IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. Larry Darnell Dunomes, Appellant.	No. 40126-6-II (Consolidated with)
In re Personal Restraint Petition of LARRY DARNELL DUNOMES, Petitioner.	No. 40756-6-II UNPUBLISHED OPINION

Hunt, J. — Larry Darnell Dunomes appeals his sentences and jury convictions for bribing a witness and for two counts of attempted murder. He also challenges his sentence in a personal restraint petition, which we have consolidated with his direct appeal.

In his direct appeal, Dunomes argues that we should reverse his convictions because (1) the evidence was insufficient to support each alternative means of committing the bribery; (2) the physician who evaluated Dunomes' competency for trial gave improper opinion evidence; (3) the

prosecutor impermissibly commented on his post-arrest silence; (4) trial counsel provided ineffective assistance by not making additional objections or seeking additional curative instructions for the prosecutor's reference to Dunomes' demeanor; and (5) cumulative error denied him a fair trial. Dunomes further argues that we should vacate his sentence because (1) the jury, rather than the court, should have determined whether he is a persistent offender; (2) the trial court considered his prior conviction as a "sentencing factor" instead of as an "aggravator"; and (3) the sentencing court made a scrivener's error on his judgment and sentence that needs correction.

In his Statement of Additional Grounds (SAG),[1] Dunomes argues that (1) the State's recording of his telephone call from jail was an unconstitutional search; (2) he did not receive a timely trial because he did not agree to the continuances that his attorney and the State requested; and (3) because he did not receive a timely trial, the charges against him should have been dismissed and the State violated his double jeopardy protections by amending his charges and re-arraigning him.

In his Personal Restraint Petition (PRP), Dunomes argues that, in sentencing him, the trial court (1) violated his double jeopardy protections, both by failing to merge his convictions and by setting his life sentences to run consecutively; and (2) improperly classified his prior Louisiana third degree aggravated battery conviction according to Washington's requirements, instead of according to Louisiana's. We affirm Dunomes' convictions, deny his PRP, and remand his judgment and sentence to correct scrivener's errors.

[1] RAP 10.10.

FACTS

I. Crimes

A. Attempted Murder

In mid-May 2008, SB[2] and her husband, Larry Darnell Dunomes, lived in their car. On May 15, 2008, SB drove Dunomes to a Seattle apartment and returned to a friend's house in Tacoma. Later that same day, Dunomes appeared outside the friend's house, angry because SB had not returned to Seattle to retrieve him: He yelled at SB and threatened to cut up her clothes in the trunk of the car. SB went back inside her friend's house, and Dunomes drove away in their car.

Later that evening, SB and her brother JB "went to hang out" on the street corner. 3 VRP at 310. After SB met a woman to whom Dunomes had given gifts belonging to SB, SB angrily phoned Dunomes, who yelled that she should stop calling and hung up the phone. Shortly thereafter, SB and JB saw Dunomes driving SB's car erratically down the street. Thinking that Dunomes was trying to run her over, SB jumped into a window well. Dunomes stopped the car on the curb, approached JB, and stabbed him in the stomach, saying, "Die, mother f*cker, die." 4 VRP at 420. The stab wounds to JB's bowel, colon, intestines, and stomach, if untreated, would have been lethal.

SB ran down an alley. Dunomes followed her in the car and then chased her across a parking lot, eventually pursuing her on foot. When SB tripped and fell, Dunomes stabbed her legs. When SB asked Dunomes if he was trying to kill her, he replied, "Die b*tch, die," and

[2] Although neither victim is a juvenile, we use initials to protect their privacy.

stabbed her in the abdomen. 3 VRP at 334. SB suffered defensive cuts on her hands and stab wounds to both legs; the stab wounds to her abdomen, if untreated, would have been lethal. Dunomes drove away before police or paramedics arrived.

Police took Dunomes into custody. While escorting him to a holding cell, they noticed that he limped on his left leg. Because of this injury, the jail officer refused to admit Dunomes, prompting the police to take him to Tacoma Emergency Care Physicians, where he received medical attention from nurse practitioner Barbara Bond, in the presence of a police officer. Dunomes told Bond he had received a stab wound to his calf from a six-inch steak-knife the day before.

B. Bribery

In May 2008, the State charged Dunomes with two counts of first degree assault with a deadly weapon. In October 2008, the State charged Dunomes with being a persistent offender, based on having twice been convicted of "most serious offense[s]," subjecting him to life imprisonment under RCW 9.94A.570. Clerk's Papers (CP) at 335. Dunomes phoned SB from jail,[3] told her he expected to receive settlement money from another case, and offered her $10,000 to split with JB. SB replied, "I don't want no money." Ex. 146 at 2. Dunomes then asked, "[Do] [y]ou want to see me gone?" Ex. 146 at 2. SB responded, "I have to come to trial." Ex. 146 at 4. Dunomes then asked, "So even if you get the $10,000 you'd [sic]?" SB responded, "I'm not going to lie on the stand, no." Ex. 146 at 4.

II. Procedure

[3] The Pierce County jail made a recording of the phone call.

In November 2008, the State added two counts of attempted first degree murder and two counts of bribing a witness (one count identifying SB as the witness and another count identifying JB as the witness) to its previous first degree assault and persistent offender charges. In a second amended information in December 2009, the State removed the second count of bribing a witness, JB, leaving only the first count of bribing a witness, SB.

A. Competency and Mental Health Evaluations

At Dunomes' request, the trial court ordered Western State Hospital to conduct competency and mental state examinations of Dunomes. Based on Dr. Edward L. Kelly's report, the trial court found Dunomes incompetent and ordered him committed to Western State Hospital for 90 days to restore his competency. In March 2009, based on Dr. Kelly's forensic report, the trial court found Dunomes competent to stand trial.

B. Jury Trial

1. Testimony

At trial, nurse practitioner Bond testified about Dunomes' injury and treatment at the hospital emergency room. When the State asked if Dunomes had told her how or why his injury occurred, Bond replied, "He related he had sustained a stab wound to the calf the day before with a six-inch steak knife, and that was it." 4 VRP at 471. When the State next asked whether Dunomes had told her "how it happened," Bond replied, "No, he did not. . . . He didn't answer." 4 VRP at 472. Dunomes did not object; instead, he briefly cross-examined Bond.

Dr. Kelly testified about Dunomes' memory of events connected to the assaults of SB and JB:

> [Dunomes] indicated that he was wasted. He denied using any drugs that evening. He expressed a suspicion one of two women he had been drinking with at the lounge had slipped something into his drink while he was in the restroom, and my recollection is he identified one of the women as being from New York City and one from the south.
>
> But he could provide no evidence, other than a suggestion that it had an oily taste. And he also indicated that he continued to drink this drink that he thought something had been put in, even though he was suspicious because of the oily taste.

