SUPREME COURT NO.
COURT OF APPEALS NO. 86163-8-I

IN THE WASHINGTON STATE SUPREME COURT

State of Washington, Plaintiff/Respondent

v.

Owen Gale Ray, Defendant/Appellant

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

The Honorable Timothy Ashcraft, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Owen Ray, asks this Court to accept review of the Court of Appeals decision denying his appeal, designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner seeks review of two issues in the September 3, 2024 decision denying his appeal. First, Petitioner asks the Court to determine a definition of "exigent circumstances" within the privacy statute and, second, to resolve a split between the divisions regarding a double jeopardy issue. A copy of the Court's unpublished opinion is attached. Appendix at 1. This petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the video of the Ray children taken in the rear of a patrol car without their knowledge fell under an exigency exception to the privacy act.

2. Whether Mr. Ray's convictions for second degree assault and felony harassment based on the same conduct violated his double jeopardy rights.

IV. STATEMENT OF THE CASE[1]

On December 26, 2020, Colonel Owen Ray suffered a mental health breakdown due to undiagnosed post-traumatic stress disorder incurred over 24 years of military service. He wanted to end his life. Mr. Ray had deployed eight times to combat zones between 2003 and 2020, half of those since 2015, and was posted to high pressure assignments, including aide to the President of the United States, when not deployed. RP 1319.

On the night of his breakdown, Mr. Ray consistently threatened suicide, to his wife and children, and later to police who surrounded the home. RP 216, 254. Mr. Ray's wife, K.R.,

[1] References to the verbatim report of proceedings are contained in Mr. Ray's Appeal below. This overview is intended to familiarize the Court with the underlying facts: a more complete discussion is in Mr. Ray's Opening Brief below.

in calls to 911, claimed she also feared for hers and the children's lives. RP 307.

Mr. Ray spent much of his career in the United States Army in combat deployments that took him worlds away from his family, frayed family ties, and wore him down as a soldier, a husband, and a father. RP 1345. Mr. Ray's story illuminates a larger problem within the military, where seeking help for mental health issues continues to be a career-ending move. RP 1096.

What is more, commanding officers like Colonel Ray are rarely able to take leave. RP 1267-8. Even over Christmas 2020, while ostensibly on leave, the colonel was directing the COVID response as chief of staff at Joint Base Lewis McCord (JBLM). The army presented the job in response to Mr. Ray's request to retire to save his marriage and family. SuppCP 981. The move, however, ultimately separated Mr. Ray from core support within his former Special Forces team, further exacerbating his condition. RP 562, SuppCP 981.

On the night of December 26, 2020 Mr. Ray was preparing his guns for the firing range with "dry fire" practice, a drill that morphed, as had often happened in recent years, into a suicide rehearsal. RP 1347-8. K.R. would later testify her husband sounded "crazy," talking to himself and yelling into the air. RP 1348, 580, 658. Telling her husband that she was going to call 911, K.R. retired upstairs, followed by Mr. Ray. RP 1350.

When K.R. placed the 911 call, Mr. Ray knew that life as he had known it was gone forever. RP 1350-51. The authorities being alerted to Mr. Ray's suicidal ideations would spell an end to his career, his identity, and the means by which he supported his family. Police soon surrounded the house with flashing lights and spotlights; K.R. and the children exited a few minutes later. RP 230. They were immediately transported several blocks away from any potential danger. RP 500. Once away from the house and out of range of any possible danger, police spoke to K.R. outside of the patrol car, and the Ray children processed the traumatic events of the evening and their reactions thereto while

inside the car, unaware that the vehicle's recorder was running. RP 893.

Mr. Ray was discernably suicidal all evening, repeatedly appearing on the home's balcony holding a gun to his head. RP 214, 287, 398, 343, 345-48, 354, 360, 364. After speaking to a negotiator for about 90 minutes, he surrendered. RP 377-86.

In the aftermath of the incident, Mr. Ray was diagnosed with chronic severe PTSD, depression, and alcohol use disorder by seven independent agencies. SuppCP 1, 983-4, RP 542, 544-5, 556-7, 730-31, 810. Mr. Ray had substantial combat and combat related injuries: Traumatic Brain Injury (TBI) from explosives and concussions, insomnia, tinnitus, myriad injuries causing chronic physical pain, and a pending diagnosis of Chronic Traumatic Encephalopathy (CTE), which can only be confirmed in an autopsy. RP 542, CP 1.

Mr. Ray immediately and successfully completed inpatient alcohol treatment at Cascade Behavioral Health and inpatient PTSD treatment at Strong Hope. Strong Hope is an

internationally renowned organization that specifically treats veterans with PTSD. RP 544. Mr. Ray continued intensive outpatient treatment with Dr. Johnson Chang in the two years before his trial. RP 1128-29.

The State charged Mr. Ray with two counts of second degree assault, one count of reckless endangerment, three counts of felony harassment, and one count of kidnapping. The State categorically refused to consider veteran's court, mental health court, or any plea, insisting that the only acceptable pre-trial resolution was for Mr. Ray to plead guilty as charged. SuppCP 689-90.

The trial itself was fraught; the State painted Mr. Ray as a chronic abuser who sought to lay the blame for his actions on an exaggerated accounting of mental health issues. The State's expert claimed that the events of December 26, 2020 were not caused by PTSD, rather by Mr. Ray's anger issues augmented by alcohol consumption, while the defense expert argued the case

for a PTSD-fueled breakdown during which Mr. Ray was not completely in control of his actions.

One count of second-degree assault based on allegations of physical assault of K.R. was dismissed by the Court after the State rested for lack of evidence. RP 1043. The jury acquitted Mr. Ray of two counts of felony harassment against first responders and the kidnapping charge against K.R.. Mr. Ray was convicted of one count of felony harassment and one count of second degree assault against his wife, and one misdemeanor count of reckless endangerment against his children. RP 1529-37.

The second-degree assault and felony harassment counts were both based on a single claim that Mr. Ray had pointed a gun at K.R.. RP 1558. Each charge carried a firearm enhancement based on the use of the same weapon. The enhancements are running consecutively to each other, with no good time. *Id.*

While awaiting trial, Mr. Ray was honorably discharged from the Army.

Mr. Ray's appeal to the Division II Court of Appeals was transferred to Division I due to court congestion. The defense double jeopardy argument hinged in part on Division II jurisprudence finding that second-degree assault and felony harassment based on the same conduct violated double jeopardy, and disagreeing with Division I precedent to the contrary. Division I decided the case in line with its own precedent, finding there was no double jeopardy violation in this case.

The defense and the state agreed that the question of what constituted an exigency within the purview of the Washington State Privacy Act was an issue of first impression within the state. Division I, after oral argument and supplemental briefing, declined to reach this issue, instead finding that the admission of the video tape was harmless error.

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V. ARGUMENT FOR GRANTING REVIEW

1. Introduction

This case presents two issues of import to criminal justice within Washington State. First, Petitioner seeks a definition of "exigent circumstances" within the scope of the Washington State Privacy Act. This term is undefined in the Act, despite the legislature's inclusion of the exception in the statute, leaving courts without a means by which to measure whether an exception is appropriate. Other definitions of exigent circumstances utilized by the parties, including a delay in reading *Miranda* rights or warrantless law enforcement searches, are grossly imperfect analogies when applied to the Privacy Act. An Act-specific definition is needed.

Second, Petitioner asks this court to settle a split between Division I and Division II regarding whether second degree assault and felony harassment when, as here, based on the same criminal conduct, violate a defendant's double jeopardy rights. Had Mr. Ray's case remained in Division II, he would now be

awaiting resentencing. But because his case was transferred to Division I, no violation was found. Citizens of Washington State have a right to consistent statewide application of the law.

2. The pre-advisement patrol car video of the Ray children violated the privacy act, was not harmless error, and should have been excluded.

i. The video violated the Privacy Act.

