IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEVEN THOMAS SKUZA, Appellant.	No. 38042-1-II ORDER AMENDING OPINION

The published portion of the opinion previously filed in this case on July 14, 2010, is hereby amended as follows:

Inserting the word "may" between the words "court" and "impose" on the second line of page 10 of the opinion.

Accordingly, it is

SO ORDERED.

DATED this _____ day of _____, 2010.

_____

QUINN-BRINTNALL, P.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEVEN THOMAS SKUZA, Appellant.	No. 38042-1-II PART PUBLISHED OPINION

Quinn-Brintnall, P.J. — A jury found Steven Skuza guilty of third degree assault, fourth degree assault, first degree driving with a license suspended, and bail jumping. Skuza appeals, arguing that (1) police improperly commented on his right to remain silent, (2) the prosecutor committed misconduct during closing argument, and (3) his sentence exceeds the statutory maximum. In his statement of additional grounds for review (SAG),[1] Skuza raises numerous challenges, including that the trial court improperly excluded testimony from a bail bonds employee, thereby depriving him of his due process right to present a defense to the bail jumping charge. Although Skuza's primary issues and most of his SAG issues lack merit as addressed in the unpublished portion of this opinion, his challenge to the exclusion of the bail bonds

[1] RAP 10.10.

employee's testimony is well taken and we address it in the published portion of this opinion. Accordingly, we affirm Sukza's assault convictions,[2] but we reverse the bail jumping conviction and remand for further proceedings.

FACTS

On August 9, 2007, Skuza drove Sheila Anson home from a narcotics anonymous meeting. Angry and upset that she had refused to follow the narcotics anonymous program correctly, Anson estimates that Skuza punched her face and head approximately 15 to 20 times while he drove.

Another motorist, Monte Edenfield, saw Skuza hit Anson several times as their cars passed each other when they crossed some railroad tracks. Edenfield made a u-turn and followed Skuza. Edenfield testified that he saw Skuza's van jerk several times and that through the van's back window he could see Skuza hitting Anson. Anson testified that during the drive, Skuza referenced a car following them and said, "Now look at what you did," and hit her. 3 Report of Proceedings (RP) at 88. Edenfield called 911 and relayed the van's license plate number. At the 911 operator's request, Edenfield ended his pursuit. Skuza ultimately drove to his father's Lakewood home.

Officer Brian Weekes of the Lakewood Police Department arrived at Skuza's father's home where he stopped Skuza's van as it backed out of the driveway, approached the driver's side of the van, and asked Skuza for his driver's license. Skuza replied that he did not have a driver's license. Anson was in the passenger's seat and Weekes noted that she appeared "very scared" and was "shaking and crying." 4B RP at 214.

[2] Skuza does not appeal his driving with a license suspended conviction.

The next sequence of events was hotly disputed at trial. However, all the parties agreed that there was little space between the driver's side of the van and another parked car in the driveway.

According to Officer Weekes, he ordered Skuza to exit the van and Skuza refused to comply and began reaching under his seat. Weekes then ordered Skuza to "get his hands out from underneath the seat" and, when Skuza failed to comply, Weekes grabbed his arm, pulled him out of the van, and ordered him to the ground. 4B RP at 218. Once Weekes got Skuza out of the van, Skuza continued to resist arrest, pushing Weekes in the chest and into the side of the van, but he eventually complied when Weekes threatened to use pepper spray.

According to Skuza, he tried to locate his "I.D." in the middle console of the van, but he could not have reached under his seat because it is "all plasticed [sic] in." 4B RP at 269. He denied pushing Officer Weekes and claimed that he had tried to comply with Weekes's orders but was rushed and that there was not enough room to comply until he got behind the back of the van. Skuza's father described the events as Skuza had described them, but he did not say anything about any of the verbal exchanges between Weekes and his son.

According to Anson, Officer Weekes "had an attitude toward [Skuza] right at the get go." 3 RP at 113. She stated that Skuza looked for his license on the van's console, never looked under his seat, and tried to comply with Weekes's requests. Anson stated she did not see Skuza strike or kick Weekes.

Lucas Sarysz, a civilian ride-a-long in Officer Weekes's car, also witnessed the 15 to 20 second struggle between Skuza and Weekes and heard Skuza saying that he would cooperate. He saw Skuza "throw a swing" at Weekes that failed to connect. 4B RP at 200. Because Sarysz was

sitting in the police car during the incident, he could not hear the initial verbal exchanges regarding the driver's license request.

Ultimately, Officer Weekes handcuffed Skuza, placed him in a patrol car, and spoke with Anson. Weekes reported seeing bruising and two hematomas on the back of Anson's head. But Anson refused medical attention, photographing of her injuries, or to provide a written statement.

On August 14, 2007, the Pierce County Prosecuting Attorney's office charged and the Pierce County Superior Court arraigned Skuza on one count of third degree assault of a police officer and one count of fourth degree assault on Anson. Skuza signed and received a copy of a scheduling order that directed him to appear in court at 8:30 am on August 30, 2007. Skuza failed to appear on August 30, 2007, as ordered, and the trial court issued a bench warrant. On April 28, 2008, the State amended Skuza's charges, adding one count of first degree driving with a license suspended and one count of bail jumping.