5 VRP at 556. Dunomes did not object to this testimony.

Dr. Kelly also testified that he had questioned Dunomes about having called SB from jail. Dr. Kelly read from his notes and quoted Dunomes' response, in which he had admitted having offered SB money not to testify:

> "To talk to her about what happened and about the kids. The only reason I made the call was I was pro se and I believe [sic] I can talk with the alleged victim. And *I offered her money to not testify*."

5 VRP at 565 (emphasis added). Dunomes declined to cross-examine Dr. Kelly.

Detective Brian Vold testified about his observations of Dunomes' injury and Dunomes' lack of response to a question about how to pronounce his name.[4]

2. Closing arguments

During closing, the State argued that, although police did not recover the weapon, the evidence indicated the crimes occurred with a deadly weapon:

> . . . Nurse Bond—when she testified, she said she treated [Dunomes] the following

[4] More specifically, Vold testified:

> State: What happened after Officer Wurges brought [Dunomes] [in]?
>
> Vold: We removed [Dunomes] from the vehicle. I introduced myself to him. I inquired about the pronunciation of his name. I didn't want to be—or misidentify him. He declined to respond to that and we escorted him into a holding cell.

5 VRP at 576-77.

> day, May 16th, for that cut that he had on his left leg that the officers found on him after he was arrested. . . . And Nurse Bond asked him . . . , as anyone would have, "How did it happen?" And he wouldn't say to her how it happened. But he described it as a six-inch kitchen knife and he described that he had been cut the day before.

6 VRP at 637-38. Dunomes did not object.

The State also argued:

> Did [Dunomes] sound remorseful in his call to [SB] five months later, the first time he spoke to her after this incident? And how did he act in court when [SB] and [JB] testified? You will have to make up your own minds from that because you were able to judge his demeanor as to whether he had any regard for them.

6 VRP at 645. Dunomes did not object contemporaneously.

Calling into question Dunomes' possible defenses, the State reviewed Dunomes' statements to SB—"I don't even know what happened" and "somebody put something in my drink," 6 VRP at 666-67, and Dr. Kelly's testimony about Dunomes' claim that he did not remember:

> . . . [And] you still drank it even after you say it tasted funny? And you are saying that nobody actually robbed you and you talked to these women and then you remember being with the women at the bar, you remember leaving the bar early, you remember talking to friends outside, and then you remember leaving after that. You remember the route that you drove back to the crime scene, you remember stopping for gas, which he clearly would have paid for. He recalled committing the crimes but came up with the car part story, but wouldn't tell Nurse Bond how he got stabbed.
>
> And then he just kind of decided to be somewhat vague at times with Doctor Kelly.

6 VRP at 668. Dunomes did not object to this characterization.

After the State completed its closing argument and out of the presence of the jury,

Dunomes objected:

> . . . I believe [the State] referenced my client's demeanor in the courtroom, which I thought was inappropriate. I believe it is violative of the court's Instruction Number 5 where he does not have to testify. I did not want to interrupt counsel's closing; however, I do believe I need to note that objection for the record.

6 VRP at 675-76. When the jury returned, the trial court instructed:

> . . . I want to remind the jurors that per Instruction Number 5, the defendant is not compelled to testify and the fact that he has not testified cannot be used to infer guilt or prejudice him in any way.

6 VRP at 676.

In closing, Dunomes argued:

> I am glad the court reminded you about a very important law that is in your jury instructions; that is, that my client is not compelled to testify and you are not to hold that against him or prejudice him in any way because he has not, in fact, testified.
> . . .
> Counsel in his closing argument mentioned my client's demeanor in the courtroom. That is not testimony. That is not evidence. You have no information before you as to why his demeanor was what it is in this courtroom. And that is why you are not to pay any attention to that. It is not evidence that was presented by the State.

6 VRP at 678.

In rebuttal closing argument, the State referred to the trial court's having instructed the jury on three alternative means of committing bribery. *See* 6 VRP at 626, 692; CP at 254, Instruction 28. The State asked the jury to examine Instruction 28 and pointed out that, because subsection (2) comprises three phrases separated by the disjunctive word "or," the jury did not need to decide unanimously which of the three phrases pertained to Dunomes.[5] 6 VRP at 692.

[5] More specifically, the State told the jury, "If [twelve] of you agree he committed one of those three different definitions in that second element, and you are convinced beyond a reasonable

Dunomes made no objection.

After reviewing the evidence of bribery, the State argued:

> But when you look at element 2, it's very clear from both the statements to Doctor Kelly and from his conduct on that phone call that what he was trying to do was either influence her testimony, or induce her to avoid process summoning her to testify.
>
> It doesn't mean she had to be summoned to testify already at that moment, but just that she would avoid process in the future for purposes of testifying. That's all that means.
>
> Now, the last one actually where it says "or induce that person to absent herself from an official proceedings to which she had been legally summoned," I agree that actually under that prong I would have had to have proved to you that she had been legally summoned. You haven't really heard testimony of that. But on the prior, that's not the case. There is no requirement under the prior case, under the prior definitions, okay?

6 VRP at 694-95.

3. Verdict, sentencing, post-sentencing actions

The jury found Dunomes guilty of two counts of first degree assault, counts I and II; two counts of attempted first degree murder, counts III and IV; and bribing a witness, count V. The jury also returned special verdicts finding that Dunomes had committed counts I–IV while armed with a deadly weapon. The trial court merged the two assault counts with the two attempted first degree murder counts and sentenced Dunomes to "life without parole" on the two counts of attempted first degree murder. The judgment and sentence, however, does not reflect this merger.

On December 18, 2009, Dunomes filed this appeal. On May 3, 2010, he filed a motion to modify his judgment and sentence with the trial court. The trial court transferred this motion to

---

doubt, then he is guilty, no matter which one you split upon." 6 VRP at 692.

us to treat as a PRP. CrR 7.8(c)(2). We consolidated Dunomes' PRP with his direct appeal.

ANALYSIS

I. Evidence

A. Substantial Evidence of Alternative Means

Dunomes argues that the State failed to present substantial evidence on each of the alternative means of bribing a witness because (1) it did not show, as one means requires, that the court had legally summoned SB at the time Dunomes phoned her; and (2) therefore, there was insufficient evidence of the third means of bribing a witness—"[inducing] that person to absent . . . herself from an official proceeding to which . . . she has been legally summoned." Br. of Appellant at 24 (quoting RCW 9A.72.090(1)(c)). We disagree.