RCW 9.73.030, Washington State's privacy statute, prohibits the recording or interception of private conversations and communications without prior consent of everyone in the conversation. The primary purpose of RCW 9.73.030 is to protect "the privacy of individuals from public dissemination (even in the course of a public trial) of illegally obtained information." *State v. Wanrow*, 88 Wn. 2d 221, 233, 559 P. 2d 548 (1977).

There are limited exceptions to the privacy act for emergency responders. RCW 9.73.090(1)(c). Police may videotape a roadside conversation or one in a uniformed officer's

patrol vehicle without consent, provided the person being recorded is informed, on tape, of the recording. RCW 9.73.090(1)(c). The requirement may be suspended "if the person is being recorded under exigent circumstances." *Id.* "Exigent circumstances" is undefined in the statute.

The Legislature intended the in-car video exception "to provide a *very limited exception* to the restrictions on disclosure of intercepted communications." Laws of 2000, ch. 195, § 1 [Emphasis supplied]. Officers thus must "*strictly comply* with RCW 9.73.090(1)(c)." *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 465, 139 P.3d 1078 (2006) [Emphasis supplied]. Failure to do so renders recordings inadmissible. *Id.*

Neither the Privacy Act nor case law interpreting the Act have defined "exigent circumstances" with regard to the in-car video exception. The definition must be specific to Washington's privacy statute – one of the most protective in the nation. Citation to other jurisdictions would not be apt. *See, e.g., State v. Christensen*, 153 Wn.2d 186, 199, 102 P.3d 789 (2004)("…the

Washington statute, unlike similar statutes in 38 other states, tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant.")

Absent a legislative definition, Courts generally give a word its ordinary, dictionary definition. *State v. Barnes,* 189 Wn.2d 492, 496, 403 P.3d 72 (2017). The Merriam-Webster Dictionary defines "exigent" as "requiring immediate aid or action."[2] Immediate, in turn, is defined as "occurring, acting, or accomplished without loss or interval of time : INSTANT."[3]

Should the Court adopt this definition for the Privacy Act, exigent circumstances should then be limited to those in which instant action must be taken that precludes proper advisement of recording. As with exigencies in other circumstances, however, the totality of the circumstances should be considered when applying this exception.

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[2] https://www.merriam-webster.com/dictionary/exigent (last visited Sept. 16, 2024).
[3] https://www.merriam-webster.com/dictionary/immediate (last visited Sept. 16, 2024).

Below, the State argued that there was an exigency here because officers needed to immediately speak to K.R. about her husband's state of mind and the weapons in the house, thus excusing the failure to advise the Ray children that they were being recorded. The State analogized this to exigent circumstances allowing warrantless searches, where officers need not seek a warrant when "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." *State v. Smith,* 165 Wash.2d 511, 517, 199 P.3d 386 (2009). In determining whether an exigency exists, Courts should look at the totality of the circumstances surrounding the warrantless search. *Smith,* 165 Wash.2d at 518, 199 P.3d 386.

The trial court analogized the exigency here to the delay of *Miranda* warnings.[4] Courts have recognized a "public safety"

[4] *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)

exception to *Miranda* warnings when "'the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.'" *State v. Richmond*, 65 Wn. App. 541, 545 n.4, 828 P.2d 1180, 1182 (1992)(*quoting New York v. Quarles*, 467 U.S. 649, 657, 81 L. Ed. 2d 550, 104 S. Ct. 2626 (1984)).

Under the public safety exception, police may briefly delay *Miranda* warnings if there is an immediate threat to public safety – such as, in *Quarles,* where a defendant may have abandoned a loaded gun in a public supermarket. *Id.* By its terms, this exception, too, considers the totality of the circumstances. Any definition of exigency applies to the Privacy Act should similarly mandate a consideration of the totality of the circumstances approach.

Moreover, unlike either *Miranda* or the warrant process, the in-car recording warning takes mere seconds. Officers need not use specific language, simply advising occupants, "you are

being audio and video recorded," or "you are being recorded." Likewise, the advising officer need not be the operator of the patrol car but where, as here, multiple officers are present, any one of them could have given the required notification.

However, the trial court considered the need to question K.R. in a vacuum and neglected the totality of the circumstances. Petitioner asks the Court to fashion a definition of exigency within the Privacy Act that requires a view of the totality of the circumstances, and find that officers' failure to advise in this case violated the Act.

K.R. and the children were placed into the car at 12:33 a.m. RP 177. The officer immediately moved his car several blocks away and out of the line of sight of the house. RP 500. Once moved, no danger remained, and any exigency ceased. Yet no advisement of recording equipment was provided until 1:05 a.m., over half an hour later. RP 893.

Further, the very nature of the conversation here demonstrates that the children thought they were in a private

setting. They, like any other citizen in the State, were entitled to a warning that they were being recorded. The State's failure to do so in this instance was a violation of the Washington State Privacy Act. The video should not have been admitted.

ii. Prejudice and Lack of Harmless Error

Prejudice is presumed if a video was erroneously admitted: "Failure to suppress evidence obtained in violation of the act is prejudicial unless, within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial." *State v. Christensen*, 153 Wn.2d 186, 200, 102 P.3d 789 (2004).

The Court below found that it did not need to reach the question of exigent circumstances because even if the video was admitted in error, any error was harmless. Under the harmless error analysis, reversal is mandated if there is a reasonable probability that the error materially affected the trial outcome. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Petitioner disagrees with the appellate court's conclusion, as the video of the distraught children processing the events and their emotions was extremely prejudicial to his case.

The State initially sought introduction of the video to establish the fear element of the kidnapping charge with regard to the children even though the children were not alleged to be victims of the kidnapping charge. RP 883. The trial court in response "focused on the fear element of kidnapping" when redacting the tape. RP 884-85, 919- 923, 1021-22, 1026. Yet, the State did not tie the children's fear on the video tape to the kidnapping charge when introducing the video to the jury.

The State instead used the video in lieu of live testimony of the children as evidence that Mr. Ray pointed the gun at his family in furtherance of the assault charge, evidence that was already in the record via K.R.'s testimony. RP 1446-7. The State also showed the video to the jury at the commencement of their closing argument, and quoted extensively from the video during closing. RP 1498. The State used the video to arouse the jurors'

emotions, especially during closing, where the State claimed that Mr. Ray intended to terrorize his family on December 26, 2020, and his diminished capacity defense was a ploy to escape responsibility for his actions.

The redactions were insufficient to mitigate the incredibly prejudicial nature of the video of distraught children processing their emotions in the middle of the night while their mother was outside of the car speaking to officers, their home remained surrounded by police officers, and their father remained inside, at risk of injury or death. In short, the children's world had just crumbled. Viewing this crumbling world was designed to evoke an emotional response from the jury. Worse, the redactions removed context behind the children's tears, as argued below.

The appellate court found the error harmless because K.R. testified that the children were "screaming" and "hysterical," and so this evidence was already before the jury. However, absent the videotape, there is no testimony from the children. No evidence of the children's statements, feelings, or thoughts would have

been presented to the jury by the children, only through second-hand testimony of their mother. The State, understanding this, sought the stunning impact of the videotape of the upset, crying children.

The admission of K.R.'s impressions of the children's mental states is far less compelling than video of sobbing, terrified children. The video placed the jury in the car with the children immediately after the incident, observers to everything that they said and felt. The children were not seen at trial; their reaction to the incident was witnessed only through the video, used by the State to play on the jury's prejudices and passions.

It cannot be said with reasonable certainty that the outcome of the trial would have been the same absent the use of a videotape of the Ray children crying and discussing not just their fears, but also the facts that the State depended upon to bolster K.R.'s testimony, in a very private moment. While it is true that K.R. was allowed to testify about the children's state of mind, secondhand testimony does not and cannot compare with

the emotional impact of the videotape of the children crying and talking in the immediate wake of their father's mental breakdown. The video was extremely prejudicial and, absent exigent circumstances, was admitted in violation of the privacy act.