Trial commenced on June 18, 2008. Skuza moved to suppress statements that he made to Officer Weekes before he received his *Miranda*[3] warnings. The trial court concluded that Skuza's statements were spontaneous and voluntary and denied Skuza's suppression motion.

The State moved to limit testimony from Laurie Spencer, Skuza's bail bondsperson, regarding Skuza's reasons for failing to appear at the August 30, 2007 hearing. Spencer was expected to testify that Skuza had contacted her after missing the hearing and explained that he had missed the hearing because he had complied with a conflicting court order in a different case. The trial court reserved judgment on the State's motion to limit Spencer's testimony until Skuza provided authority that "confusion" of how to comply with multiple court orders qualified as an

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

affirmative defense to bail jumping.

On June 19, the trial court held an emergency bail reconsideration hearing after Anson revealed that Skuza contacted her the night before and attempted to influence her testimony. Pierce County Sheriff's Detective Kevin Johnson interviewed Anson. Johnson testified that Anson had told him that Skuza wanted her to testify "that he was not driving" and then started crying, saying, "There's more but I'm not going to get him in trouble." 2 RP at 50-51. The trial court revoked Skuza's bail and entered an order prohibiting him from having future contact with Anson.[4] At trial, Anson testified that Skuza had contacted her and attempted to influence her testimony.

On June 24, Skuza was scheduled to call bail bondsman Spencer as a witness. Before the trial court reconvened, the trial judge revealed that the previous night he had personally overheard Spencer and Skuza discussing Spencer's upcoming testimony:

> THE COURT: It's always a -- it may not appear, being a judge, that it requires that you do things that are hard on all of us. But I need to start off by bringing up to the defense, as well as the prosecutor's attention, what occurred last night. I'm saying what I'm saying because I expect defense counsel to, or the defense to put the testimony on of the bail bondsman person this morning.
>
> When we left the courtroom last night, I walk[ed] out on the Nollmeyer side and as you come to the corner of the building, the smoking section is on the right side of the building. I walk out, I come to the corner and as I come to the corner, [Skuza] is talking to the bail bond[s]man. They are smoking and I distinctly heard the bail bondsman say, well, I'm going to testify to this and that, to [Skuza].
>
> That brings up an important point in why we exclude witnesses, so they don't discuss what the testimony is from one to the other. It brings up the concern that I have. You exclude witnesses, you don't discuss what one testified to or the other testified to. You come in, you give your evidence and you're out. But it was apparent to me that the discussion between the defendant and the bail

[4] Although the trial court's oral ruling included a prohibition on Skuza's contact with "the victims and witnesses," the trial court's written order prohibited only Skuza's contact with Anson. *Compare* 2 RP at 66 *with* Clerk's Papers (CP) at 121-22.

bondsman was as to what the bail bondsman was to testify to. I'm concerned.

I bring that up -- well, counsel, do you have anything you want to say, [defense counsel]? I know you're just being apprised of this right now. I'm sorry about that. That's what happened.

[DEFENSE COUNSEL]: If she's telling him -- they are not necessarily colluding as to what their testimony is going to be. If she's just simply telling Mr. Skuza what her testimony will be, I'm not sure what -- I don't know what the ramifications are of a witness -- I mean, they have known each other for a long time, that bail bondsman. [The State] called her to find out what she was going to testify about. I don't think that has changed. She pretty much has stuck to what she said all along, what she's going to be testifying to.

Obviously I wasn't there. I didn't hear or see the conversation. I don't know what took place between the two of them, whether there's any collusion, whether he's trying to tell her what she's going to say. I didn't hear any of that, simply where she's telling him -- I don't see the real harm at this point. I certainly wouldn't want to -- [The State] may have a different view than I do.

THE COURT: [Prosecutor]?

[PROSECUTOR]: Your Honor, we have already had one incident in this trial with Mr. Skuza having contact with witnesses. I think the Court has made it abundantly clear to Mr. Skuza, by both reprimanding him and increasing his bail and taking him into custody, that he is to have no contact with witnesses. In no uncertain terms when you executed the conditions of release on June 19th, I don't think there's any confusion that he was to have no contact with any witnesses and also no contact with the victim, Ms. Anson.

In spite of it, I feel that Mr. Skuza continues to try to undermine the court process. Your Honor, it gives the State concern. But given the fact that we're so far into this process, I would think that we probably could do closing this morning. I'm not going to ask for a mistrial. I'm just going to ask that we proceed. Mr. Skuza may face some later ramifications from the Court and/or from the prosecutoring [sic] attorney for additional charges, but I'm not going to ask for a mistrial.

[DEFENSE COUNSEL]: I can't speak with regard to what Mr. Skuza understood when the Court was talking about the fact that he was not supposed to have contact with Ms. Anson. Did you feel at that point that you could not talk to your bail bondsman?

[SKUZA]: No.

