thompson moved for a mistrial, but the motion was denied. RP (3/10/14) 61-66. Ms. Gates’s mother, a doctor, a social worker, and police officers also testified. RP (3/10/14) 116-56.

The jury was instructed on the charged crimes and on lesser-included offenses for the assaults, kidnapping, and robbery. CP 35-94. In closing argument, defense counsel emphasized that no kidnapping or robbery occurred. RP (3/12/14) 8. As to the former, counsel acknowledged that Mr. Thompson committed the lesser-included offense of unlawful imprisonment when he ordered Ms. Gates into the trunk, but

said the State failed to prove first-degree kidnapping as charged, because the assault at issue was complete well before the trunk incident. RP (3/12/14) 11-12. Also, ordering Ms. Gates into the trunk did not facilitate “flight” from the assault, because Mr. Thompson stayed in the car where the assault occurred and eventually drove Ms. Gates home. RP (3/12/14) 12-13. Thus, counsel pointed out, “[t]here was no fleeing.” RP (3/12/14) 13.

During the State’s closing argument, defense counsel objected several times to the prosecutor’s mischaracterizations of the law and the evidence, but the trial court overruled all objections. RP (3/11/14) 88; RP (3/12/14) 25, 29-31. The jury deliberated for several hours, then requested a definition for “flight.” The court referred the jury to the existing instructions. RP (3/12/14) 35-37; CP 108-09.

After further deliberations, the jury found Mr. Thompson guilty of two counts of second-degree assault, one count of first-degree kidnapping, one count of intimidating a witness, one count of tampering with a witness, and one count of third-degree theft. The court sentenced him to 198 months of confinement. CP 110-22. Mr. Thompson timely appeals. CP 125-35.

D. ARGUMENT

1. The State presented insufficient evidence to prove first-degree kidnapping, requiring reversal of the conviction and remand for entry of a conviction on the lesser-included offense of unlawful imprisonment.

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Where the sufficiency of the evidence turns on the meaning of a statute, it is a question of law this Court reviews *de novo*. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

Intentional abduction is second-degree kidnapping. RCW 9A.40.020(1). To obtain a conviction for *first-degree* kidnapping as charged in this case, the State was required to prove that Mr. Thompson intentionally abducted Ms. Gates with intent to facilitate the commission of the broken-shoulder assault or flight thereafter. CP 79-80; RP (3/11/14) 87; RCW 9A.40.020(1)(b). Thus, “[w]hile kidnapping in the second degree requires only an intentional abduction, kidnapping in the first degree requires an additional specific intent.” *State v. Garcia*, 179 Wn.2d 828, 838, 318 P.3d 266 (2014). That additional intent element must be strictly enforced and narrowly construed. *Id.* at 839.

Here, the State failed to present sufficient evidence to prove the additional specific intent required to sustain a conviction for first-degree kidnapping. It is undisputed that the assault at issue was completed well before Mr. Thompson ordered Ms. Gates to get into the trunk. Thus, the State did not prove an abduction was committed with intent to facilitate an assault.

The prosecutor argued to the jury that Mr. Thompson intentionally abducted Ms. Gates with intent to commit flight from the assault. She said:

And so, to buy himself some time, to figure out what he was going to do, how he was going to get out of this mess, how he was going to stop her from calling the police, he

put her in the trunk and that is facilitating flight from this crime.

RP (3/11/14) 88. As defense counsel pointed out, this is a misstatement of the law. *See* RP (3/12/14) 13 (“There was no fleeing.”); RP (3/12/14) 30 (objecting to above as mischaracterization of law).

Buying time to figure out what one is going to do is not “flight.” Flight is not defined in either the kidnapping section or the general definitions section of the criminal code. RCW 9A.40.010; RCW 9A.04.110. Where a statute does not define its terms, the words are given their ordinary dictionary definition. *State v. Chester*, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). The dictionary defines “flight” as “an act or instance of running away.”³

The State’s own evidence showed that Mr. Thompson did not run away. He stayed in the car, which was the scene of the alleged assault, and he eventually drove the victim of the assault home. If he had put her in the trunk, parked and locked the car, and then fled to a friend’s house, perhaps the State would have sufficient proof of first-degree kidnapping. But this is not what happened. Accordingly, the conviction should be reversed for insufficient evidence. Because the jury was instructed on the lesser-included offense of unlawful imprisonment, and because the State

³ <http://www.merriam-webster.com/dictionary/flight>

presented sufficient evidence to support that charge, the trial court may enter a conviction for unlawful imprisonment on count five. *See In re the Personal Restraint of Heidari*, 174 Wn. 2d 288, 293, 274 P.3d 366 (2012) (following a reversal for insufficiency of the evidence, remand for resentencing on a lesser included offense is permissible when the jury has been explicitly instructed thereon and necessarily found the elements of the lesser offense).