Petitioner asks this Court to find that the video was prejudicial, admitted in error, and that Mr. Ray should be granted a new trial.

3. Mr. Ray's convictions for second degree assault and felony harassment based on the same conduct violated his double jeopardy rights.

The state may bring multiple charges arising from the same criminal conduct in a single proceeding. *State v. Freeman,* 153 Wn.2d 765, 770, 108 P.3d 753 (2005). However, state and federal constitutional protections against double jeopardy prohibit multiple punishments for the same offense. *State v. Vladovic,* 99 Wash.2d 413, 422, 662 P.2d 853 (1983); WASH. CONST. art. I, § 9; U.S. CONST. amend. VI. Two crimes

constitute the same offense for double jeopardy purposes if they are the same in both fact and law. *State v. Calle,* 125 Wash.2d 769, 777, 888 P.2d 155 (1995).

Washington Courts have well-established criteria for determining double jeopardy violations. First, the court examines whether the legislature intended to authorize multiple punishments for an act that supports charges under two separate criminal statutes. *In re Borrero,* 161 Wn.2d 532, 536, 167 P.3d 1106 (2007). The legislature may specifically authorize cumulative punishments for crimes. *State v. Esparza,* 135 Wash.App. 54, 60, 143 P.3d 612 (2006). If the legislative intent is unclear, the Court then looks at the elements of the crimes. The court cannot find the crimes are the same offense if each crime has an element that the other does not. *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180 (1932).

In this case, the charge of second-degree assault as to K.R. based upon a physical assault was dismissed at halftime for lack of evidence. This left only the charge of second degree assault

based on allegations that Mr. Ray instilled fear by pointing a gun at K.R., which are the same facts relied upon by the State to prove felony harassment based on the allegation that Mr. Ray instilled fear in K.R. by pointing a gun at her.

The Division II Court of Appeals has found that when the same set of facts is the basis for both a felony harassment and a second-degree assault charge, there is a double jeopardy violation. *State v. Leming,* 133 Wn. App. 875, 138 P.3d 1095 (Div. II, 2006). The *Leming* Court found no provisions in the statutes governing felony harassment and second degree assault "expressly authorizing separate punishments for the same conduct." *Id.* at 888. The State likewise had to prove the same facts, and relied on the same evidence, for both charges. *Id.* at 889. Thus, the convictions were the same in fact and law and violated double jeopardy. *Id.*

Division I, however, has come to the opposite conclusion in *State v. Mandanas*, 163 Wn. App. 712, 721, 262 P.3d 522, 527 (2011). Mr. Mandanas was charged with second-degree assault

and felony harassment after striking his victim with his gun and then pointing a gun at the same victim and threatening to kill him. *Id.* at 721. As Division I noted in *Mandanas,* "separate and apart from the act constituting felony harassment, Mandanas also admitted to striking Padilla on the head with the gun," committing a physical assault as well as threatening death *Id.* The Court found that there were facts to support the second degree assault charge that were separate and distinct from those necessary to prove the felony harassment charge, and thus the two crimes did *not* violate double jeopardy. *Id.* The *Mandanas* Court also theorized that the crimes in the abstract, even based on the same conduct, would not violate double jeopardy, but did not rely on this theory in its holding. *Id.*

In his briefing, Mr. Ray relied both on *Leming* and the unpublished Division II case *State v. Nakamura*, No. 57050-5-II, slip op. (Wash. Ct. App. June 13, 2023)(cited as persuasive authority pursuant to GR 14.1), where a landlord's son, after pointing a gun at his father's tenant and threatened to kill him,

was charged with second degree assault and felony harassment. In *Nakamura,* Division II specifically disagreed with the conclusions drawn by Division I in *Mandanas*, holding that "there is no clear evidence demonstrating a legislative intent to punish felony harassment and assault separately when they are predicated on the same distinct act and cause the same distinct harm."

This case was heard by the Division I Court of Appeals, which relied on its decision in *Mandanas* to find that there was no double jeopardy violation. The Court declined to apply *State v. Leming* 133 Wn. App. 875, 138 P.3d 1095 (Div. II, 2006), finding that it did not conduct an independent purpose test and was decided prior to *Mandanas.* The court likewise declined to follow *Nakamura*, as it is unpublished and could only be considered as persuasive authority.

The appellate court's findings, however, do not eliminate the fact that there remains a split in the divisions regarding this issue. Had Mr. Ray's case been heard before the Division II

Court of Appeals, Petitioner has every reason to believe that he would now be awaiting resentencing based on the dismissal of the felony harassment charge. Petitioner, like any citizen of the State of Washington, has every right to expect consistent rulings throughout the State, without regard to venue.

The decision below relied primarily on the last step in the *Freeman* analysis, the question of whether the two statutes serve an "independent purpose." Division II has found, both implicitly in *Lemming*, and explicitly in *Nakamura,* that the crimes of felony harassment and second degree assault do not serve independent purposes. Division I has, again, concluded the opposite.

Mr. Ray asks the Court to accept review to eliminate this split between the divisions, and to hold that the conclusions reached by Division II are proper. In support of this position, Mr. Ray points to this Court's decision in *State v. Muhammad*, 194 Wn.2d 577, 451 P.3d 1060 (2019), where Justice Gordon McCloud, in her concurrence, observed that the outcome of the

Blockburger[5] analysis "creates a strong presumption of the legislature's intent," and "[t]his presumption can 'be overcome only by clear evidence of contrary [legislative] intent.'" *Muhammad*, 194 Wn.2d at 620, (Justice Gordon McCloud, concurring), *quoting State v. Louis*, 155 Wn.2d 563, 570, 120 P.3d 936 (2005).

The court below in fact acknowledged that there is no overt evidence that the legislature intended for felony harassment and second degree assault to be punished separately when charged together, and thus there is no "clear evidence of contrary intent" in this case.

Moreover, despite being located in different chapters of the criminal code, the harassment statute explicitly cross-references second-degree assault, as a crime that harassment "may include." RCW 9A.46.060(6).

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[5] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)

As Justice Gordon McCloud reasoned in *Muhammad,* explicitly cross-referencing between statutes is indicative of an intent to avoid cumulative punishment:

> When the legislature uses cross-references in statutes, the cross-referenced material is not truly located somewhere else; it is as if the legislature set out the cross-referenced material in full. The legislature is merely saving trees, not revealing a clear intent to punish the same offense twice.

Muhammad, 194 Wn.2d at 622.

The court below also appears to have examined the crimes of felony harassment and second-degree assault in the abstract, rather than as specifically charged in this case as this Court has mandated the latter analysis:

> We do not consider the elements of the offenses in the abstract; that is, we do not consider all the ways in which the State could have charged an element of an offense, but rather we consider how the State actually charged the offense.

In re Pers. Restraint of Francis, 170 Wn.2d 517, 524, 242 P.3d 866 (2010).

The fact that two statutes may, as here "serve different purposes when examined in isolation" does not overcome the strong presumption based on factors outlined in *Muhammad* that the offenses are the same. *Muhammad*, 194 Wn.2d at 622.

In addition, the concurrence noted, requiring clear evidence of legislative intent "is in accord with the rule of lenity, which we apply in double jeopardy cases." *Id*.

When viewed in light of the facts of this case, the independent purpose test also points to a double jeopardy violation. Here, the purpose of both the second degree assault and the felony harassment was, in the State's eyes, to terrorize K.R. The State argued repeatedly that Mr. Ray's sole objective on the night of December 26, 2020 was to terrorize his wife and children:

> December 27, 2020, was a night of terror and fear for [K.R.] and her three children. A night of terror and fear that was brought on by Owen Ray….
>
> RP 1493

> He wanted power, and he had that power; he had the gun. He knows the power, the danger, the terror of having a gun.
> …
> He's in there to ensure that he can inflict as much trauma and terror on his kids and his wife.
>
> RP 1497

It follows from the State's own arguments that the purpose of all the crimes committed by Mr. Ray on the night of December 26, 2020 were done with the same intent: to instill fear in K.R. The two crimes of second degree assault and felony harassment, when viewed *as charged* were done as part of an overarching plot to instill fear K.R., and based on the same action of the pointing of a firearm.