THE COURT: Well, I specifically asked the bail bondsman to step out while [Skuza] testified, because we wanted to hear from his side of it first with regard to the bail jumping. I'm referring to the material found for me by the extern this morning pertaining to Rule 615, Federal 615, which deals with exclusion of witnesses. Part of it reads, "Therefore, when witnesses who meet and discuss testimony outside the courtroom, or witnesses who read trial transcripts or discuss the trial with others in attendance routinely are found in violation of Rule 15."[5]

[5] We could not determine the original source of this uncited quote from material found by the trial

> There's three recognized sanctions, one, holding the offending witness in contempt; two, permitting cross-examination concerning the violation; three, precluding the witness from testifying.
>
> That's what I'm thinking, [defense counsel], is with Mr. Skuza, the defendant, stepping outside the courtroom and discussing his testimony with the bail bondsman that he intends to call as a witness, after being instructed to step out of the courtroom so that she could not hear the testimony of Mr. Skuza, and they are doing that outside the courtroom, I think it would be proper for me at this point to preclude the witness from testifying, period.
>
> Any response?
>
> [DEFENSE COUNSEL]: I'm just going to obviously, if the Court is -- I'm objecting for the purpose of appeal and this witness should have been allowed to testify with regard to what the defense proffered, as to what their testimony would be.
>
> I don't have anything more.
>
> THE COURT: Anything from the State?
>
> [PROSECUTOR]: No, Your Honor.

5 RP at 307-11. Citing ER 615, the trial court explained that Skuza and Spencer's conversation undermined the trial court's reasons for excluding Spencer from the courtroom during Skuza's testimony. The trial court prohibited Skuza from calling Spencer as a witness in his defense.

The State objected to two of Skuza's proposed jury instructions on an "uncontrollable circumstances" affirmative defense to bail jumping. The trial court refused to give any "uncontrollable circumstances" instruction, ruling that Skuza had failed to present enough evidence to support the instruction.

The jury found Skuza guilty on all four counts. The trial court sentenced Skuza to 57 months of confinement followed by 9 to 18 months of community custody for the third degree assault and bail jumping convictions and concurrent suspended sentences of 365 days of

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court extern. We did find secondary sources conveying some information similar to parts of the quoted material. Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice § 615, at 621 (5th ed. 2007); Robert H. Aronson, The Law of Evidence in Washington § 615 (4th ed. 2009).

confinement for the fourth degree assault and driving with a license suspended convictions. Skuza timely appeals.

ANALYSIS

ER 615 Violation and Sanction

After reviewing the initial briefs and Skuza's SAG, we ordered supplemental briefing on the trial court's exclusion of Spencer's testimony. In its supplemental brief, the State argues that Skuza did not provide sufficient information to "inform the court of the nature and occurrence of the alleged errors," as required by RAP 10.10 governing SAGs. Suppl. Br. of Resp't at 4; *see* RAP 10.10(c).[6] In the alternative, the State argues that the trial court did not abuse its discretion when it excluded Spencer's testimony. We disagree.

Skuza adequately informed us of his assigned error to the exclusion of Spencer as a witness in his SAG

> [a] criminal defendant is entitled to have jury instructed on a defense theory of the case if there is evidence to support the theory. *I was denied my witness that would have supported the theory* but the State's witness gave testimony to support the theory[.] RP 130 147-152[.] I made a phone call to bail co [sic] on same day [sic] I failed to appear is evidence[.] RP 29.

SAG at 6 (emphasis added). This statement is sufficient to challenge the exclusion of Spencer's testimony because it challenges the denial of a *witness* and not merely a denial of some *testimony*.

[6] RAP 10.10(c) provides,

> **Citations; Identification of Errors.** Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors. Except as required in cases in which counsel files a motion to withdraw as set forth in RAP 18.3(a)(2), the appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds for review.

While *some* of Skuza's *testimony* may have been excluded as inadmissible, Skuza's only denied *witness* was Spencer. Skuza adequately informed this court of his challenge to the exclusion of Spencer as a witness.

Washington's ER 615 provides,[7]

> At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

The intent of ER 615 is "to discourage or expose inconsistencies, fabrication, or collusion." Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice § 615.2, at 623 (5th ed. 2007). Sanctions for a violation of an ER 615 exclusion ruling lie within the trial court's exercise of sound discretion. *State v. Dixon*, 37 Wn. App. 867, 877, 684 P.2d 725 (1984); *see State v. Schapiro*, 28 Wn. App. 860, 867, 626 P.2d 546 (1981). Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Several Court of Appeals' decisions have upheld a trial court's decision to allow witnesses to testify despite violating an ER 615 exclusion order. *Dixon*, 37 Wn. App. at 877; *Schapiro*, 28 Wn. App. at 868; *State v. Walker*, 19 Wn. App. 881, 883, 578 P.2d 83, *review denied*, 90 Wn.2d 1023 (1978). But no Washington court has addressed whether the trial court has discretion to suppress the testimony of a witness for an ER 615 violation. Based on a review of other

[7] Washington's rule is similar to Fed. R. Evid. 615 and differs by substituting "shall" for "may" in the first sentence and substituting "essential" for "reasonably necessary" in the last sentence.

jurisdiction's decisions, there are generally three possible sanctions for an ER 615 violation that a Washington court impose: (1) hold the witness in contempt, (2) allow cross-examination regarding the violation and/or comments about the witness's actions during closing argument, or (3) preclude the witness from testifying. Tegland, § 615.5, at 627-30.