2. The trial court violated ER 404(b) by admitting evidence of two prior assaults Mr. Thompson allegedly committed against the complaining witness.

The remaining convictions should be reversed and the case remanded for a new trial, because the court erroneously admitted highly prejudicial evidence of prior bad acts. The acts were alleged assaults by the same defendant against the same victim, and merely showed Mr. Thompson's propensity to assault Ms. Gates. Although the trial court admitted the evidence to show the victim's "state of mind," this was not a proper purpose under controlling Supreme Court caselaw. The prior assaults were substantially more prejudicial than probative, and tainted the entire trial.

- a. Over Mr. Thompson's objections, the trial court admitted evidence of two prior assaults Mr. Thompson allegedly committed against Ms. Gates.

Before trial, the State moved to admit evidence of prior assaults Mr. Thompson allegedly committed against Ms. Gates for the purpose of showing Ms. Gates's "credibility" and "state of mind." RP (3/5/14) 10-12. Mr. Thompson objected on the basis that this was mere propensity evidence prohibited by ER 404(b), and was not relevant to an element of the crimes charged. RP (3/5/14) 21-23. The prosecutor acknowledged that the complaining witness's state of mind was not an element of any crime charged, but claimed that the evidence of prior assaults was necessary to explain the decision Ms. Gates made to wait until Mr. Thompson went to sleep before seeking help. RP (3/5/14) 14-15.

Defense counsel pointed out that a rational jury would understand the decision Ms. Gates made just by hearing the evidence in this case, but the prosecutor insisted the prior bad acts were admissible "to explain her state of mind given the dynamics of a DV relationship." RP (3/5/14) 19-20; RP (3/10/14) 12. The court admitted the evidence for this purpose. RP (3/10/14) 12-13. The judge stated, "appellate case law has been fairly liberal in allowing this kind of evidence in, in these kinds of cases, domestic violence cases." RP (3/5/14) 23. As explained below, this was error.

- b. Evidence of acts other than the crime charged is not admissible to show a defendant's propensity to commit such acts, and must be excluded if more prejudicial than probative .

“The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined.” *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1998). Consistent with this purpose, ER 404(b) provides:

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.

The “forbidden inference” of propensity to act in conformity with prior acts “is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact finder to the merits of the current case in judging a person’s guilt or innocence.” *Wade*, 98 Wn. App. at 336.

If the State offers evidence of other acts, the court must “closely scrutinize” it to determine if it is truly offered for a proper purpose and its probative value outweighs its potential for prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Prior to the admission of misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct occurred, (2) identify the purpose of admitting

the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

ER 404(b) must be read in conjunction with ER 403, which mandates exclusion of evidence that is substantially more prejudicial than probative. *Id.* at 745. Evidence of prior acts should be excluded if “its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” *Smith*, 106 Wn.2d at 776.

This Court reviews the trial court’s interpretation of ER 404(b) de novo as a matter of law. *Fisher*, 165 Wn.2d at 745. A trial court’s ruling admitting evidence is reviewed for abuse of discretion. *Id.* A trial court abuses its discretion where it fails to abide by the rule’s requirements. *Id.*

- c. The trial court erred in admitting the prior assaults to show the complainant's "state of mind," because her state of mind was not at issue and the prior assaults were substantially more prejudicial than probative.

The trial court acknowledged that the decision about whether to admit evidence of prior bad acts "is such an important issue because it does have a huge effect on how the jury evaluates a case" RP (3/5/14) 24. But the judge ultimately admitted evidence of two recent prior assaults to show the complainant's "state of mind," because she thought "appellate case law has been fairly liberal in allowing this kind of evidence in, in these kinds of cases, domestic violence cases." RP (3/5/14) 23; *see also* RP (3/10/14) 12-13. The court was wrong.

The court's error can be traced to the prosecutor's false claim that a majority of the Supreme Court had held that "Defendant's prior acts leading up to his arrest for domestic violence [were] relevant to show [the] victim's 'reasonable fear of bodily injury'" in an assault case. Supp. CP ___ (sub no. 44) (State's Trial Memorandum) at 12 (citing *State v. Magers*, 164 Wn.2d 174, 181-84, 189 P.3d 126 (2008)). In fact, five justices in *Magers* held the opposite. *See Magers*, 164 Wn.2d at 194-95 (Madsen, J., concurring); *id.* at 195-99 (C. Johnson, J., dissenting).