This case is where assault and harassment merge, such that convictions for both violate double jeopardy. Here the act that forms the basis of the second degree assault charge – instilling fear in another by pointing a gun at that person – and the act that forms the basis of the harassment charge – instilling fear in another by pointing a gun at that person – are identical. Petitioner

asks the Court to resolve the split in the divisions and find that his double jeopardy rights were violated.

VI. CONCLUSION

Mr. Ray seeks review by this Court of two issues that will affect litigants statewide. First, a definition of the exigency exception of the Privacy Act must be created, and should be narrowly tailored and require trial courts to examine the totality of the circumstances in determining whether an exigency exists. Such a definition will provide not just defendants, but law enforcement officers guidance in the application of the Privacy Act. A narrowly tailored exception will encourage the provision of the notification in more circumstances and ensure that citizens' privacy rights continue to be strongly protected in Washington State.

Second, the Court should resolve the split between Division I and Division II regarding whether the crimes of felony harassment and second degree assault violate double jeopardy in

cases where both crimes depend on the same act. In line with Supreme Court precedent, the independent purpose test should be applied to the crimes as charged, not in the abstract, and the reasoning utilized by Division II should be found more in line with this Court's own precedent and adopted statewide. This will provide defendants, prosecutors, and courts with necessary guidance in making, challenging, and ruling on charging decisions.

Mr. Ray asks the Court to then apply both the definition of exigent circumstances under the Privacy Act and the reasoning of *Lemming* to his case and grant him a new trial.

I certify that this motion contains 4998 words in compliance with RAP 18.2

Respectfully presented this 30th day of September, 2024.

/s/ Michael Austin Stewart
Michael Austin Stewart, Attorney for Petitioner
WSBA No. 23981

/s/Dena Alo-Colbeck
Dena Alo-Colbeck, Attorney for Petitioner
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Filing Petition for Review

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. OWEN GALE RAY, Appellant.	No. 86163-8-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — Owen Ray was convicted of assault in the second degree and felony harassment following an incident in which he pointed a gun at his wife, which resulted in his wife and children fleeing the family home after police arrived. Ray argues that the trial court improperly admitted patrol car video capturing conversations between his children without the children's consent, in violation of Washington's Privacy Act. At issue is whether exigent circumstances existed that met a statutory exception to requiring police to notify the children they were being recorded. We need not resolve that dispute because any error in admitting the recording was harmless. Ray also challenges the admission of ER 404(b) evidence that he had previously assaulted his wife. Ray additionally argues that the trial court improperly excluded a defense expert witness, that the prosecutor committed misconduct in closing, and that his convictions violate double jeopardy. We affirm.

FACTS

In 2020, Ray and K.R. lived with their three children and dog in DuPont, Washington after Ray was transferred to a new position at Joint Base Lewis- McChord. Ray was a colonel in the United States Army. The marriage began to deteriorate a few years before the family moved to DuPont. Ray began drinking hard alcohol frequently, developed a quick temper, and would swear at K.R. As Ray's drinking became more frequent, he progressed from yelling to throwing objects.

In the last six months or so of 2020, Ray would comment about having the control in the relationship, telling K.R. she could not leave him and threatening to "sell th[e] house out from under" her. At issue in this case are two incidents. The first occurred during the summer or fall of 2020 in the front entry way of the family home. The second, the basis for the convictions, occurred the day after Christmas the same year.

During the first incident, Ray was "yelling and cussing" in the front entry way of their home when he grabbed K.R. by the chest and pushed her into the wall by the front door, causing K.R. to hit her head on the wall. Though K.R. slept in a locked guest bedroom that night, she did not report the incident and eventually went back to the couple's shared bedroom.

Ray again was "yelling and cussing" at K.R. on the evening of December 26. He had been drinking and became very angry at K.R., accusing her of undermining him in regards to figuring out how their oldest daughter would get to work the next day. While the children and K.R. got ready for bed upstairs, Ray texted K.R., "Way to destroy a father's credibility, as always. Done with this shit."

Ray again got in K.R.'s face, calling her names when she returned to the first floor to attend to the family dog, who recently had surgery, and asked Ray to stop yelling. K.R. told Ray to "back off" and stated that she was going to bed. After K.R. returned to the second floor, she could hear Ray become louder and "really aggressive in what he was saying." Ray said "you want to do this?" "let's do this," and "fine I don't care" while pacing in their front entryway. K.R. explained Ray "sounded like he was coming up to pick a fight with me." K.R., from the second floor, saw Ray put on his shoes in the front entry, so K.R. went to the third floor, believing that Ray would not pick a fight with her in front of the children, whose bedrooms were on the third floor.

After getting to the third floor, K.R. observed the two youngest children asleep in the same bed together in her middle daughter's room with the door open. The oldest daughter was still in the third-floor bathroom getting ready for bed. From her location on the third-floor landing, K.R. could see Ray walk toward the garage and heard the garage door open and close. K.R. then saw Ray go to the second floor and "very aggressive[ly]" open all the doors and turn on all the lights. Concerned, K.R. dialed 911 on her cell phone, but did not hit "send." Ray then ascended the stairs to the third floor, where K.R. noticed that he was holding a gun by his side as their daughter came out of the bathroom. K.R. backed into a loft area between the bedrooms and told her daughter to go to bed. Ray said goodnight to their oldest daughter and closed her door before "immediately" turning on K.R. and yelling at her.

K.R. told Ray to put the gun down and backed into their middle daughter's room, threatening to call 911. Ray told K.R. to "go ahead" and K.R. called 911 before beginning to head down the stairs. K.R. told the 911 operator that her husband was

"drunk," that there was a gun "on his person," and that he was "threatening me with it." Upon hearing K.R. give his name to the 911 operator, Ray came back into the room and pointed the gun at K.R. while yelling, waking up their children. Ray raised his arm and pointed the gun at K.R. telling her to hang up the phone. The children began screaming and K.R. attempted to back away from Ray, but stumbled and fell to the floor. While K.R. was on the floor, Ray kicked her in the chest, stomach, and ribs while continuing to point the gun at her. The 911 recording captured Ray yelling, "you are going to force me to kill myself" and "turn it off right now." K.R. told the operator that she and the children could not get out because "he's blocking it" and "if I talk to you he's going to kill me."

K.R. believed she would be shot and did not want her children to see that, so she moved herself to a small opening between her daughter's bed and closet where they could not see her. Ray continued to kick her, kicking her face and causing K.R. to hit her head on the wall. The youngest children were in bed screaming for Ray not to kill their mother or them and begging him to "go away."

Ray then briefly left the room before returning and pointing the gun at K.R. while yelling again. The second time Ray left the room, K.R. got up and locked the door, attempting to barricade it with her daughter's bookcase. On the 911 recording, K.R. tells the operator that "he's going to kill my kids. Help us." When Ray returned to the room and found the door would not open, he kicked until it broke open, sending the bookcase toward K.R. and causing her to again fall to the floor. Ray then pointed the gun at his two children on the bed, who were "hysterical." The youngest child can be heard on the 911 recording crying and saying, "I don't want to die." Ray responds by

saying, “you’re going to be safe buddy. Don’t worry about it.” Ray continued to swear at K.R., called her names and then said, “you are safe. The kids are safe. You will go to fucking hell.” K.R. positioned herself between the gun and the children while Ray waved the gun around, continuing to point it at K.R. with the children behind her. Ray then backed up to the doorway and turned off the light before raising the gun toward K.R. and the children.

K.R. remained on the line with 911 during the entirety of the incident. In the recording of the phone call, Ray can be heard yelling at K.R., calling her an “asshole” and a “psycho fuck.” Ray repeatedly stated “good job” to K.R. and told her to “go to fucking hell.” K.R. believed Ray was going to shoot her and the children before he left the room. Ray began yelling about how he could see police outside. Officers from three nearby police agencies had arrived just after midnight and established a perimeter around the house.