Here, however, the trial court erred because there was no evidence that Spencer violated ER 615. The trial judge stated that he had seen Skuza and Spencer together in a smoking area near the court and heard a portion of a conversation between them. But the trial court failed to conduct a hearing regarding the circumstances of the interaction. Spencer, Skuza, and the trial judge were not questioned about the interaction or their observations of it. The trial judge made a statement, which was not subject to cross-examination, about what he had witnessed and the results of legal research the trial court extern had conducted. Counsel discussed the effect of the trial judge's observation on whether Spencer could be called as a defense witness in the proceeding but did not discuss the fact that the trial judge had inadvertently become a witness in the proceeding. Skuza had no opportunity to question the trial judge about his observations, call Spencer to testify about the specifics of their contact, or research the law to provide a defense or authority against the sanction of excluding Spencer's testimony.

Moreover, the trial judge's description of the conversation did not identify specific exchanges that took place between Spencer and Skuza sufficient to warrant a finding that an ER 615 violation occurred. The trial judge only described statements that Spencer made to Skuza about her testimony and made no reference to specific statements that Skuza made to Spencer about her intended testimony or his prior testimony. It is possible that the conversation did not violate ER 615's intent, which is "to discourage or expose inconsistencies, fabrication, or

collusion." Tegland, § 615.2, at 623. Skuza had already completed his testimony in the case by the time of the alleged violation, so Spencer telling Skuza about her intended testimony did not give Skuza an opportunity to alter his testimony to match hers.

Without a thorough factual development of the circumstances of the conversation, the record is insufficient to establish that an ER 615 violation occurred. On this record, the trial court erred when it applied the harshest possible sanction of excluding evidence central to the defendant's bail jumping defense.

At oral argument, the State argued that Skuza's violation of trial court orders prohibiting him from speaking with Spencer supported an inference of testimonial collusion justifying the trial court's exclusion of Spencer as a witness. But the three written court orders cited prohibited Skuza's contact only with Anson. The August 14, 2007 court order prohibits Skuza's contact with "Shelia [sic] Anson" (Clerk's Papers (CP) at 114); the September 5, 2007 court order does not limit Skuza's contact with anyone; and the June 19, 2008 court order, entered after Skuza's alleged contact with Anson and his attempt to influence Anson's testimony, states, "No contact w/ Ms. Anson" with the word "victim(s)" circled on the form but not the word "witness(es)." CP at 122. Despite the State's arguments and the trial court's belief at the time it excluded Spencer's testimony, Skuza does not appear to have violated the trial court's written orders by speaking with Spencer. The State argues that the trial court's June 19, 2008 oral ruling prohibited Skuza from having contact with potential witnesses. To the extent its oral rulings conflict with its written order, a written order controls over any apparent inconsistency with the court's earlier oral ruling. *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966); *see State v. Eppens*, 30 Wn. App. 119, 126, 633 P.2d 92 (1981). The evidence is insufficient to establish that Skuza

violated the trial court's orders and the trial court's exclusion of Spencer's testimony was error.

Skuza argues that the trial court's decision excluding Spencer's testimony on the ground that he violated ER 615 was error and that his bail jumping conviction should be reversed. We agree. Accordingly, we reverse Skuza's bail jumping conviction and remand for further proceedings.[8]

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Fifth Amendment

Next Skuza argues that Officer Weekes's testimony was an improper comment on his right to remain silent. Assuming without deciding that Weekes improperly commented on Skuza's right to remain silent, Skuza's trial testimony and spontaneous and voluntary admissions made before receiving his *Miranda* warnings rendered any such error harmless.

Skuza challenges the following portion of Officer Weekes's testimony during cross-examination:

> [DEFENSE COUNSEL] Now, at any time do you recall Mr. Skuza telling you that [Anson] hit him; that he had marks on his face? Did you notice those?
> [WEEKES] No.
> [DEFENSE COUNSEL] Okay. You don't recall him telling you anything about that?
> [WEEKES] No. After I [gave him *Miranda* warnings], he refused to answer any questions.

4B RP at 238. After this exchange, the defense immediately turned to specific questions about

[8] Because we reverse Skuza's bail jumping conviction on these grounds, we do not address the other alleged grounds for its reversal raised in his SAG.

the physical confrontation between Weekes and Skuza.

Here, Officer Weekes's statement was in response to a defense cross-examination question. The State did not elicit the testimony from Weekes, did not question Weekes on his response during redirect, and did not reference Skuza's silence during closing argument. Although Skuza asserts that the State's use of the word "refusing" during closing argument has an "obvious link" with Weekes's testimony, because Weekes used the word "refused" in his testimony, this connection is too attenuated.[9] In addition, Weekes's testimony did not imply Skuza's guilt because the context of his answer was with regard to injuries that Skuza alleged Anson inflicted on him. Moreover, the trial court properly admitted Skuza's voluntary and spontaneous statements made during the traffic stop about his lack of having a driver's license and his refusal to cooperate with Weekes's request to exit his vehicle that resulted in the struggle. Further, at trial, Skuza admitted to hitting Anson. Thus, Weekes's isolated response to defense counsel's questions did not prejudice Skuza and any error is clearly harmless.