In that case, the defendant was accused of holding a sword to the back of the victim's neck and threatening to cut off her head. *Id.* at 179.

The State charged him with second-degree assault, and the jury was instructed that “[a]n assault is also an act 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.” *Id.* at 183. The victim recanted before trial, and the State offered evidence of the defendant’s prior violent acts to impeach the victim’s credibility and to show her state of mind.

Only four justices in *Magers* agreed with the State’s position that evidence of prior violent incidents was relevant and admissible to impeach a recanting victim’s testimony, and to show that her “state of mind” satisfied the “reasonable apprehension” definition of assault. *Magers*, 164 Wn.2d at 181-86 (plurality). The two concurring justices and three dissenting justices disagreed with the plurality on both issues. *Id.* at 194-99. The concurrence held that even though the State’s theory was that the defendant committed the “reasonable apprehension” type of assault, the defendant’s prior acts of violence were not relevant to prove the alleged victim’s state of mind as an element of the crime. *Id.* at 194 (Madsen, J., concurring). The concurring justices affirmed the convictions only because the improper admission of the evidence was harmless. *Id.* But there was no question that the admission of the evidence was error. *Id.*

The dissent noted, “We should continue to emphasize the constriction of any exception to ER 404(b). ... [I]f there is any doubt as to its admission, the scale should be tipped in favor of the exclusion of evidence.” *Id.* at 199 (C. Johnson, J., dissenting).

Given that the evidence of prior acts was held to be inadmissible in *Magers*, it was certainly inadmissible here. First, as the trial court properly recognized, it was not admissible to show Ms. Gates’s credibility even under the plurality opinion in *Magers*, because Ms. Gates never recanted and never changed her story. Second, it was not admissible to show Ms. Gates’s state of mind because a majority of justices in *Magers* held that a complaining witness’s state of mind is not a material issue even in a case like *Magers*, where the primary theory of assault is that the defendant caused the victim to reasonably fear bodily injury. Here, both counts of assault involved allegations of *actual battery*, for which a complainant’s state of mind is not at issue at all.

The State claimed that evidence of Mr. Thompson’s prior assaults against Ms. Gates was necessary to explain Ms. Gates’s state of mind when she was waiting until Mr. Thompson went to sleep before seeking help, and to show “the dynamics of a DV relationship.” This claim is wrong both factually and legally. Factually, any rational juror would understand that it made sense to wait until an alleged batterer was not

paying attention before escaping. Legally, there is no “DV exception” to the rule prohibiting propensity evidence. The Supreme Court recently reiterated this point in *State v. Gunderson*, 181 Wn.2d 916, 337 P.3d 1090 (2014). There, as here, the defendant was charged with assaulting his sometime girlfriend and mother of his child. As here, the alleged victim consistently told the same story – although in *Gunderson* she said there was no assault. *Id.* at 919. The trial court admitted evidence of prior alleged assaults over the defendant’s objection, but the Supreme Court reversed in an 8-1 opinion.

The Court noted that even the plurality in *Magers* took “great care” to limit the admissibility of prior violent acts to circumstances in which the complaining witness gave conflicting statements about the defendant’s conduct. *Gunderson*, 181 Wn.2d at 923-24. Contrary to the trial court’s claim in Mr. Thompson’s case that courts are “liberal” about admitting prior-acts evidence, the Supreme Court emphasized that courts should exercise caution:

Much like in cases involving sexual crimes, courts must be careful and methodical in weighing the probative value against the prejudicial effect of prior acts in domestic violence cases because the risk of unfair prejudice is high. To guard against this heightened prejudicial effect, we confine the admissibility of prior acts of domestic violence to cases where the State has established their overriding probative value, such as to explain a witness’s otherwise inexplicable recantation or conflicting account of events.

Otherwise, the jury may well put too great a weight on a past conviction and use the evidence for an improper purpose.

Id. at 925 (internal citations omitted).

Here, as in *Gunderson* and *Magers*, the admission of prior acts of violence was improper. This Court should stress that there is no “domestic violence exception” to the prohibition on propensity evidence established by ER 404(b).

d. The remedy is reversal of the convictions and remand for a new trial.