1. Standard of review

Criminal defendants have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21. Where a defendant can commit the charged crime by more than one means, the right to a unanimous jury trial may also include the right to jury unanimity on the *means* by which the jury finds that the defendant committed the crime. *State v. Lobe*, 140 Wn. App. 897, 903, 167 P.3d 627 (2007). But the defendant does not have a right to express jury unanimity on the means if the State presents substantial evidence of each of the alternative means on which the trial court instructs the jury. *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When

the appellant challenges the sufficiency of the evidence in a criminal case, we draw all reasonable evidentiary inferences in the State's favor and interpret those inferences most strongly against the defendant. *Salinas*, 119 Wn.2d at 201.

2. Alternative means

Consistent with the applicable statute,[6] the trial court instructed the jury about alternative means for committing bribery:

> To convict the defendant of the crime of bribing a witness, as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about October 29th, 2008 the defendant offered a benefit upon a witness or a person he had reason to believe was about to be called as a witness in any official proceeding or upon a person whom he had reason to believe might have information relevant to a criminal investigation; and
>
> (2) That the defendant acted with the intent to influence the testimony of that person or induce that person to avoid legal process summoning her to testify or induce that person to absent herself from an official proceeding to which she had been legally summoned; and
>
> (3) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

---

[6] RCW 9A.72.090(1) provides:

> A person is guilty of bribing a witness if he or she offers, confers, or agrees to confer any benefit upon a witness or a person he or she has reason to believe is about to be called as a witness in any official proceeding or upon a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child, with intent to:
>
> (a) Influence the testimony of that person; or
>
> (b) Induce that person to avoid legal process summoning him or her to testify; or
>
> (c) Induce that person to absent himself or herself from an official proceeding to which he or she has been legally summoned; or
>
> (d) Induce that person to refrain from reporting information relevant to a criminal investigation or the abuse or neglect of a minor child.

CP at 254; Instruction 28. Thus, to sustain a bribery conviction for the alternative means that Dunomes now challenges on appeal, the State had to prove beyond a reasonable doubt:

> That the defendant acted with the intent to influence the testimony of that person or induce that person to avoid legal process summoning her to testify or induce that person to absent herself from an official proceeding to which she had been legally summoned;

CP at 254; Instruction 28.

Analogizing to *Lobe*, Dunomes argues that the State presented no evidence that, at the time Dunomes phoned SB, the trial court had legally summoned her as a witness. Br. of Appellant at 26; RCW 9A.72.090(1)(c). Dunomes' comparison to *Lobe* fails. Accepting the State's concession that it had erroneously charged a third means of witness tampering for which it had presented no evidence or argument, we reversed Lobe's conviction because we could not be sure that the jury had been unanimous as to the alternative means for which the State had presented evidence and argument. *Lobe*, 140 Wn. App. at 906-07. Moreover, the unsupported alternative means at issue in *Lobe* was critical to the State's case because it had presented no evidence or argument that Lobe had asked a witness to testify falsely. *See Lobe*, 140 Wn. App. at 906.

Here, in contrast, taken in the light most favorable to the State, the direct evidence shows that Dunomes at least twice offered SB money not to testify in court. Moreover, Dr. Kelly testified that Dunomes had admitted that he "offered [SB] money to not testify." 5 VRP at 565. Thus, there is no reasonable dispute about the essence of the crime of witness tampering or bribing a witness. What is in dispute is the subsidiary issue of whether the witness whom Dunomes tried to bribe had been summoned to appear in court. Although there is no direct evidence of such a summons, the jury could reasonably infer that a summons existed from other circumstantial evidence: (1) Dunomes' recorded telephone call from the jail to SB offering her money not to testify; (2) SB's overt refusal to accept the offered bribe and her statement, "I have to go to court whenever you go to court"[7]; and (3) Dunomes' second attempt to persuade SB not

[7] Ex.; 146 at 4.

to testify and her repeated assertion, "I have to come to trial." Ex. 146 at 4. It was also reasonable for the jury to conclude that the court had summoned the witnesses where criminal charges had been pending against Dunomes since May, the court had set the original trial date for July, and Dunomes had phoned SB in October.

We draw all reasonable evidentiary inferences in the State's favor and interpret those inferences most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Thus, although the State did not offer into evidence an actual copy of SB's summons, the other evidence permits a reasonable inference that both Dunomes and SB anticipated that the court would (or did) summon SB as a witness to testify against Dunomes in court. We hold that a rational trier of fact could have found beyond a reasonable doubt that Dunomes committed bribery by any and all of the alternative means presented to the jury and that the evidence was sufficient to support the alternative means challenged here. *See Lobe*, 140 Wn. App. at 901-02.

B. Opinion Evidence

Dunomes next contends, both in his counsel's brief of appellant and in his SAG, that Dr. Kelly's testimony—that he (Dunomes) "'could provide no evidence'" for his claim that someone drugged his drink—impermissibly informed the jury that Dr. Kelley did not find Dunomes credible. Br. of Appellant at 21 (quoting 5 VRP at 556). The State responds that Dunomes failed to object below and that Dr. Kelly's statement does not meet the standard necessary to raise it for the first time on appeal. We agree with the State.

1. Preservation of error; manifest constitutional error

To preserve an evidentiary error for appeal, the party must object below to give the trial

court the opportunity to prevent or cure error. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Here, because Dunomes failed to object or to move to strike allegedly erroneous evidence, he did not give the trial court such an opportunity. Thus, Dunomes failed to preserve the issue for appellate review unless he can demonstrate a manifest constitutional error. RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926.

The narrow exception for unpreserved "manifest error affecting a constitutional right"[8] requires an "unmistakable, evident or indisputable" error. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Impermissible opinion testimony about the defendant's guilt violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury, and, therefore, may constitute manifest constitutional error warranting reversal. *Kirkman*, 159 Wn.2d at 927. Accordingly, we address whether Dunomes has met this manifest constitutional error threshold.

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error.[9] *Kirkman*, 159 Wn.2d at 936. "Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim. *Kirkman*, 159 Wn.2d at 936. Reviewing courts consistently require an explicit or almost explicit witness statement on an ultimate issue of fact before holding that the appellant

[8] RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926.

[9] Washington courts have long recognized that a qualified expert is competent to express an opinion on a proper subject even though he thereby expresses an opinion on the ultimate fact that the jury will determine. *Gerberg v. Crosby*, 52 Wn.2d 792, 795-96, 329 P.2d 184 (1958); ER 704.

meets the narrow manifest error exception for an unpreserved argument. *See State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

2. Dr. Kelly's testimony

To determine whether statements are impermissible opinion testimony, we consider the circumstances of the case, including "'(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.'" *Kirkman*, 159 Wn.2d at 928 (internal quotation marks omitted) (quoting *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)). Dunomes argues that Dr. Kelly testified inappropriately because the State called him to testify, not as an expert, but as a fact witness about his examination of Dunomes. Dunomes compares Dr. Kelly's testimony to the impermissible opinion testimony in *State v. Jones*, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003), where the officer testified that, although Jones denied possessing the gun, "I just didn't believe him." Dunomes further argues that, because he conducted little cross-examination and called no witnesses on his behalf, Dr. Kelly's testimony improperly affected the jury. We disagree.