Prior Bad Acts

Next, in his SAG, Skuza contends that the trial court should have analyzed the admissibility of Anson's testimony about his attempt to influence her testimony under ER 404(b) instead of ER 402. ER 402 relates to relevancy of evidence, whereas ER 404(b) concerns character evidence. Here, Skuza objected to Anson's testimony on relevancy grounds. He did

[9] The State's closing argument comments cited by Skuza are

> [t]he assault situation with Officer Week[e]s would never have happened if Mr. Skuza had not chosen to play by his own rules. Officer Week[e]s had an obligation and duty to investigate the domestic violence. Mr. Skuza elevates the situation by refusing, by arguing, by refusing to give his license, by refusing to step out of the vehicle.

5 RP at 393.

not argue that it was improper character evidence. The evidence was clearly relevant to evaluating the credibility of Anson's testimony and the trial court did not err in admitting it. Moreover, even if evidence is improperly admitted for one purpose when it has been properly admitted for another, the error is harmless. *See State v. Foxhoven*, 161 Wn.2d 168, 179, 163 P.3d 786 (2007) (admission of evidence under ER 404(b) exception is harmless when the evidence is properly admitted under a different exception).

Third Degree Assault Specific Intent

In his SAG, Skuza appears to argue that the State failed to present sufficient evidence to support his third degree assault conviction. Specifically, Skuza argues that the State failed to prove that he had specific intent to inflict bodily injury on Officer Weekes. We hold that sufficient evidence supports Skuza's third degree assault conviction.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201.

To obtain a conviction for third degree assault under RCW 9A.36.031(1)(g), the State most prove that Skuza intended to, and actually did, commit an assault against a law enforcement officer performing law enforcement duties at the time of the assault. *State v. Brown*, 140 Wn.2d 456, 468, 998 P.2d 321 (2000). Because "assault" itself is not defined in the statute, we resort to the common law for its definition. *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995). In order to commit assault, a person must have specific intent to cause bodily harm or to create an

apprehension of bodily harm. *Byrd*, 125 Wn.2d at 713. Specific intent can be inferred as a logical probability from all the facts and circumstances. *State v. Pedro*, 148 Wn. App. 932, 951, 201 P.3d 398 (2009) (citing *State v. Louther*, 22 Wn.2d 497, 502, 156 P.2d 672 (1945)).

Here, Officer Weekes and Sarysz testified that Skuza pushed Weekes and threw "a swing" that did not connect. 4B RP at 200. This is sufficient evidence for the jury to find that Skuza intended to create an apprehension of bodily harm (i.e., assault) on Weekes and it supports the jury verdict finding Skuza guilty of third degree assault.

Third Degree Assault Conflicting Testimonies

Skuza also argues in his SAG that the evidence is insufficient to prove he assaulted Officer Weekes because he, Anson, and his father testified that Skuza did not assault Weekes. Weekes testified that Skuza pushed his chest and Sarysz testified that he saw Skuza "throw a swing" that missed. 4B RP at 200. We defer to the trier of fact, here the jury, on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992). Sufficient evidence supports the jury verdict finding Skuza guilty of third degree assault.

Self-Defense Jury Instruction

Next in his SAG, Skuza argues that the trial court failed to provide the jury with a self-defense instruction.[10] It is unclear whether Skuza believes that the trial court should have instructed the jury on self-defense on the third degree assault charge (Officer Weekes), the fourth degree assault charge (Anson), or both. The defense did not propose an instruction on self-

[10] Skuza simultaneously argues the substance of a self-defense jury instruction that he alleges the trial court provided to the jury. But this argument is meritless because the trial court did not present the jury with any self-defense jury instructions.

defense as CrR 6.15 requires. Moreover, to be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; and once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997). In Washington, "[e]vidence of self-defense is evaluated 'from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.'" *Walden*, 131 Wn.2d at 474 (quoting *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). This approach incorporates both subjective and objective elements to determine whether a defendant acted in self-defense. *Walden*, 131 Wn.2d at 474.

RCW 9A.16.020 defines the lawful use of force:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> . . . .
>
> (3) Whenever used by a party *about to be injured*, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

(Emphasis added.)

Here, Skuza did not provide evidence of self-defense for either assault charge. Skuza testified, "Yes, I did" in response to the question, "Did you hit [Anson] *back*?" 4B RP at 264 (emphasis added). Self-defense allows a party to hit another in an attempt to *prevent* injury. Skuza's testimony established only that he had retaliated against Anson. Accordingly, Skuza was not entitled to a self-defense instruction for the fourth degree assault charge.

Skuza's defense to the third degree assault charge was that he had never assaulted Officer

Weekes. Thus, no evidence supported instructing the jury on the law of self-defense in relation to this charge.

Diminished Capacity Jury Instruction

Skuza also contends that the trial court erred when it failed to instruct the jury on the law of diminished capacity or mental illness regarding his ability to form the requisite intent for his assault convictions. But Skuza offered no evidence that at the time of the assaults he was suffering from a mental disease or defect that rendered him incapable of forming the mental state necessary to commit the crime. Such evidence is necessary to support giving such an instruction. *See, e.g.*, *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Eakins*, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995); *see also State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986) ("[I]t is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it.").