Evidentiary errors require reversal if, “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Thomas*, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). “[W]here there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.” *Salas v. Hi-Tech Erectors*, 168 Wn. 2d 664, 673, 230 P.3d 583 (2010). Furthermore, “[a] claim of harmless error should be closely examined where it results from the deliberate effort of the prosecution to get improper evidence before the jury.” *State v. Aaron*, 57 Wn. App. 277, 282, 787 P.2d 949 (1990).

In *Salas*, the Supreme Court held the trial court abused its discretion under ER 403 by admitting evidence of the plaintiff’s

immigration status in a personal-injury case. *Id.* at 672-73. The Court further held that reversal was required: “We find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury.” *Id.* at 673.

If the risk of prejudice inherent in admitting immigration status is great, the risk of prejudice inherent in admitting evidence of prior domestic violence incidents is even greater. Indeed, the Supreme Court has recognized that there is a “heightened prejudicial effect” when prior acts of violence are admitted in DV cases. *Gunderson*, 337 P.3d at 1094.

Here, as in *Salas*, this Court cannot say the admission of the improper evidence had no effect on the jury. This is especially true for the kidnapping count discussed above, for which there was scant evidence of the required *mens rea* and about which the jury expressed confusion. As for the assault convictions, Mr. Thompson acknowledges the overwhelming evidence that some level of assault occurred. But the jury was instructed on lesser degrees of assault for both counts, and the jury may well have convicted Mr. Thompson of the lesser charges had the trial not been tainted with evidence of prior assaults. Finally, the jury may not have convicted Mr. Thompson of intimidating a witness had the State not improperly bolstered Ms. Gates’s credibility and inflamed the passions of the jury against Mr. Thompson by introducing prior acts of violence.

Accordingly, this Court should reverse the convictions on counts one, three, four, and five, and remand for a new trial.⁴

3. The trial court erred in overruling Mr. Thompson’s repeated objections to persistent prosecutorial misconduct, requiring reversal and remand for a new trial.

a. Mr. Thompson objected to several instances of prosecutorial misconduct.

During opening statements, the prosecutor told the jury that Mr. Thompson said, “I am not going back to prison.” RP (Opening Statements) at 8. Defense counsel raised the issue outside the presence of the jury, and the prosecutor responded that she thought she only had to comply with the motion in limine “to preclude any evidence or testimony regarding Mr. Thompson being on active DOC or that there was an active DOC warrant at the time of his arrest.” RP (3/10/14) at 21-22. The court disagreed with the prosecutor, stating, “I just couldn’t believe what I was hearing, that you made a statement regarding him being in prison.” RP (3/10/14) at 22. The court said, “I am not going to allow any reference to it. You need to instruct your witness not to say anything about him having been in prison before.” RP (3/10/14) at 22.

⁴ Mr. Thompson acknowledges that the error is harmless as to count six, for which there was documentary evidence.

Yet, during the presentation of the evidence, Ms. Gates testified that Mr. Thompson “asked if I talked to his probation officer.” RP (3/10/14) at 60. Mr. Thompson moved for a mistrial based on the combined prejudice of the testimony and the opening statement, but the court denied the motion.⁵ RP (3/10/14) 61-66.

Also during opening statements, the prosecutor claimed that Mr. Thompson said, “I am going to kill you” when Ms. Gates was in the backseat of the car. RP (Opening Statements) at 8. However, no such evidence was ever presented. Despite the fact that no one so testified, the prosecutor repeated the accusation during closing argument, telling the jury that Mr. Thompson said, “I am going to kill you,” when Ms. Gates got into the trunk. Mr. Thompson objected on the basis that the prosecutor was arguing facts not in evidence, but the trial court did not sustain the objection. Instead, the judge said, “I will instruct the jury that you are [the] ones that recall the evidence.” RP (3/11/14) 88.

Mr. Thompson also objected to several misstatements of law. For instance, when discussing first-degree kidnapping, the prosecutor told the jury: “When he put her in that trunk, he did it because he was afraid she

⁵ The motion was denied without prejudice. Counsel did not raise this particular issue again, but she had already objected twice to the State’s mentioning Mr. Thompson’s prison and probation involvement, and she later objected to other instances of misconduct.

would call the police. And he needed time to figure it out. The crime is complete at that point.” RP (3/12/14) 25. Defense counsel stated, “I object to this as a misstatement of the law,” but the court overruled the objection. RP (3/12/14) 25.