K.R. grabbed the children and started for the door before being blocked by Ray. K.R. told Ray to “let them go. Be a dad” and he took a step back. K.R. and the children were able to move past Ray and run to the front door. The couple’s oldest daughter had remained in her bedroom on the third floor during the assault and had also called 911. In the call, the oldest daughter said, “My dad’s trying to kill himself and he might try to kill my mom, my little sister and my little brother.” The oldest daughter said her father threatened her mom and siblings. When the 911 operator asked if he said he was going to harm them, the daughter said, “No, but they’re screaming.” The daughter said her father said he was not going to surrender and that he was going to kill himself.

When K.R. left the bedroom, she screamed for her oldest daughter to leave the

house before running out the front door with the two youngest children. Dash camera footage from a responding police car shows K.R. and the two youngest children running from the home screaming, followed moments later by the oldest daughter. K.R. and the children were rushed into a waiting patrol car and immediately driven away from the house so they were no longer within Ray's eyesight. Patrol car cameras recorded the backseat conversations starting at 12:39 a.m. At 1:05 a.m., an officer alerted K.R. and the children that they were being video and audio recorded while in the back seat.

Responding officers observed Ray enter and exit the balcony on the home's third floor and place a handgun to his head each time he exited. Officers could hear a handgun being "racked" in an attempt to chamber a round. Lakewood police sergeant Jason Catlett was able to contact Ray by phone. On the call, Ray said "I will fucking kill every single one of you; it will be a fucking blood bath." Ray also told the sergeant to "go find out" who Ray was, which the sergeant understood to be a threat based on his later understanding of Ray's military background. The sergeant explained that the nature of the threats appeared to be "there is nothing left for me; I've ruined this. My career is over. I've made a mess of my life. If you come in here, I'm going to kill you."

After entering and exiting the balcony several times, Ray returned inside the house and turned off the lights. As a result, officers on scene could no longer see his location in the house. Officers then heard the "distinct" sound of a pump action shotgun being manipulated. The sergeant was again able to get in touch with Ray by phone and spoke with him several times. Ray began to calm down. Ray eventually agreed to come out of the house and was arrested without incident.

Ray was charged with seven counts by way of a second amended information:

Count I (kidnapping K.R. in the first degree), Count II (assault in the second degree against K.R.), Count III (assault in the second degree against K.R.), Count IV (felony harassment, threat to kill, against K.R.), Count V (reckless endangerment); Count VI (felony harassment, threat to kill, against sergeant Jason Catlett), Count VII (felony harassment, threat to cause bodily injury, against sergeant Jason Catlett). At trial, Ray presented a diminished capacity defense, based on his post-incident diagnosis and treatment for post-traumatic stress disorder. Ray and K.R. testified at trial, but none of the children were called to testify. The 911 calls were admitted as well as videos from dash cameras, body cameras, and footage from the backseat of the patrol vehicle where the children sat after fleeing the home. After the State rested its case, the court dismissed one count of assault in the second degree because the kicking of K.R. did not result in substantial bodily injury.

A jury found Ray guilty of counts II (assault in the second degree against K.R.), IV (felony harassment, threat to kill, against K.R.), and V (reckless endangerment). The jury also found Ray was armed with a firearm on counts II and IV. Ray was acquitted on all remaining counts. For the purposes of sentencing, the court found the assault and felony harassment constituted the same course of conduct. The court sentenced Ray to a total of 60 months confinement.

Ray appeals. Additional relevant facts are set out below.

DISCUSSION

Washington's Privacy Act

Ray first challenges the admission of video of his children's conversation in the patrol car after their escape from the house, arguing it was admitted in violation of the

state's Privacy Act.

After K.R. and the children fled the house, all four were directed into the back of a patrol vehicle and driven to a different street so they would no longer be visible from the family's home, where the defendant remained armed and in a standoff with police. After coming to a stop, the officer driving the car can be heard asking K.R. questions pertinent to the safety of the officers on scene, including where Ray was in the house, his access to firearms in the home, the types of firearms in the home, and Ray's phone number. The officer can be heard relaying the information from K.R. to other officers by radio. Seven minutes into the video, at 12:47 a.m., officers ask K.R. to step outside to answer additional questions. Body camera footage documented that questioning had transitioned from the immediate risk Ray posed to responding police to interviewing K.R. about what she had just experienced. The officer driving the patrol car was not involved in this questioning.

After K.R. left the car to speak to officers, the three children were left alone in the patrol car. The children tried to comfort each other while discussing what had just happened and how they felt. While officers spoke to K.R., at least one other officer, possibly the one who drove children and K.R., can be seen standing near the patrol vehicle who was not engaged in interviewing K.R. and not actively involved in responding to the scene at the house which was at a different location. No officers spoke to the children or attended to them until 1:05 a.m., when K.R. returned to the vehicle. It was then that the officer who had been interviewing K.R. outside the patrol vehicle, saw the children and notified all the occupants that they were being video and audio recorded while in the back seat.

Washington's privacy act makes it unlawful to record any private conversation without obtaining the consent of all parties to the conversation.[1] RCW 9.73.030(1)(b). Information obtained in violation of this provision "shall be inadmissible in any civil or criminal case" in the courts of Washington. RCW 9.73.050. The statute does provide an exception for emergency response personnel. Law enforcement officers are permitted to make "sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles." RCW 9.73.090(1)(c). Law enforcement are generally required to "inform any person being recorded by sound under this subsection (1)(c) that a sound recording is being made" and the statement informing them is required to be captured in the recording. RCW 9.73.090(1)(c). This is not required, however, "if the person is being recorded under exigent circumstances." RCW 9.73.090(1)(c). If a recording falls under the exceptions provided in RCW 9.73.090, it may be admissible in court. RCW 9.73.090(3). When an officer is required to inform the person about the recording but fails to do so, the recording's exclusion is the remedy. Lewis v. Dep't of Licensing, 157 Wn.2d 446, 452, 139 P.3d 1078 (2006).

The parties do not dispute that the conversations were both private and recorded without the consent of the children. Though an officer eventually informed the children they were being recorded by video and audio, this occurred after obtaining the recorded statements that were admitted at trial. At issue is whether police were not required to inform the children that they were being recorded because the recording was made under exigent circumstances. The statute does not define "exigent circumstances."

Ray contends that the children's conversation took place in a patrol vehicle

[1] The act includes exceptions for emergencies, threats, and the investigation of specific crimes, but those exceptions do not apply here. See RCW 9.73.030(2), .210, .230.

located in a safe location away from the ongoing standoff between Ray and other responding police. This was after the patrol's driver already gathered initial information from K.R. about Ray. Thus, Ray argues, the exigent circumstances exception does not apply. The State counters that the police's ongoing focus on how best to respond to the standoff with Ray who had access to firearms qualifies as exigent circumstances.

We need not address whether the circumstances here qualify as "exigent" under RCW 9.73.090(1)(c). Even if we assume, without deciding, the trial court erred in admitting the recording, the error was harmless.

"Admission of evidence in violation of the privacy act is a statutory, and not a constitutional violation." Courtney, 137 Wn. App. at 383 (citing Cunningham, 93 Wn.2d at 831). Non-constitutional error "is harmless unless there is a reasonable probability, in light of the entire record, that the error materially affected the outcome of the trial." State v. Webb, 64 Wn. App. 480, 488, 824 P.2d 1257; accord Cunningham, 93 Wn.2d at 831. A "'reasonable probability' is a probability sufficient to undermine confidence in the outcome." State v. Chavez, 76 Wn. App. 293, 298, 884 P.2d 624 (1994) (quoting United States v. Bagley, 473 U.S. 667, 682, 106 S. Ct. 3375, 87 L. Ed. 2d 401 (1985)).