Dr. Kelly testified about his interview of Dunomes, relaying that Dunomes claimed women from the bar had drugged him, "[b]ut he could provide no evidence, other than a suggestion that it had an oily taste." 5 VRP at 556. Unlike the officer's statement in *Jones*, "I just didn't believe him," 117 Wn. App. at 91, Dr. Kelly's statement here does not meet the "explicit statement" standard required for an unpreserved allegation of opinion evidence. *Kirkman*, 159 Wn.2d at 936. Furthermore, in testifying about his examination of Dunomes, Dr. Kelly's statements relaying what did not occur are no less factual than his statements relaying what did occur.

An error is manifest when the defendant shows "the asserted error had practical and identifiable consequences in the trial of the case." *Lynn*, 67 Wn. App. at 345; *see also State v.*

Naillieux, 158 Wn. App. 630, 638-39, 241 P.3d 1280 (2010). Dunomes does not meet this narrow manifest constitutional error threshold of an "unmistakable, evident or indisputable" error. *Lynn*, 67 Wn. App. at 345.[10] Dunomes identifies no consequences of the alleged error beyond its mere occurrence, contrary to the requirement that he "show how the alleged error actually affected [his] rights at trial." *Kirkman*, 159 Wn.2d at 926-27. Instead, he baldly argues that Dr. Kelly's testimony unduly prejudiced him because of the "aura of reliability" accompanying the testimony of a medical professional and because his (Dunomes') cross-examination of Dr. Kelly had been minimal. Br. of Appellant at 22. This argument fails.

The trial court did not err simply because Dunomes failed to cross-examine rigorously a witness. Nor does Dunomes' generalized argument that a psychological expert's opinion "often unfairly prejudices [a] defendant,"[11] show "unmistakable, evident or indisputable" error. *Lynn*, 67 Wn. App. at 345. Because Dunomes does not show that "manifest error" occurred when the trial court admitted Dr. Kelly's testimony, he cannot raise this issue for the first time on appeal, and we reject his claim that he is entitled to a new trial. *Kirkman*, 159 Wn.2d at 936.

[10] RAP 2.5(a)(3); *Kirkman*, 159 Wn.2d at 926.

[11] Br. of Appellant at 22.

II. Prosecutorial Misconduct

In both his brief of appellant and SAG, Dunomes argues that the prosecutor impermissibly commented on his constitutional right to remain silent by (1) eliciting nurse Bond's testimony that "he didn't answer"[12] her inquiry about how his stab wound had occurred while she provided post-arrest medical treatment; and (2) commenting in closing argument, "He recalled committing the crimes but came up with the car part story, but wouldn't tell Nurse Bond how he got stabbed."[13] The State responds that (1) because Dunomes failed to object to the prosecutor's comments at trial, he waived the issue on appeal unless he shows that the comments were so flagrant and ill-intentioned that they caused an enduring prejudice, which could not have been cured with jury instruction; and (2) Dunomes fails to meet this heightened burden and fails to show either prosecutorial misconduct or resulting prejudice when the prosecutor touched only slightly on Dunomes' medical situational silence. The State is correct.

A. Constitutional Right To Remain Silent

Both the state and federal constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to remain silent. U.S. Const., amend. V; Wash. Const., art. I, § 9. The Fifth Amendment prohibits impeachment based on a defendant's exercise of this right where the defendant neither waives the right nor testifies at trial. *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008) (citing *Griffin v. California*, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)). Due process under the Fourteenth Amendment prohibits

[12] Br. of Appellant at 17 (quoting 4 VRP at 472).

[13] Br. of Appellant at 17-18 (quoting 6 VRP at 668).

impeachment based on a defendant's silence after he receives *Miranda*[14] warnings.

The State may not use a defendant's silence to "suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) (citing *Tortolito v. State*, 901 P.2d 387 (Wyo. 1995)). Nevertheless, "'a mere reference to silence which is not a 'comment' on the silence [ ] is not reversible error absent a showing of prejudice.'" *State v. Sweet*, 138 W.2d 466, 481, 980 P.2d 1223 (1999) (quoting *Lewis*, 130 Wn.2d at 706-07). And the State may use a defendant's prior inconsistent statements as impeachment evidence, offered solely to show that he is not being truthful. *Burke*, 163 Wn.2d at 219 (citing *State v. Thorne*, 43 Wn.2d 47, 53, 260 P.2d 331 (1953)). When the State draws specific attention to silence as evidence of guilt, however, it violates constitutionally protected silence. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996);[15] *see also State v. Fricks*, 91 Wn.2d 391, 396-97, 588 P.2d 1328 (1979). Yet "[s]ome improper prosecutorial remarks can be described as 'touching on' a constitutional right, and still be curable by a proper instruction." *State v. Klok*, 99 Wn. App. 81, 84, 992 P.2d 1039, *review denied*, 141 Wn.2d 1005 (2000).

B. Standard of Review

We review a prosecutor's alleged improper comments in the context of the evidence, the issues, the jury instructions, and the prosecutor's entire argument. *State v. Dhaliwal*, 150 Wn.2d

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

[15] For example in *Easter*, an officer testified that Easter was a "smart drunk" because he would not talk to the officer, or answer his questions. *Easter*, 130 Wn.2d at 233. The *Easter* court noted this statement went beyond opinion and was a pejorative characterization of silence as substantive evidence of guilt. *Easter*, 130 Wn.2d at 235. But in contrast with Dunomes, Easter preserved this argument by objecting repeatedly at trial. *Easter*, 130 Wn.2d at 233.

559, 578, 79 P.3d 432 (2003). Where a defendant timely objected at trial, on appeal he bears the burden of establishing both the impropriety of a prosecutor's comments and their prejudicial effect. *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006). But here, because Dunomes failed to object at trial to this newly alleged prosecutorial misconduct, he has waived this argument on appeal unless he can meet a heightened burden to show that the misconduct was so flagrant or ill-intentioned that the trial court could not have cured the error by instructing the jury.[16] *Weber*, 159 Wn.2d at 270. We examine whether Dunomes meets his burden in the context of the entire record and circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), *review denied*, 151 Wn.2d 1039 (2004). Dunomes fails to meet this burden for both of his prosecutorial misconduct arguments.