Then, at the end of rebuttal closing argument, the prosecutor stepped through a theme in which she characterized the jury’s decision on each charge as a simple yes/no determination. RP (3/12/14) 29-31.

Defense counsel’s objections to the arguments were overruled:

[PROSECUTOR]: Either the defendant strangled Destinie with his bare hands and with the purse strap or he did not. And if he did, he is guilty of assault in the second degree.

Either he went - -

[DEFENSE COUNSEL]: I object.

THE COURT: Overruled.

[PROSECUTOR]: Either he went through her pockets and he stole her cash after repeatedly slamming her head against the console or he didn’t. And if he did, that’s robbery in the first degree.

[DEFENSE COUNSEL]: I object to that as mischaracterization.

THE COURT: Again, the jury will apply the evidence, read the jury instructions, and make the final decision.

[PROSECUTOR]: Either the defendant held onto her arm and dragged her alongside that car, shattering her shoulder blade or he didn’t. And if he did, that is assault in the 2nd degree.

Either the defendant threw her in the trunk of her car for hours in order to figure out how to get out of what he had done or he didn't. And if he did, that is kidnapping in the first degree.

[DEFENSE COUNSEL]: Standing objection.

THE COURT: Overruled.

[PROSECUTOR]: I urge you to find him guilty.
[end of rebuttal closing argument].

RP (3/12/14) 29-31.

- b. The prosecutor committed misconduct by arguing facts not in evidence and by misstating the law and trivializing the burden of proof.

“The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution.” *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); U.S. Const. amends. VI, XIV; Const. art. I, § 22. Every prosecutor is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); see *Berger v. United States*, 295 U.S. 78, 84-85, 55 S.Ct. 629, 79 L.Ed.1314 (1935). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *Glasmann*, 175 Wn.2d at 703-04.

A new trial should be granted where a prosecutor's conduct was both improper and prejudicial. *Id.* at 704. Prejudice is established if there is a substantial likelihood that the misconduct affected the verdict. *Id.*

Here, the prosecutor committed prejudicial misconduct by presenting facts not in evidence, misstating the law, and trivializing the burden of proof. To begin with, the prosecutor made the outrageous claim during closing argument that Mr. Thompson said, "I will kill you" as he ordered Ms. Gates into the trunk. No such evidence had been presented, yet the trial court refused to sustain Mr. Thompson's timely objection, instead deferring to the jury. It is the court's role to sustain proper objections to prosecutorial misconduct, and the trial judge erred in abdicating her responsibility. *See State v. Allen*, ___ Wn.2d ___, 341 P.3d 268, 275 (2015) (when trial court fails to sustain a timely, specific objection, it lends "an aura of legitimacy to what was otherwise improper argument."). The error was especially egregious because the prosecutor had also made the claim in opening statements, so the trial was bookended by accusations that Mr. Thompson said "I am going to kill you," despite the fact that no one so testified. RP (Opening Statements) at 8.

"A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider." *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Thus,

“[a]lthough prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record.” *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). A closing argument “calculated to appeal to the jury’s passion and prejudice and encourage it to render a verdict on facts not in evidence are improper.” *State v. Stith*, 71 Wn. App. 14, 18, 856 P.2d 415 (1993).

This Court reversed two murder convictions where the prosecutor argued facts not in evidence in *State v. Pierce*, 169 Wn. App. 533, 537, 280 P.3d 1158 (2012). There, the prosecutor during closing argument “fabricat[ed] an emotionally charged story of how the victims might have struggled with [the defendant] and pleaded for mercy.” *Id.* The prosecutor said, “It was just another day,” and “[n]ever in their wildest dreams” would the victims have thought that 15 hours later “they would be forced to [lie] facedown in their own kitchen in their own home to be robbed by somebody that knew them....” *Id.* at 541. The prosecutor speculated that the male victim probably did not want to do anything to put his wife in greater danger, and that the two probably looked into each other’s eyes while lying on the floor just before being shot. *Id.* at 543. The trial court overruled a defense objection, but this Court reversed.

The court held, “the prosecutor committed misconduct by arguing facts not in evidence and by appealing to the passion and prejudice of the jury.” *Id.* at 551. The “embellishments to the evidence were nothing more than an improper appeal to the jury’s sympathy that encouraged the jury to decide the case based on the prosecutor’s heart-wrenching, though essentially fabricated, tale of how the murders occurred.” *Id.* at 555.