The statements of the children in the video related to their recounting of events, including the facts that Ray was armed, threatened K.R., pointed a gun at K.R., kicked K.R., and that the children were placed in fear by their father's actions. These facts were also introduced through K.R.'s testimony and the 911 calls. K.R. testified to each, stating multiple times that the defendant pointed a gun at her, kicked her, and that the children were "screaming" and "hysterical." The jury also viewed body camera footage of K.R. speaking to police after she exited the patrol car, in which she told them that the

defendant pointed the gun at her while kicking her and threatened to shoot her. Ray testified at trial that he wanted to be downstairs by himself, but that K.R. came down and wanted to argue. When asked if he remembered going upstairs with a firearm, Ray said "[v]aguely." Ray testified that he did not understand why K.R. was calling 911, but that it "destroyed" him and that moments later he saw police surround the house and realized he was "not making it out of this alive." After that, Ray testified that he did not remember hardly anything after that point

The overwhelming uncontroverted evidence establishes that there is not a reasonable probability that the admission of the challenged video of the children materially affected the outcome of the trial. We conclude that even if the court erred in admitting the recording, the error was harmless. Because we conclude any error was harmless, we need not consider Ray's subsequent argument that the video's risk of unfair prejudice outweighed any probative value under ER 403.

ER 404(b)

Ray challenges the trial court's decision to admit evidence of the prior 2020 assault against K.R. that occurred in the entry way of their home.

"Decisions involving evidentiary issues lie largely within the sound discretion of the trial court and ordinarily will not be reversed on appeal absent a showing of abuse of discretion." State v. Nava, 177 Wn. App. 272, 289, 311 P.3d 83 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. State v. Taylor, 193 Wn.2d 691, 697, 444 P.3d 1194 (2019). ER 404(b) prohibits the introduction of other crimes, wrongs, or acts to prove propensity, but allows for their admission for other purposes, including proof of intent.

Before a trial court may admit such evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). The trial court is required to conduct this balancing analysis on the record. State v. Lilliard, 122 Wn. App. 422, 431, 93 P.3d 969 (2004).

The State explained that one purpose in introducing the evidence was to show the escalating nature of Ray's conduct toward K.R. and to prove the element of fear for the harassment charge. In order to prove felony harassment, the State had to prove that Ray knowingly threatened to cause K.R. bodily injury and that it put K.R. in reasonable fear the threat would be carried out. The trial court heard testimony from K.R. regarding the assault in which Ray pushed her against the wall causing her to hit her head during an argument. "'Credibility determinations are for the trier of fact' and are not subject to review." State v. Cardenas-Flores, 189 Wn.2d 243, 266, 401 P.3d 19 (2017) (quoting State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). The trial court found that the event had occurred by a preponderance of the evidence following K.R.'s testimony. The trial court then balanced the probative value against the prejudicial effect, noting that the fact the assault had occurred in the recent past and that it was another physical altercation between the defendant and K.R. made it more probative. The trial court permitted the admission of the incident.

We conclude that the trial court did not abuse its discretion in allowing the State to introduce evidence of a prior assault committed by the defendant against K.R.

Witness Exclusion

Ray next argues that the trial court erred in excluding the testimony of a physician who diagnosed and treated Ray subsequent to his arrest.

The record reflects that the trial court made no such ruling. Instead, it shows that the defense chose not to call Dr. Chang. After the State moved prior to trial to exclude several witnesses on the defense witness list, the trial court indicated that it would not "exclude folks in a pretrial motion like this." The trial court explained that its concerns about hearsay, relevance, and redundancy would depend on the circumstances and could not be adjudicated prior to trial.

During trial, defense counsel indicated that it planned to call Dr. Chang to testify to the fact that Ray had undergone psychiatric treatment. The court again stated that it would "have to hear the witnesses, hear the specific questions, and hear the testimony," and that it would not adjudicate its concerns regarding relevance, cumulative evidence, or expert testimony from lay witnesses before they testified. The next day, defense informed the court "I am not calling Dr. Chang; he was scheduled for this morning as well. Kind of based on the direction that the case has gone and kind of the limitations, we are choosing not to proceed with Dr. Chang."

Because the defense chose to not call Dr. Chang before the court issued a ruling as to his testimony, there is no court ruling for us to review as to this issue.

Prosecutorial Misconduct

Ray argues that the prosecutor committed misconduct in closing argument by attributing thoughts and motives to the defendant that were not in evidence. Ray did not object to these statements at trial.

To prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). The effect of a prosecutor's conduct is viewed in "'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" State v. Monday, 171 Wn.2d 667, 675, 275 P.3d 551 (2011) (quoting State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)). We first determine whether the prosecutor's conduct was improper. Emery, 174 Wn.2d at 759. If the conduct was improper, we then look to whether the prosecutor's improper conduct resulted in prejudice to the defendant. Id. at 760. Prejudice is established by showing a substantial likelihood that the prosecutor's conduct affected the verdict. Id. Where, as here, a defendant fails to object to the prosecutor's remarks at trial, he is "deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." Id. at 760-61.

The Washington Supreme Court has noted that prosecutorial misconduct found to be flagrant and ill intentioned is "in a narrow set of cases where we were concerned about the jury drawing improper inferences from the evidence, such as those comments alluding to race or a defendant's membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner." In re Pers. Restraint of Phelps, 190 Wn.2d 155, 170-71, 401 P.3d 1142 (2018).

A prosecutor is not permitted to appeal to the passion and prejudice of the jury through the use of inflammatory rhetoric. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Though the State has wide latitude to argue reasonable

inferences from the evidence, it is misconduct for a prosecutor to urge the jury to decide a case based on evidence outside the record. State v. Teas, 10 Wn. App. 2d 111, 126, 447 P.3d 606 (2019) (citing State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012)).

Ray argues that the prosecutors mischaracterized him as a "controlling and abusive spouse" when there were no facts in the record supporting that assertion. Ray specifically challenges two statements made in closing and rebuttal.[2] In closing, the first prosecutor said

> This was about purposefully traumatizing [K.R.]. Letting her know that it was her fault. All of this, the fact that he was going to kill himself, it wasn't his military's fault. It wasn't prior experiences there. He wasn't thinking about his time with President Obama, no.
>
> This was about [K.R.] and the things that she had done or not done, and he wanted to make sure that she knew that, and he also wanted to make sure that she knew that, and he also wanted to make sure that the kids knew when he was gone whose fault this was.

In rebuttal, the second prosecutor said

> Not only can he not treat her with a single modicum of respect, but he decides it's time for intimidation. He'll show her who's in charge. Nobody can challenge him; he's full of resentment. After all, quote, "You're a fucking asshole is what you are."
>
> How does one gain compliance? Introduce a gun. Introduce a gun in the hand of a man who hunts down his wife, door to door, on the second floor. Then up to the third floor. She'll have to listen to him now.
>
> He's the man of the household; he has the power; he has the control. You are a, quote, "Crazy fucking woman." And then he grabs his

[2] The State asserts in a Statement of Additional Authority that this court should decline to address Ray's claims regarding the prosecutor's statement in rebuttal arguments because Ray first challenged these statements in his Reply Brief. Parties may file a statement of additional authorities prior to the filing of a decision on the merits. RAP 10.8. However, Ray did identify and challenge in his opening brief specific arguments made in rebuttal closing. Ray's additional quoted rebuttal argument in his reply brief related to State's arguments made in its response brief. Ray moves to strike the State's Statement of Additional Authority Regarding Rebuttal Arguments because the State improperly included argument in its filing. We deny the motion to strike because the State complied with RAP 10.8.

> handgun and says, quote "Come on, Hun, let's do this, man." She doesn't respect, so I'll teach you a little respect.
>
> . . . .
>
> And he's thinking, I've been trying to be here for my family, and how do you repay me? You ruin me. All those years of deployment after deployment, I was on track for promotion, but you ruined that. Ruined that all with that 9-1-1. So she will pay. She will pay for what she's done.