Third Degree Assault Elements in Jury Instruction

Next, in his SAG, Skuza appears to argue that the trial court improperly instructed the jury on the elements of third degree assault. Specifically, Skuza argues that instructing the jury on the meaning of "unlawful force" shifted the State's burden of proving every element of the charge. Our review of the third degree assault jury instructions read at Skuza's trial shows that the trial court did not mention or instruct the jury on the phrase "unlawful force."

Resisting Arrest Lesser Included Offense Jury Instruction

In his SAG, Skuza claims he was entitled to a resisting arrest lesser offense jury instruction for his third degree assault charge. Under the *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) test, a defendant is entitled to a lesser included offense instruction only if

each of the elements of the lesser offense is a necessary element of the greater offense. Resisting arrest requires a person to intentionally prevent or attempt to prevent a lawful arrest. RCW 9A.76.040.[11] A person commits third degree assault under RCW 9A.36.031(1)(g) when assaulting a "law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." Because lawful arrests are not the sole duty of law enforcement officers, a person can commit third degree assault outside the context of resisting a lawful arrest. Accordingly, resisting arrest is not a lesser offense of third degree assault as a matter of law and Skuza was not entitled to a resisting arrest instruction.

Prosecutorial Misconduct

Skuza alleges that the State committed prosecutorial misconduct during closing arguments by (1) arguing evidence outside the record while interjecting opinion that inappropriately appealed to the jury's passions, (2) misstating the jury's role in making credibility determinations that mischaracterized the State's burden of proof and then vouching for Edenfield's credibility, and (3) citing cumulative error. We discern no error.

We review allegations of prosecutorial misconduct for an abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996), *vacated on other grounds in In re Pers. Restraint of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001). To establish prosecutorial misconduct, the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). If the defendant proves the conduct was

[11] RCW 9A.76.040(1) reads, "A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer *from lawfully arresting him*." (Emphasis added.)

improper, the misconduct still does not constitute prejudicial error unless we determine that there is a substantial likelihood that the misconduct affected the jury's verdict. *Stenson*, 132 Wn.2d at 718-19. We do not reverse when an instruction, had the defendant requested it, would have cured any prejudice. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995).

Without a proper objection made at trial, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill-intentioned that no curative instruction would have corrected the possible prejudice. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). That defense counsel did not object to a prosecutor's statement "suggests that it was of little moment in the trial." *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294 (1993), *review denied*, 123 Wn.2d 1004 (1994). A defendant cannot remain silent, speculate on a favorable verdict, and, when it is adverse, use the alleged misconduct to obtain a new trial on appeal. *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). During closing argument, a prosecutor has "wide latitude in drawing and expressing reasonable inferences from the evidence." *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). But a prosecutor may not argue facts not in evidence or make arguments appealing to a jury's passion that prejudices the defendant. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988); *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).

A. Evidence Outside the Record/Appealing to the Passions of the Jury

Skuza asserts that the State referred to evidence outside the record and interjected its opinion throughout its closing argument theme of "Mr. Skuza plays by his own rules." Br. of Appellant at 31. He asserts that the State repeatedly branded him as "someone who refuses to follow the law," establishing a character trait to prove the current charges in violation of ER 404(b). Br. of Appellant at 34. Skuza claims that this closing theme is used so pervasively that it is inconceivable that it did not sway the jury to convict him based on animosity. Skuza specifically argues that the prosecutor's pluralizing of "witness" when stating "that the jurors 'know that Mr. Skuza has gone to great lengths to tamper with other *witnesses*'" misstates the record because the jury heard evidence of the possible witness tampering of only one witness, Anson. Br. of Appellant at 36 (quoting 5 RP at 363). Skuza objected to the prosecutor's statements below.

Our review of the record establishes that the State's closing argument theme did not improperly appeal to the jury's emotions. The State's challenged theme is embodied by part of its rebuttal:

> [PROSECUTOR]: Now, I brought up the fact that Mr. Skuza is someone who plays by his own rules. I think it actually goes a little farther than that. He doesn't just play by his own rules, he expects other people to play by his rules. He expects that he can impose his will, that he can do what he wants without being held accountable. He's someone that frankly thumbs his nose at the law, manipulates situations, manipulates people.
>
> [DEFENSE COUNSEL]: Objection. Counsel -- this is not testimony, that evidence that was presented. This is counsel's opinion.
>
> [PROSECUTOR]: Your Honor, this is argument.
>
> THE COURT: Objection denied.
>
> [PROSECUTOR]: There are many, many examples throughout this case of what Mr. Skuza is like. Department of Licensing tells Mr. Skuza not to drive. Most people would not drive. Not Mr. Skuza. Does he care? No. He's going to drive.

> Don't hit women. That's a general societal norm. Most people, not going to do it. Mr. Skuza, he doesn't care.