C. No Elicitation of Incurable Improper Silence Testimony

Again, in both his brief of appellant and SAG, Dunomes argues that the prosecutor impermissibly commented on Dunomes' constitutional right to remain silent by eliciting nurse Bond's testimony that "he didn't answer"[17] her inquiry about how his injury had occurred while she provided post-arrest medical treatment.[18] Unlike in *Fricks*,[19] however, here the prosecutor did

[16] For example, "[s]ome improper prosecutorial remarks can be described as 'touching on' a constitutional right, and still be curable by a proper instruction." *Klok*, 99 Wn. App. at 84.

[17] Br. of Appellant at 17 (quoting 4 VRP at 472).

[18] 4 VRP at 472.

[19] In *Fricks*, our Supreme Court held that the prosecutor impermissibly drew the jury's attention to the fact that Fricks had remained silent, including "specifically ask[ing] each officer whether defendant made any statement after being advised of his *Miranda* rights" and then remarking that defendant had offered no statement when placed under arrest. *Fricks*, 91 Wn.2d at 395. Although the *Fricks* court held that a constitutional error occurred, it did not discuss whether

not specifically illicit or draw attention to testimony about protected silence.[20] Instead, the prosecutor focused on Dunomes' having told Bond that his injury came from a "six-inch knife"[21] and Bond's observations about Dunomes' mental state when she examined him; in contrast to *Fricks*, the prosecutor only briefly touched on whether Dunomes had also mentioned what had precipitated the knife wound.

Here, even assuming, without deciding, that the prosecutor's question elicited an improper comment on Dunomes' silence, a jury instruction would have cured any theoretical prejudicial effect. *See State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Dunomes, however, neither objected nor requested such a curative instruction. Dunomes fails to show that the alleged misconduct was so flagrant or ill-intentioned that the trial court could not have cured it with an instruction; we hold, therefore, that he did not preserve this issue for review and we do not further consider it. *Weber*, 159 Wn.2d at 270.

D. Closing Argument References to Silence

During closing argument, the prosecutor twice referred to Bond's testimony, which Dunomes now challenges for the first time on appeal as impermissible comments on his post-arrest constitutional right to remain silent. 6 VRP at 637-38; 667-68. Similar to our previous discussion about eliciting testimony "touching" on Dunomes' right to remain silent, he similarly

---

Fricks preserved the error by objecting below. *Fricks*, 91 Wn.2d at 397.

[20] The State notes that, although the trial court conducted a CrR 3.5 hearing to determine the admissibility of Dunomes' statements to other persons, the trial court did not address Dunomes' statements to Bond. In addition, neither party seemed to view Bond's medical examination of Dunomes as a custodial interrogation, despite the presence of a police officer and Dunomes' having just been arrested at the time. *See* CP at 336-41.

[21] 4 VRP at 471.

failed to object to the State's closing argument comments. Generally, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997) *cert. denied*, 523 U.S. 1008 (1998). Although a prosecutor may not interject his or her personal beliefs into the case, he certainly may comment on a witness's credibility. *State v. Knapp*, 14 Wn. App. 101, 110–11, 540 P.2d 898, *review denied*, 86 Wn.2d 1005 (1975). Although in closing argument a prosecutor may not infer guilt from a defendant's silence, such was not the case here. *Easter*, 130 Wn.2d at 236. Furthermore, because Dunomes failed to object below and to request a curative instruction, he has a heightened burden to show that the prosecutor's conduct was flagrant and ill-intentioned. *Weber*, 159 Wn.2d at 270. Again, Dunomes fails to meet his burden.

1. Circumstances precipitating Dunomes' stab wound

The prosecutor argued in closing that the crimes had occurred with a deadly weapon, despite law enforcement's failure to recover the weapon. In this context, the prosecutor reminded the jury of Bond's testimony relaying Dunomes' statement about the source of his injury—a kitchen knife:

> Nurse Bond—when she testified, she said she treated him the following day, May 16th, for that cut that he had on his left leg that the officers found on him after he was arrested. . . . And Nurse Bond asked him . . . as anyone would have, "How did it happen?" And *he wouldn't say to her how it happened. But he described it as a six-inch kitchen knife and he described that he had been cut the day before.*

6 VRP at 637-38 (emphasis added).

The prosecutor's latter statement—that Dunomes "wouldn't say . . . how it

[22] 6 VRP at 637.

happened"[22]—was not an isolated impermissible reference to Dunomes' constitutional right to remain silent. Rather, the prosecutor made the statement in the context of reminding the jury that Dunomes had told Nurse Bond that he had been cut with a six-inch kitchen knife the day before, but he simply had not included a description of the circumstances that had precipitated this injury. Moreover, the prosecutor did not argue that Dunomes' lack of explanation—about how he had come to be injured by the knife—was evidence of guilt. When evaluated in context with other testimony and its main purpose (that Dunomes had told Bond that a knife with a six-inch blade had caused his injury), the prosecutor's passing remark did not highlight protected silence. At most, the prosecutor's remark merely touched on the lack of explanation about the circumstances that had led to Dunomes' receiving the knife wound, which he had already mentioned to Bond. Even then, the prosecutor's remark was apparently so insignificant that it did not even draw an objection by Dunomes.

We hold that Dunomes fails to show that the prosecutor's closing argument passing reference to Dunomes' lack of explanation about how he had obtained the stab wound to his leg (1) was an impermissible comment on his right to remain silent; (2) rose to the level of manifest constitutional error; or (3) was flagrant and ill-intentioned prosecutorial misconduct, especially where it could easily have been cured, if necessary, with a timely jury instruction if Dunomes had requested one.

2. Dunomes' inconsistent memory gaps

In closing argument, the prosecutor questioned Dunomes' claim that he did not remember

[22] 6 VRP at 637.

the crimes because "somebody put something in [his] drink." 6 VRP at 667. The prosecutor contrasted Dunomes' clear recollection of certain events with his inability to recall other events and argued that Dunomes' inconsistent memory gaps constituted a fabricated defense strategy. 6 VRP at 668. The prosecutor also challenged Dunomes' claim of involuntary drug-induced memory loss:

> [Y]ou still drank it even after you say it tasted funny? And you are saying that nobody actually robbed you and you talked to these women and then you remember being with the women at the bar, you remember leaving the bar early, you remember talking to friends outside, and then you remember leaving after that. You remember the route that you drove back to the crime scene, you remember stopping for gas, which he clearly would have paid for. He recalled committing the crimes but came up with the car part story, but wouldn't tell Nurse Bond how he got stabbed.