All but the last paragraph can be reasonably inferred from evidence presented to the jury. While a prosecutor has wide latitude to argue inferences from the evidence, "mere appeals to the jury's passion or prejudice are improper." Pierce, 169 Wn. App. at 552 (citing State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006), overruled on other grounds by State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014)). This court has previously explained that it is "*improper* for the prosecutor to step into the *defendant's* shoes during rebuttal and, in effect, become the *defendant's* representative." Id. at 554. In Pierce, the prosecutor's "statements attributed to Pierce were calculated to portray Pierce as an impatient, amoral drug addict who refused to work and 'want[ed] [his] meth now.'" Id. (alterations in original). The court explained that "by arguing in the first person singular, the prosecutor inflamed the prejudice of the jury against [the defendant] by attributing repugnant and amoral thoughts to him." Id. We agree with the Pierce court that it is improper for a prosecutor to attribute thoughts not in evidence to a defendant in closing and rebuttal arguments. Rather than "effectively testifying about what particular thoughts [a defendant] must have had in his head," prosecutors should instead argue that the jury should infer from the evidence what a defendant's motive may have been in committing the crimes charged. Id. at 555.

While the court in Pierce held that this argument, in addition to additional improper arguments made by the prosecutor, were so flagrant and ill intentioned as to be incurable by instruction to the jury, it explained this was so because there was no evidence as to the thoughts in Pierce's head while he committed the crimes and Pierce did not testify at trial. Id. at 555-56.

The jury in the instant case heard testimony from K.R. that Ray had a quick temper and would become angry if his wife and oldest daughter "said something that wasn't respectful, or he would always say that we were undermining him." K.R. explained that Ray "just had in his mind what our priorities should be, and if we were not saying it correctly or doing something the way that he thought we should react to it, he would start yelling." K.R. also testified that Ray would tell her that she could not leave the marriage, "that he had the control." The jury heard from K.R. that Ray told her "he would sell this house out from under me, that he had all the control, and that everything was in his name." K.R. told the jury that Ray "liked to blame [K.R.] for whatever he did." K.R. testified that Ray became disproportionately irritated when a ski trip with his daughters on December 26 did not go as he planned and began "yelling and cussing" when their daughter did not want him to drive with her to work the next morning and instead asked K.R. to do it.

In addition to the testimony, the jury heard 911 calls in which Ray can be heard in the background telling K.R. to "turn it off right now." Ray can also be heard telling K.R. "good job, you psychofuck. You can deal with these kids for the rest of your fucking life, you fucking asshole. [The police are] all around our house right now. What choice do I have, [K.R.]? Good job." Ray can also be heard telling K.R.

> Fuck you. You will deal with all of this. Fuck you, fucking whore" [and] "This is the reconciliation for what you have done for the last three fucking years. Now, let's fucking do this. I know how to do it. You are safe. Your kids are safe. You go to fucking hell. You go to fucking hell.

The jury also heard testimony that Ray sent text messages to K.R. complaining that her offer to drive their oldest daughter to work instead of Ray destroyed his credibility as a father "as always." After K.R. and the children fled the home and while Ray was inside with firearms and surrounded by law enforcement, he texted her "Thanks for this. Best wife ever."

However, the last paragraph of the challenged portion of the State's rebuttal appears to be improper first-person attribution of Ray's inner thoughts that goes beyond a reasonable inference from the record. While K.R. testified that Ray blamed her for ruining his credibility as a father, there was no testimony about her ruining his promotion track. Catlett reported that Ray said, "There is nothing left for me; I've ruined this. My career is over. I've made a mess of my life. If you come in here, I'm going to kill you." While this last paragraph was improper, it was not so flagrant and ill intentioned that it could not have been cured by an instruction.[3] Therefore, as Ray did not object during trial, his challenge is waived.

[3] In the "statement of the case" section of Ray's opening brief, he notes an additional instance of the prosecutor attributing first-person thoughts not in evidence to Ray. The prosecutor stated that, while Ray threatened to harm the law enforcement officers surrounding his home, Ray thought

> My career is over, but I'll show [K.R.]. She'll have blood on her hands, and it's not just my own; she'll be responsible for the death of police. That blood will stain her for the rest of her life. The smell of it will never go away.

Ray does not repeat this statement in the argument section, but does argue that first-person attributions that are not in the record are improper. To the extent Ray's argument includes this quoted passage, other than the statement, "[m]y career is over," the rest of the statement was an overdramatization that was not supported by evidence in the record. However, the statements also were not so ill intentioned that they were not curable with an instruction.

Double Jeopardy

Ray argues that his convictions for felony harassment and assault in the second degree based on his threats to kill K.R. by pointing a gun at her violate the double jeopardy clause of the federal and state constitutions. We disagree.

Though Ray raised a double jeopardy argument below, it related to firearm enhancements that he does not repeat on appeal. Nonetheless, double jeopardy is a type of constitutional challenge that may be raised for the first time on appeal. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).

The double jeopardy clauses of the Fifth Amendment and the Washington Constitution protect a defendant from multiple punishments for the same offense. State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995); U.S. CONST. amend. V; WASH. CONST. art. I, § 9. The legislature "has the power to define offenses and set punishments," and so double jeopardy is not offended if the legislature "intended to punish separately" crimes that constitute the same criminal act, or steps leading to a greater crime. State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Where the acts of the defendant result in charges under multiple criminal statutes, a double jeopardy challenge requires the court to determine whether, in light of legislative intent, the charged crimes constitute the same offense. In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2009). A double jeopardy claim is a question of law that is reviewed de novo. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

"To determine whether the legislature intended to punish crimes separately, we apply the four-part test enunciated in *State v. Freeman*." State v. Fuentes, 150 Wn. App. 444, 449, 208 P.3d 1196 (2009) (citing Freeman, 153 Wn.2d at 765)).

> First, we look at the statutory language to determine if separate punishments are specifically authorized. If we cannot ascertain this from the language itself, we next apply the "same evidence" test. Under that test, we ask whether one offense includes an element not included in the other and proof of one offense would not necessarily prove the other. If that is the case, we presume that the crimes are not the same for double jeopardy purposes. Third, if applicable, we use the merger doctrine to determine legislative intent even if two crimes have formally different elements. Finally, even if on an abstract level the two convictions appear to be for the same offense or for charges that would merge, we must determine whether there is an independent purpose or effect for each offense. If so, they may be punished as separate offenses without violating double jeopardy.

Id. at 449-50 (citations omitted).

Neither party claims that statutory language expresses a legislative intent to impose separate punishments for the same conduct. They are correct. See State v. Leming, 133 Wn. App. 875, 888, 138 P.3d 1095 (2006) (recognizing that the two statutes governing felony harassment and second degree assault, RCW 9A.46.020 and RCW 9A.36.021, respectively, do not contain specific provisions expressly authorizing separate punishments for the same conduct). We next turn to the remaining steps under the Freeman analysis, starting with the Blockburger test. Id. at 885 (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) (establishing "same evidence" or the "same elements" test)). This test applies where the "same act or transaction" constitutes a "violation of two distinct statutory provisions." Blockburger, 284 U.S. at 304. The analysis asks whether the crimes as charged and proven are "identical both in fact and in law." Calle, 125 Wn.2d at 777. "[D]ouble jeopardy will be violated where '*the evidence required* to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other.'" Orange, 152 Wn.2d. at 820 (second alteration in original) (internal quotation

marks omitted) (quoting State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)).

Ray argues that his convictions for felony harassment and assault in the second degree violate double jeopardy because they were based on the same evidence.