5 RP at 392. The State continued with more examples, including Skuza's refusing to obey traffic laws, not cooperating with Officer Weekes's orders, not appearing at his original court date, contacting witnesses when "[h]e knows better" (5 RP at 394), giving narrative self-serving answers that did not answer the prosecutor's questions because "Mr. Skuza is not going to let the prosecutor dictate what questions are being asked or what he's going to answer to" (5 RP at 395), and ending with

> Mr. Skuza has repeatedly sat through this trial. He's made comments, he's made noises. He's acted out. Ms. Anson is testifying on direct, and Mr. Skuza is willing to stand up and object on his own, because he doesn't play by anyone else's rules. It's just Mr. Skuza's rules, and it's entirely unacceptable.
>
> The State would ask that you return verdicts of guilty on all counts against Mr. Skuza.

5 RP at 395.

The State's comments do not mislead the jury or misstate the evidence. Each example that the State referenced is supported by evidence presented during the trial or a reference to Skuza's behavior at trial which the jury observed. At no point did the State reference *prior* instances of Skuza's disregard for rules and the law. The State threaded together instances from the charged offenses and Skuza's conduct during the trial on those offenses into a theme to draw and express reasonable inferences from the evidence before the jury. *See State v. McKenzie*, 157 Wn.2d 44, 57, 134 P.3d 221 (2006) (rejecting that use of the word "rapist" during a trial constitutes prosecutorial misconduct when it is "a reasonable inference from the evidence and was consistent with the charged crimes"); *Hoffman*, 116 Wn.2d at 94-95; *State v. Hunter*, 35 Wn. App. 708, 715, 669 P.2d 489 (stating the prosecution's use of the word "pimp" is a permissible

reasonable inference from the trial evidence when the trial court properly instructed the jury on use of relevant prior convictions), *review denied*, 100 Wn.2d 1030 (1983).

Moreover, the trial court instructed the jury to "reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference" (CP at 51) and that the lawyer's remarks "are intended to help you understand the evidence and apply the law. . . . You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP at 50. The jury is presumed to follow the court's instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Finally, none of the State's statements are of such nature that any prejudice could not have been corrected by a further curative instruction had Skuza requested one. *See Hoffman*, 116 Wn.2d at 94. Skuza requested no such curative instruction.

Next, Skuza's claim that the State improperly referred to evidence outside the record when it pluralized "witness" during closing argument is not well founded. Skuza exercised his right to testify during trial and the phrase "other witnesses" (i.e., those other than himself) was not improper. More important, the State's argument did not prejudice Skuza's right to a fair trial. While reviewing Skuza's testimony during closing arguments, the State argued,

> [PROSECUTOR]: It really makes you wonder about [Robert Skuza's[12]] testimony. It really makes you wonder about his testimony, especially given the fact that you know that [Skuza] has gone to great lengths to tamper with other witnesses.
>
> [DEFENSE COUNSEL]: Objection. . . . That's a fact not in evidence. There was nothing that I recall that -- where that was actually an issue that was mentioned to the jury.
>
> [PROSECUTOR]: Ms. Anson testified to contact, Your Honor.
>
> THE COURT: Objection denied.

[12] Robert Skuza is Skuza's father.

5 RP at 363.

Skuza objected. The State adequately provided support for its statement by citing Anson's testimony regarding Skuza's witness tampering, which had been presented to the jury. Based on the phrasing of Skuza's objection and the State's response, a reasonable jury would not infer that evidence of other witness tampering might exist that did not get presented to the jury. In context, the deputy prosecutor was not referring to other State's witnesses. Rather, the use of the plural of witnesses referred to witnesses other than Skuza and was not error.

B. The Jury's Role/Vouching for Credibility/Burden of Proof

Next, Skuza argues that the State misstated the law by asserting that the jury had to find Edenfield had lied during his testimony in order to acquit Skuza, which shifted the burden of proof, and also that the State vouched for Edenfield's credibility. Skuza did not object to these statements that he now claims to be prosecutorial misconduct during the trial. Accordingly, we review the statements under the flagrant, ill-intentioned, incurable prejudice test. *Gentry*, 125 Wn.2d at 596. We discern no error.

Skuza challenges the State's closing argument when it stated, "[W]hat motive does [Edenfield] have to make up specifically the part about the railroad crossing? He doesn't. The only way for Mr. Edenfield to tell you what he saw and the fact that they were at the railroad crossing, was because it really happened." 5 RP at 388. Although this detail was relevant to the jury's assessing the weight and credibility appropriate for Edenfield's testimony, Skuza fails to show how these statements, or any others, assert that the jury could acquit him if they found that Edenfield had lied.

In addition, our review of the closing arguments reveals that the State properly clarified to

the jury its fact-finding role. In rebuttal, the State did not vouch for Edenfield's credibility. Rather, it responded to Skuza's closing argument regarding the inconsistencies in his and Edenfield's testimonies. The State is allowed to draw "an inference from the evidence as to why the jury would want to believe one witness over another" during closing arguments. *Brett*, 126 Wn.2d at 175. The trial court instructed the jury that they "are the sole judges of the credibility of each witness." CP at 50. We presume that the jury follows the court's instructions. *Stein*, 144 Wn.2d at 247. Skuza has failed to show that the statements prejudiced his right to a fair trial and that no further curative jury instruction would have eliminated any possible prejudice.