6 VRP at 668. Again, Dunomes neither objected nor requested a curative instruction.

We discern no prejudicial harm from the prosecutor's arguments because (1) the challenged remarks had no relation to Dunomes' bribery charges, and (2) SB's and JB's uncontroverted testimony sufficiently supported that Dunomes stabbed them with a knife, causing life-threatening injuries. Even if the prosecutor's closing remarks were improper, to the extent that these remarks addressed whether Dunomes had the requisite mental state to support attempted murder charges, Dunomes offers no argument on appeal[23] about why the prosecutor's statement—that Dunomes "wouldn't tell Nurse Bond how he got stabbed"—prejudiced his theory of the case below that he lacked the requisite mental state. 6 VRP at 668.

[23] Dunomes baldly asserts that the State bears the burden of showing the alleged error to be harmless; but he cites no supporting authority. He also makes no attempt to demonstrate how the prosecutor's comments caused him harm. Because this argument does not meet the requirements of RAP 10.3(a)(6), we do not further consider it.

We hold that Dunomes fails to establish any prejudice from the prosecutor's drawing an inference that Dunomes' affirmative claim of memory loss was inconsistent and, therefore, fabricated. *Weber*, 159 Wn.2d at 270. And, even if he had shown prejudice, he fails to show that a timely objection and curative instruction below would not have ameliorated the alleged prejudice. Again, he has waived this issue on appeal and we do not further consider it.

III. Effective Assistance of Counsel

In both his brief of appellant and SAG, Dunomes next argues that his legal representation was constitutionally deficient because his trial counsel failed (1) to request an effective curative instruction for prosecutor's reference to Dunomes' demeanor and (2) to object to admission of improper opinion testimony. The State responds that Dunomes shows neither deficient performance nor resulting prejudice. Again, we agree with the State.

To establish ineffective assistance, Dunomes must show that (1) his trial "counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances"; and (2) his trial "counsel's deficient representation prejudiced [his case], *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If Dunomes' claim does not satisfy either element of the test, the inquiry ends. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Where the defendant claims ineffective assistance based on counsel's failure to challenge

the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (citing *McFarland*, 127 Wn.2d at 336). Because Dunomes fails to show that the result of the trial would have differed had the evidence not been admitted, his ineffective assistance of counsel argument fails. *Saunders*, 91 Wn. App. at 578.

IV. Cumulative Error

In both his brief of appellant and SAG, Dunomes argues that, under the cumulative error doctrine, multiple errors at trial created a cumulative and enduring prejudice that likely materially affected the jury's verdict. Again, we disagree.

Dunomes asserts that the following trial court errors were cumulative and warrant reversal: (1) the prosecutor's comments on silence, (2) Dr. Kelly's testimony, (3) the lack of a unanimity instruction, and (4) trial counsel's ineffective assistance. But he neither explains nor supports this assertion. Thus, we hold that Dunomes fails to show cumulative error.

V. Sentence

A. Court Determination of Persistent Offender Status; Due Process

Dunomes argues that we must vacate his sentence because due process requires the jury to determine any fact that increases his maximum possible sentence. Br. of Appellant at 35, 40. The State responds that federal and Washington case law hold that the trial court properly determines persistent offender status. The State is correct.

An appellant may challenge the validity of his judgment and sentence on constitutional grounds for the first time on appeal. *State v. McNeair*, 88 Wn. App. 331, 336, 944 P.2d 1099 (1997). We review constitutional issues de novo. *State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006).

Dunomes argues that recent United States Supreme Court holdings call into doubt its previous holdings that excluded prior convictions from the general constitutional requirement that the jury determine questions of fact. *See* Br. of Appellant at 35 (citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)). But Dunomes ignores *Blakely*'s express holding that "'[*o*]*ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 542 U.S. at 301 (emphasis added) (alteration in original) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

Consistent with *Blakely*, our Washington Supreme Court has also rejected the argument Dunomes makes here: "*Apprendi* and its progeny do not require the State to submit a defendant's prior convictions to a jury and prove them beyond a reasonable doubt." *State v. Thiefault*, 160 Wn.2d 409, 418, 158 P.3d 580 (2007).[24]

B. "Aggravators" and "Sentencing Factors"; Equal Protection

[24] As our State Supreme Court has similarly noted in another case: "'[W]hile technically questions of fact, [prior convictions] are not the kinds of facts for which a jury trial would add to the safeguards available to a defendant.'" *State v. Smith*, 150 Wn.2d 135, 148, 75 P.3d 934 (2003), (quoting *State v. Thorne*, 129 Wn.2d 736, 783, 921 P.2d 514 (1996)), *cert. denied*, 541 U.S. 909 (2004).

Dunomes next argues that (1) the legislature's varying classifications of a recidivist's prior conviction as an "element" in certain circumstances, but as an "aggravator" in others, violate his right to equal protection because these classifications are irrational; and (2) therefore, we should strike his persistent offender sentence and remand to the trial court to impose a standard range sentence.[25] Br. of Appellant at 40, 45. The State responds that because persistent offenders "are not similarly situated" to first time offenders, no equal rights violation occurs. Br. of Resp't at 51. Again, we agree with the State.

Under the equal protection clauses of the Fourteenth Amendment to the United States Constitution and article I, section 12, of the Washington Constitution, persons similarly situated with respect to the legitimate purpose of the law must receive like treatment. *State v. Thorne*, 129 Wn.2d 736, 770-71, 921 P.2d 514 (1996). Because recidivists are not a suspect class, a reviewing court need only find a rational basis for legislative classifications. *Thorne*, 129 Wn.2d at 771. Under the rational basis test, a statute is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the legislation. *State v. Smith*, 117 Wn.2d 263, 279, 814 P.2d 652

[25] In his SAG, Dunomes also argues that he received ineffective assistance when trial counsel failed to object to the trial court's determining that his prior felony convictions constituted aggravating factors for sentencing. But, as we explain elsewhere in this opinion, our Supreme Court has held that neither the federal nor state constitution "includes the right to a jury determination of prior convictions at sentencing." *Smith*, 150 Wn.2d at 156. Trial counsel need not pursue strategies that appear unlikely to succeed, especially on points that are contrary to established law. *See McFarland*, 127 Wn.2d at 337; *State v. Stockman*, 70 Wn.2d 941, 946, 425 P.2d 898 (1967).

(1991). The burden is on the party challenging the classification to show that it is purely arbitrary. *Thorne*, 129 Wn.2d at 771.