Here, the prosecutor inflamed the passions of the jury by claiming Mr. Thompson issued a death threat where no such evidence had been presented. The trial court’s failure to sustain the objection left the jurors wondering if either they had missed this testimony or the prosecutor knew something they didn’t know. Several probably assumed Mr. Thompson had issued a death threat, because a prosecutor, as a quasi-judicial officer, would not fabricate such an allegation. *Cf. Allen*, 341 P.3d at 276 (2015) (“[t]he jury knows that the prosecutor is an officer of the state”). The trial court erred in refusing to sustain Mr. Thompson’s timely objection.

The prosecutor also committed misconduct by telling the jury that Mr. Thompson had been in prison before, and by introducing testimony that Mr. Thompson was on probation at the time of the crime. This Court’s decision in *Escalona* and the Supreme Court’s decision in *Taylor* are instructive. *See State v. Taylor*, 60 Wn.2d 32, 371 P.2d 617 (1962); *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987). In *Escalona*, a

witness stated that the defendant “already has a record and had stabbed someone.” *Escalona*, 49 Wn. App. at 253. The trial court ordered the statement stricken and provided a curative instruction, but denied a motion for mistrial. *Id.* This Court reversed, noting, “[o]ur rules of evidence embody an express policy against the admission of evidence of prior crimes except in very limited circumstances and for limited purposes.”

In *Taylor*, a police officer testified that he contacted the defendant’s parole officer as part of his investigation. *Taylor*, 60 Wn.2d at 33. A new trial was granted because the statement “may have revealed to at least some members of the jury that the defendant Taylor had been in previous trouble with the law.” *Id.* at 35. The Court stated, “In a trial of a criminal case the issue is singular, as to guilt or innocence: ‘Did the defendant commit the crime charged?’ and not upon the question, ‘Has the defendant the reputation of committing crime before.’” *Id.* at 38. The Court further recognized that a curative instruction would likely exacerbate the very problem it was meant to solve: “we deal with an evidential harpoon which would only be aggravated by an instruction to disregard.” *Id.* at 37. The same is true here, and the combined prejudice caused by these instances of misconduct and the others in closing argument rendered Mr. Thompson’s trial unfair.

Although the improper references to facts not in evidence were highly damaging, the State's multiple misstatements of law were equally objectionable. First, the prosecutor told the jury that Mr. Thompson was guilty of first-degree kidnapping even if he did not abduct Ms. Gates with intent to facilitate an assault or flight therefrom, so long as he did it because "he was afraid she would call the police [a]nd he needed time to figure it out." RP (3/12/14) 25. As explained above, this is a misstatement of the elements of kidnapping, and one the trial court was obligated to correct. "A prosecuting attorney commits misconduct by misstating the law." *Allen*, 341 P.3d at 273. When a trial court overrules a timely, specific objection, it lends "an aura of legitimacy to what was otherwise improper argument." *Id.* at 275 (citing *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). The trial court erred in overruling Mr. Thompson's objection to the State's mischaracterization of the elements of first-degree kidnapping.

The prosecutor also characterized the jury's decision on each charge as a simple yes/no determination. For instance, the prosecutor averred: "Either the defendant threw [Ms. Gates] in the trunk of her car for hours in order to figure out how to get out of what he had done or he didn't. And if he did, that is kidnapping in the first degree." Mr.

Thompson's multiple objections to this line of argument were improperly overruled.

A prosecutor commits misconduct when she "improperly minimizes and trivializes the gravity of the [reasonable doubt] standard and the jury's role." *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014). Thus, in *Emery*, the Supreme Court held it is misconduct for the State to tell the jury it must simply "speak the truth." *State v. Emery*, 174 Wn. 2d 741, 760, 278 P.3d 653 (2012). A jury's job is not to solve a case but "to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Id.* And in *Lindsay*, the Court held the prosecutor improperly trivialized the jury's role and minimized the burden of proof by comparing the jury's decision on guilt with everyday decisions like crossing the street. *Lindsay*, 180 Wn.2d at 436.

Here, the prosecutor improperly trivialized the jury's role and misstated the State's burden by claiming that as to each count, Mr. Thompson either did something or he didn't, and if he did, he was guilty. This was misconduct because the jury was supposed to determine whether the State met its burden of proving each element of each crime beyond a reasonable doubt. The trial court erred in overruling Mr. Thompson's repeated objections to this line of argument.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

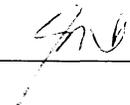
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 72066-0-I
v.)	
)	
LESTER THOMPSON, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> LESTER THOMPSON, JR. 827181 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF MARCH, 2015.

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