C. Cumulative Error

Finally, Skuza argues that the cumulative effect of the State's aforementioned actions amounts to reversible error. Multiple incidents of a prosecutor's improper conduct that, when combined, materially affect the verdict violate a defendant's right to fair trial and require a new trial. *See State v. Case*, 49 Wn.2d 66, 73-74, 298 P.2d 500 (1956); *State v. Henderson*, 100 Wn. App. 794, 805, 998 P.2d 907 (2000). But here, Skuza has failed to meet his burden of showing that any single act—let alone their combination—rises to the level of prosecutorial misconduct. Thus, the cumulative error doctrine does not apply.

Third Degree Assault Indeterminate Sentence

Skuza also challenges his sentence for third degree assault, alleging that it is indeterminate and that the 57 months incarceration and 9 to 18 months community custody exceeds the 60-month statutorily provided maximum sentence for class C felonies established in RCW 9A.20.021(1)(c). Our decision in *State v. Vant*, 145 Wn. App. 592, 186 P.3d 1149 (2008), governs this issue in its entirety and holds that where, as here, the trial court expressly notes that

the total combined sentence shall not exceed the statutory maximum, the sentence shall stand. 145 Wn. App. at 605-07. Skuza asks us to overturn *Vant*. Skuza argues that *Vant* relies heavily on Division One's reasoning in *State v. Sloan*, 121 Wn. App. 220, 87 P.3d 1214 (2004), which Division One overturned in *State v. Linerud*, 147 Wn. App. 944, 197 P.3d 1224 (2008), *withdrawn on remand*, noted at 153 Wn. App. 1004 (2009), *withdrawn and substitute opinion filed*, noted at 154 Wn. App. 1001 (2010). But since the parties' briefing, our Supreme Court disapproved of the *Linerud* court's analysis in *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009), and approved Division Three's holding in *State v. Torngren*, 147 Wn. App. 556, 196 P.3d 742 (2008). The holding in *Torngren* mirrors the holdings in *Vant* and *Sloan*. *Compare Torngren*, 147 Wn. App. at 566 *with Vant*, 145 Wn. App. at 605-06; *Sloan*, 121 Wn. App. at 223-24. In *In re Brooks*, the court expressly rejected the exact challenge Skuza raises here. 166 Wn.2d at 673-74. Moreover, any opinions made by the *Linerud* court are no longer authoritative in Washington courts as they were withdrawn and replaced with an unpublished opinion. RAP 10.4(h); GR 14.1. Accordingly, we affirm.[13]

Because we affirm this issue on these grounds, we reject Skuza's ineffectiveness of counsel claim against his trial attorney for failing to object and raise *Linerud* as authority at his sentencing. To prove ineffective assistance of counsel, Skuza must show that (1) counsel's performance was deficient and (2) that the deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005) (citing *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). Counsel's performance is deficient when it falls

[13] Skuza's judgment and sentence includes *Vant*'s requisite language: "That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offence." CP at 92. *See Vant*, 145 Wn. App. at 606-07.

below an objective standard of reasonableness. *Stenson*, 132 Wn.2d at 705. Skuza received his sentence on July 18, 2008. This court published *Vant* on July 1, 2008, and Division One did not issue its opinion in *Linerud* until December 29, 2008. It is "not deficient performance for defense counsel not to anticipate changes in the law." *State v. Millan*, 151 Wn. App. 492, 502, 212 P.3d 603 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)), *review granted*, 168 Wn.2d 1005 (2010); *see also United States v. Fields*, 565 F.3d 290, 296 (5th Cir.) (recognizing that a majority of circuits in the United States Courts of Appeal find that it is not ineffective assistance for counsel to fail to anticipate changes in law), *cert. denied*, 130 S. Ct. 298 (2009).

Prior Convictions Considered at Sentencing

In his SAG, Skuza challenges the consideration of his prior convictions at sentencing, claiming that (1) the State failed to prove by a preponderance of the evidence that his seven prior felony convictions from 1980 to 2000 that resulted in an offender score of eight; and (2) under a 1990 version of RCW 9.94A.525 (former RCW 9.94A.360), his class C felonies washed out because he was not convicted of a felony for a five-year period as required by that 1990 Sentencing Reform Act of 1981, ch. 9.94A RCW, statute. Skuza did not stipulate to his prior criminal history. Because we reverse Skuza's bail jumping conviction, this issue is moot.

Ineffective Assistance of Counsel

In his SAG, Skuza alleges ineffective assistance of his trial counsel, asserting that his attorney failed to interview Spencer. On direct appeal, we do not consider matters outside the record. *McFarland*, 127 Wn.2d at 338 n.5. As there is nothing in the record to allow this court to assess this allegation, we cannot review this claim on this record.

Other SAG Issues

In his SAG, Skuza alleges several more errors, including vague references to errors related to ER 701 and ER 704. An appellant must "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). Skuza has failed to adequately inform this court of the nature of these errors and we cannot address them in this appeal.

In accordance with this opinion, we affirm both of Skuza's assault convictions but reverse his bail jumping conviction and remand for further proceedings.

QUINN-BRINTNALL, P.J.

We concur:

VAN DEREN, J.

HOUGHTON, J.P.T.