In the context of a trial court's decision to bifurcate a trial so that the court would determine prior convictions and the jury would decide the other elements, our Supreme Court has considered the distinction between a prior conviction used as an element of a crime and a prior conviction used to increase a sentence. *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008). Roswell argued that (1) his prior conviction for a sexual offense was a sentencing factor, rather than an element of the crime of felony communication with a minor for immoral purposes; and (2) therefore, his trial should have been bifurcated such that in the first phase, the jury would have considered only whether he had communicated with a minor for immoral purposes. *Roswell*, 165 Wn.2d at 190. Our Supreme Court affirmed the trial court's refusal to bifurcate because Roswell's felony charge of communication with a minor for immoral purposes included his prior conviction for a sexual offense as an element of that crime and, therefore, the State had to present that evidence to the jury with the other elements. *Roswell*, 165 Wn.2d at 193, 199. The *Roswell* court noted:

> [An aggravating factor] is decidedly not an element needed to convict the defendant of the charged crime. . . . Conversely, a defendant charged with felony communication with a minor for immoral purposes can never be convicted of that crime if the State is unable to prove that the defendant has a prior felony sexual offense conviction. Roswell's prior felony sexual offense conviction was an element of the crime charged.

Roswell, 165 Wn.2d at 194 (alteration in original) (citation omitted). Thus, when used as a sentencing aggravator, a prior conviction merely "elevates the maximum punishment"[26] for a

[26] *Roswell*, 165 Wn.2d at 192.

crime. In contrast, when used as an element of a crime, a prior conviction actually alters the crime that may be charged. *Roswell*, 165 Wn.2d at 192.

Dunomes argues that *Roswell* drew an arbitrary distinction between recidivists whose prior convictions are treated as sentencing aggravators and recidivists whose prior convictions are treated as elements of the current offense because the legislative purpose in both types is the same: to impose harsher penalties on recidivists. Rejecting this same argument, Division One of our court stated:

> [R]ecidivists like Langstead are not situated similarly to recidivists like Roswell. The recidivists whose prior felony convictions are used as aggravators necessarily must have prior felony convictions before they commit the current offense. This is not true of the recidivists Langstead uses as a comparison group.

State v. Langstead, 155 Wn. App. 448, 455-56, 228 P.3d 799, *review denied*, 170 Wn.2d 1009 (2010).

The legislature created both misdemeanor and felony versions of certain crimes where an isolated instance of the basic crime is a misdemeanor but proof of a prior similar conviction makes it a felony. *See, e.g.*, RCW 9A.88.010 (indecent exposure); RCW 26.50.110 (protection order violations); RCW 9A.46.020 (harassment). For these crimes, if there are no prior convictions, the charged crime will not be a felony. In contrast to those types of crimes, however, Dunomes committed attempted murder, a serious felony, with no previous criminal conviction of any kind; this type of categorization does not amount to a denial of equal protection. As Division One of our court has concluded:

> [R]ecidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense.

Langstead, 155 Wn. App. at 456-57.

C. Scrivener's Error

Both parties ask us to remand to the trial court to correct multiple scrivener's errors on the judgment and sentence. Br. of Appellant at 45-46; Br. of Resp't at 51-52. More specifically, both parties argue that the sentencing court erroneously checked the second of two checked boxes in Section 4.5 of the judgment and sentence form, the "two strikes" provision, because none of the crimes listed there applied to Dunomes.

The State also asks us to remand to the trial court to correct the portion of the judgment and sentence that improperly references counts one and two (two counts of first degree assault) in the sentencing data, which the trial court merged with counts three and four (two counts of attempted first degree murder) at the time of sentencing, even though the sentencing court did not impose punishments on counts one and two. In addition, the State asks us to remand to the trial court to correct the judgment and sentence to specify that his life sentences for counts three and four (two counts of attempted first degree murder) run consecutively to each other and that count five (bribing a witness) runs concurrently with the consecutive attempted murder sentences. We accept and follow the parties' recommendations to remand for correction of the judgment and sentence.

D. Offender Score

In his SAG, Dunomes argues that, based on the United States Supreme Court's holding in *Blakely*,[27] the trial court improperly admitted evidence of his prior first degree arson conviction

[27] In *Blakely*, the Supreme Court held that because a jury did not determine the facts supporting

because, despite his having pleaded guilty to that conviction, he did not do so knowingly. This argument fails.

But Dunomes failed to raise these objections below. Instead, for the first time on appeal, he argues that the trial court improperly included his prior conviction for arson in his offender score because (1) his arson conviction was based on his guilty plea, which he did not enter knowingly; and (2) the jury (for his attempted murder/assault trial) did not consider these circumstances. As we have previously explained, a claim of error may not be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Rather, the asserted error must be "manifest"; if the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *McFarland*, 127 Wn.2d at 333. Here, Dunomes' disagreement with his arson conviction falls outside of the record; therefore, it is not manifest and we do not address it for the first time on appeal.

E. Personal Restraint Petition

In his PRP, Dunomes raises an additional challenge to his sentencing: (1) The sentencing court violated his right to be free from double jeopardy, both by failing to merge his convictions and by setting his life sentences to run consecutively; and (2) the sentencing court improperly classified his prior Louisiana conviction according to Washington's requirements, instead of according to Louisiana's. These arguments also fail.

1. Double jeopardy; correction of judgment and sentence

---

his exceptional sentence, and Blakely did not admit to them, his exceptional sentence violated his constitutional right to trial by jury. *Blakely*, 542 U.S. at 303.

Dunomes argues that the trial court failed to merge incidental crimes and to vacate convictions, thus violating his constitutional protections against double jeopardy. The State responds that the trial court properly merged Dunomes' charges but, as previously noted, the judgment and sentence erroneously fails to specify that his sentences on the two counts of first degree attempted murder should run consecutively. The State is correct.

Dunomes argues that (1) because first degree assault cannot merge with attempted first degree murder, the State should have charged him with second degree assault; and (2) all of these charges should have merged into a single count of attempted first degree murder. Dunomes' arguments are difficult to follow; nonetheless, we find nothing in the record to support his allegations.

The jury found Dunomes guilty of bribing a witness; and on two counts of attempted first degree murder and two counts of first degree assault, the jury also returned deadly weapon special verdicts. The trial court ruled that the two counts of first degree assault merged with the two counts of attempted first degree murder, and sentenced Dunomes on only the two counts of attempted first degree murder. He received "life without parole" on each count of first degree attempted murder and 84 months for bribing a witness. The record thus shows that the trial court properly merged Dunomes' convictions.[28]

Dunomes also argues that there is no reason for his sentences to run consecutively because his criminal conduct consisted of one incident. He implies that, because his stabbing two different

[28] Moreover, as we note earlier in this opinion, accepting the State's concession of scrivener's error, we are remanding to the trial court to correct the judgment and sentence's failure to reflect this merger of counts.

persons occurred within a short time frame, they are one crime instead of two. Here, nothing in the record supports Dunomes' argument that his stabbing of JB followed by his stabbing of SB comprised a single crime. Instead, the jury convicted Dunomes of two serious violent offenses arising from separate and distinct conduct against two different victims, for which RCW 9.94A.589(1)(b) requires consecutive sentences:

> (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct . . . sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

Although, Dunomes' separate and distinct criminal conduct is clear, his judgment and sentence is unclear. As we have already ruled, we remand the judgment and sentence for correction to specify that Dunomes' life sentences for attempted first degree murder run consecutively to each other and that his 84-month sentence for bribing a witness runs concurrently.