To convict Ray of felony harassment under RCW 9A.46.020(1)(a)(i), (2)(b)(ii), the State had to prove that Ray knowingly threatened to kill K.R. immediately or in the future and that the words or conduct of the defendant placed K.R. in reasonable fear that the threat would be carried out. In closing, the State explained that the evidence supporting the charge was "the circumstances surrounding the situation of him pointing the gun at her and yelling at her." To convict Ray of assault in the second degree under RCW 9A.36.021(1)(c), the State was required to prove that Ray assaulted[4] K.R. with a deadly weapon. In closing the State explained to the jury that the evidence supporting the charge was "we have the defendant with a gun, yelling and screaming and pointing the gun." The State relied on the same facts to prove both crimes. The State does not present any argument that the convictions were not based on the same evidence. Instead, the State relies on the last step of the Freeman double jeopardy analysis.

Even if two convictions appear to be the same offense, this court must determine whether there is an independent purpose or effect for each offense. Freeman, 153

[4] The jury instructions defined assault as

> An assault is an intentional touching, striking, or shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person.
>
> An assault is also an act 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 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.

Wn.2d at 773. This court conducted that analysis in Mandanas, 163 Wn. App. at 720. We held that

> [a] plain language reading indicates that the legislature intended to distinguish felony harassment and second degree assault as distinct offenses. The harassment statute specifically criminalizes threats to injure or kill another, which, standing alone, are insufficient to establish an assault. The offenses are set forth in different chapters of the Washington Criminal Code, title 9A RCW, and address different social concerns. Assault addresses concerns about physical harm; criminal harassment aims to prevent invasion of individual privacy. See RCW 9A.46.010. These differences in aim and purpose, demonstrated by the legislature's establishment of different essential elements, indicate that felony harassment and second degree assault do not constitute the same offense for purposes of double jeopardy.

Id. at 719-20. However, Division Two of this court found that the two crimes did violate double jeopardy in Leming, 133 Wn. App. at 889 (concluding under the same evidence test that the convictions for felony harassment and assault in the second degree were the same in fact and law when the State relied on the same evidence to prove both – Leming's threat to snap the victim's neck and her fear that he would carry out the threat). Division Two did not conduct an independent purpose or effect analysis in Leming, which was decided before Mandanas.

In a recent unpublished opinion, Division Two disagreed with Mandanas. See State v. Nakamura, No. 57050-5-II, slip op. (Wash. Ct. App. June 13, 2023) (unpublished), https://www.courts.wa.gov/opinions/pdf/D2%2057050-5-II%20Unpublished%20Opinion.pdf.[5] In Nakamura, the court, under the rule of lenity, concluded that the jury relied on the same acts to convict Nakamura of both felony harassment and assault in the second degree. Id. slip op. at 14. After applying the

[5] We may properly cite to unpublished opinions and discuss it as a nonbinding authority where, as here, doing so is "necessary for a reasoned decision." GR 14.1(c).

same evidence test and concluding that dual punishments are therefore presumptively not authorized, it next considered whether there is clear evidence of contrary legislative intent showing that these offenses should be punished separately. Id. slip op. at 15 (citing Calle, 125 Wn.2d at 780). Division Two concluded

> [h]ere there is no clear evidence demonstrating a legislative intent to punish felony harassment and assault separately when they are predicated on the same distinct act and cause the same distinct harm. Importantly, the crimes as charged and proven in this case address the same societal concern: threatening another person with a gun and inflicting terror on the victim. Finally, we discern no independent purpose or effect for these offenses under these unique facts.

Id. Division Two observed that the Mandanas court held otherwise, but appeared to suggest that the independent purpose language in Mandanas was dicta. Division Two noted

> In that case, the defendant pointed a gun at the victim and threatened to kill him, and also repeatedly pistol whipped the defendant on the head with the gun. Mandanas, 163 Wn. App. at 715, 721. The court went on to note that the crimes in that case were predicated on distinct acts, making it distinguishable from this case. Id. at 721. It is unclear why the Mandanas Court felt compelled to discuss the same evidence test and legislative intent given their holding that the crimes were predicated on separate and distinct acts.

Nakamura, slip op. at 15 n.7.

First, Nakamura, unlike Mandanas, is an unpublished case. See GR 14.1(a) ("Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court" but "may be cited as nonbinding authorities . . . and may be accorded such persuasive value as the court deems appropriate"). Moreover, we disagree with Division Two's independent purpose analysis. That last step in a double jeopardy analysis does not turn on the fact that two crimes are based on the same act. See Calle, 125 Wn.2d at 778 (holding that the differing purposes served by the incest

and rape statutes, as well as their location in different chapters of the criminal code, are evidence of the Legislature's intent to punish them as separate offenses despite the fact the defendant committed one act of forcibly engaging intercourse).

Independent purpose or effect is "a well established exception that may operate to allow two convictions even when they formally appear to be the same crime under other tests." Freeman, 153 Wn.2d at 778. The exception applies where there is a separate injury to "the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." Id. at 778-79 (quoting State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384 (1996)). "This exception is less focused on abstract legislative intent and more focused on the facts of the individual case." Id. at 779.

The other exception is when the presumption under Blockburger can be rebutted by other evidence of legislative intent. See e.g. Freeman, 153 Wn.2d at 772; State v. Womac, 160 Wn.2d 643, 655, 160 P.3d 40 (2007); Calle, 125 Wn.2d at 780 (recognizing that the presumption from the Blockburger "same evidence" test should be overcome only by clear evidence of contrary intent).

In Freeman the court analyzed whether double jeopardy is violated when an assault elevates the degree of robbery. 153 Wn.2d at 774. The State in that case similarly argued that the court could "find legislative intent to punish these crimes separately in the fact that the two statutes are directed at different evils." Id.

The Supreme Court rejected the argument observing that "in Calle, this court reviewed in detail the history and academic material bolstering its conclusion that the legislature *did* intend to combat different societal evils through the rape and incest

statutes" and that "[n]o such historical review appears in the briefing here." Id. at 775 (citing Calle, 125 Wn.2d at 780-81). The court further reasoned that "a per se holding that the legislature *never* intends these two crimes [assault and robbery] to merge would also require us to substantially overrule a long line of cases." Id.

Years later, the Washington State Supreme Court in State v. Arndt, 194 Wn.2d 784, 818, 453 P.3d 696 (2019), once again turned to the independent purpose analysis to hold that double jeopardy was not violated. The defendant in Arndt was convicted of murder in the first degree with an arson aggravator and arson in the first degree, both convictions from the act of starting a two-story house fire where all but one of the eight people inside were able to escape. Id. at 790. The State admitted that the convictions at issue in that case were the same under Blockburger because "aggravated murder as charged *required* proof of every element of first-degree arson." Id. at 818. The Supreme Court agreed with the State. Id. at 819. While noting that Arndt is "not exactly like Calle," the Supreme Court turned to the primary purpose of the statutes at issue as additional indication that the legislature clearly intended separate punishments for the separate crimes of first degree murder with an arson aggravator and first degree arson. Id. at 820. The Arndt court concluded that the statutes at issue were in different parts of the criminal code and that the primary purpose of the arson statute is to protect property, while the primary purpose of the aggravated murder statute is to protect human life. Id. See State v. Heng, 22 Wn. App. 2d 717, 734, 512 P.3d 942 (2022) (relying on Arndt to reject a double jeopardy violation "because Heng's arson had an effect independent of the murder and because the purpose of criminalizing arson is to protect property whereas the purpose of criminalizing murder is to protect human life,

this case falls within the 'independent purpose or effect' exception to the merger doctrine").

We follow Mandanas and conclude that the convictions do not violate double jeopardy because the offenses have independent purposes, which is evidence of legislative intent for dual punishments.

CONCLUSION

We conclude that even if the trial court erred in admitting the recorded conversation of the children, any such error was harmless. Because the crimes of felony harassment and assault in the second degree have independent purposes, those convictions do not violate double jeopardy. The court did not abuse its discretion in admitting evidence of the earlier 2020 assault under ER 404(b). And because the prosecutor's challenged statements in closing argument were not so flagrant and ill intentioned that they could not have been cured with an instruction, Ray, who did not object to those statements during trial, waived that claim.

We affirm.

Colum, J.

WE CONCUR:

Díaz, J.

Chung, J.