2. Louisiana Conviction Properly Classified

Dunomes also argues that the trial court improperly ranked his prior Louisiana third degree aggravated battery conviction as a "B," instead of a "C," level felony. The State responds that (1) it properly provided evidence of both the existence and the classification of the Louisiana conviction, and (2) the trial court properly included the Louisiana conviction in Dunomes' offender score. We agree with the State.

We review the trial court's calculation of an offender score de novo. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). The Supreme Court has adopted a two-part test for

determining whether an out-of-state conviction is comparable to a Washington conviction. *State v. Larkins*, 147 Wn. App 858, 862-63, 199 P.3d 441 (2008). First, a sentencing court compares the legal elements of the out-of-state crime with those of the Washington crime; if the elements comprising the crimes are comparable, the trial court counts the defendant's out-of-state conviction as an equivalent Washington conviction. *Larkins*, 147 Wn. App. at 863 (citing *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998)). If the elements are different, then the trial court must examine the undisputed facts from the record of the foreign conviction to determine whether that conviction was for conduct that would satisfy the elements of the comparable Washington crime. *Larkins*, 147 Wn. App. at 863 (citing *Morley*, 134 Wn.2d at 606).

Here, the record shows that the sentencing court compared the elements of Dunomes' Louisiana aggravated battery conviction with the elements of Washington's second degree assault and found the charges comparable:

> The crime in Louisiana that Mr. Dunomes was found guilty of, aggravated battery, is a battery, which was unlawful touching of another committed with a dangerous weapon. That would appear to be comparable to a charge in the State of Washington for assault in the second degree, which is an assault that occurs with a weapon or [an]other instrument or thing likely to produce bodily harm.
>
> I will find that the two . . . charges are comparable and the conviction would be comparable to a charge of assault in the second degree in the [S]tate of Washington.

6 VRP at 720-21. The sentencing court classified Dunomes' Louisiana conviction as a "most serious offense" because Washington so classifies second degree assault. RCW 9.94A.525(3) provides:

> Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.

The sentencing court properly followed Washington's classification of felonies and, therefore, properly classified Dunomes' prior Louisiana conviction. *See State v. Weiand*, 66 Wn. App. 29, 32-35, 831 P.2d 749 (1992). Accordingly, Dunomes' argument that the trial court did not rank his prior Louisiana conviction according to Louisiana's requirements fails and does not warrant granting his PRP.

VI. Remaining Additional Grounds and Personal Restraint Petition Issues

In addition to the arguments we have already addressed, Dunomes makes three additional arguments in his SAG: (1) The State's recording of his telephone call to SB from jail was an unconstitutional search (2) he did not receive a timely trial because he did not agree to his attorney's and the State's requests for continuances; and (3) because he did not receive a timely trial (requiring dismissal of his charges), the State violated his double jeopardy protections by amending his charges and re-arraigning him These additional grounds do not merit reversal or granting his PRP.

A. Recorded Jail Telephone Conversation

Under the Fourth Amendment, although an inmate is "'not wholly stripped of constitutional protections when . . . imprisoned for crime,'" many of the inmate's rights and privileges are subject to limitation because institutional goals and policies take precedence. *State v. Rainford*, 86 Wn. App. 431, 436, 936 P.2d 1210, (internal quotation marks omitted) (quoting *State v. Hartzog*, 96 Wn.2d 383, 391, 635 P.2d 694 (1981)), *review denied*, 133 Wn.2d 1019 (1997). Inmates do not have a reasonable expectation of privacy in their telephone calls from jail; jails inform them that someone may be monitoring their phone calls, both by posting physical warning signs and by an automated system warning. *See State v. Modica*, 164 Wn.2d 83, 87-89, 186 P.3d 1062 (2008).

The recording of Dunomes' phone call included such automated warning that the jail would record the phone call. Thus, Dunomes had no reasonable expectation of privacy in the call and its recording did not violate his constitutional rights. We hold, therefore, that the trial court

properly admitted the evidence.

B. Timely Arraignment and Trial

A trial court may grant either party's motion for a continuance when "required in the administration of justice" so long as the continuance will not substantially prejudice the defendant in the presentation of his defense. *State v. Saunders*, 153 Wn. App. 209, 217, 220 P.3d 1238 (2009) (quoting CrR 3.3(f)(1), (2)). CrR 3.3 excludes properly granted continuances from the time-for-trial period. CrR 3.3(e)-(f). A trial court does not abuse its discretion in granting a continuance to permit the parties time to prepare for the case or to permit the parties time to obtain new evidence. *State v. Flinn*, 154 Wn.2d 193, 200–01, 110 P.3d 748 (2005); *State v. Cauthron*, 120 Wn.2d 879, 910, 846 P.2d 502 (1993), *overruled in part on other grounds by State v. Buckner*, 133 Wn.2d 63, 65-67, 941 P.2d 667 (1997).

Dunomes does not explain why he contends the trial court acted improperly by granting continuances or why he now objects. The record indicates that the trial court signed three orders continuing trial for purposes of discovery, reassignment of counsel, and accommodating both the parties' and the court's schedule. Similarly, Dunomes does not explain, nor does the record show, that these court-ordered continuances either harmed him, prejudiced his right to present a defense, or violated his right to a "speedy trial" under CrR 3.3.

C. Double Jeopardy and Amended Charges

Dunomes argues that the State violated his right to be free from double jeopardy because (1) after allegedly violating his right to a "speedy trial" under CrR 3.3, the law required the trial court to dismiss his charges with prejudice; but (2) instead, the State amended his charges and

arraigned him on both the original and the additional charges. These circumstances, he argues, constituted double jeopardy under the United States Constitution. We disagree.

Dunomes' double jeopardy argument depends on his ability to show that the trial court violated his right to a timely trial under CrR 3.3, warranting dismissal of the original charges with prejudice. He fails to show such a CrR 3.3 violation. Consequently, his double jeopardy argument also fails.

We affirm Dunomes' convictions, remand for correction of his judgment and sentence, and deny his PRP.

With a majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

I concur:

Penoyar, C.J.

I concur in result only:

Quinn-Brintnall, J.