IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63548-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JAMES DERRICK RUFFIN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: October 18, 2010
	)	

Lau, J. — A jury convicted James Ruffin of second degree assault involving his girl friend Naomi Wilson. She did not testify at trial. Ruffin appeals the admission of Wilson's recorded 911 call to the police and the emergency room doctor's testimony recounting Wilson's statements to a triage nurse. Ruffin argues that this evidence violated his right to confrontation under the federal and state constitutions. He also alleges improper closing remarks by the prosecutor denied him a fair trial. We conclude that because the 911 call was nontestimonial, it violates no federal confrontation right. And any alleged confrontation right violation based on the doctor's testimony was harmless beyond a reasonable doubt. Ruffin also fails to demonstrate

reversible misconduct. Accordingly, we affirm Ruffin's second degree assault conviction.

FACTS

Naomi Wilson and James Ruffin had been dating for seven years and had one child together. Around midnight on December 28, 2008, Wilson's mother, Jody Neumann—who lived downstairs—heard Ruffin and Wilson arguing and "a big thud" on the floor. Neumann immediately went upstairs and saw Wilson bent over, covering her bleeding face. Wilson told her, "He hit me." Report of Proceedings (RP) (May 4–5, 2009) at 73. Wilson then called 911. On the recorded 911 call, which the State introduced at trial, Wilson identified Ruffin as her assailant, stated she was bleeding from the nose, and repeatedly said, "I need the police."[1] RP (Apr. 21, 2009) at 23.

Sheriff's Deputies David Cissna and Duane Goding responded to the 911 call. They testified that Wilson had been crying, had red marks and scratches on her neck, a red and swollen eye, and a bloody nose. A later diagnosis confirmed an orbital fracture—a facial fracture that the treating physician, Dr. David Sternfeld, described as "a very common injury that you would see with someone [who] was struck in the face." RP (May 6, 2009) at 162. Ruffin, however, showed no visible injuries.

Wilson went to the emergency room at 1:50 a.m., where she was seen by Dr. Sternfeld. At trial, because he could not remember treating Wilson, Dr. Sternfeld read to the jury some of Wilson's statements that the triage nurse had recorded on

[1] The trial court admitted the recording under the excited utterance and present sense impression hearsay exceptions.

Wilson's medical chart. Wilson told the nurse that Ruffin "punched me in the face and abdomen. I was also strangled. My nose was bleeding" and "[m]y whole abdomen hurts, especially in the middle. He sat on me and kneed me in the stomach, too." RP (May 6, 2009) at 148–49. Wilson went on to describe what movements caused her pain and the degree of that pain. The nurse wrote, "That it was an assault, and that she was hit in the stomach, the face, and the neck . . . that she's been with her boyfriend for seven years. She told him to move out tonight and he assaulted [her]." RP (May 6, 2009) at 147–48.

Before Dr. Sternfeld's testimony, but after playing the 911 recording, the State informed the court that Wilson did not wish to testify at trial. The State decided not to request a material witness warrant because Wilson, then pregnant with Ruffin's second child, believed the stress of the trial was affecting her pregnancy and causing her to bleed.

On direct examination, Ruffin claimed he acted in self-defense. According to Ruffin, Wilson, who was drunk, became verbally abusive and threw a cup of beer at him. Ruffin claimed that Wilson began hitting him and he twice hit her back. Then Wilson allegedly tried to pull Ruffin to the ground, they both fell, and Wilson's head hit the ground and her nose started to bleed. Ruffin stood up, saw Neumann coming into the apartment, and the fight ended. On cross-examination, Ruffin stated his only injury from the fight was a cut on the inside of his mouth. He also acknowledged his three previous convictions for assaulting Wilson and that he visited Wilson weekly for the past several months. But he claimed they never discussed his pending assault case.

A jury convicted Ruffin of second degree assault but found that the crime was not an aggravated domestic violence offense.[2]

ANALYSIS

Confrontation

Ruffin argues that the admission of Wilson's 911 call and emergency room personnel testimony about what she reported to them violated his right to confrontation. Because Ruffin failed to object to the challenged statements, he may not raise them for the first time on appeal unless the claimed error is a "'manifest error affecting a constitutional right.'" State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting RAP 2.5(a)(3)). Under that standard, a defendant must demonstrate that the alleged error was "manifest" and that, in the context of the trial, the alleged error actually affected the defendant's rights. McFarland, 127 Wn.2d at 333. Washington courts have reviewed claims alleging confrontation violations raised for first time on appeal only when they amount to manifest constitutional error. State v. Kronich, 160 Wn.2d 893, 900–01, 161 P.3d 982 (2007).

Ruffin concedes that he did not object during the trial but contends he did not do so because he thought Wilson was going to testify. But to challenge a trial court's admission of evidence on appeal, a party must raise a timely and specific objection at

[2] The "to convict" instruction for aggravated domestic violence offense required the State to prove

"(1) That the victim and the defendant were family or household members or in a dating relationship; and

"(2) That the offense was committed within sight or sound of the victim's and defendant's child who was under the age of 18 years."

trial. State v. Gray, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006). "To be timely, the party must make the objection at the earliest possible opportunity after the basis for the objection becomes apparent." Gray, 134 Wn. App. at 557. Here, before Dr. Sternfeld testified, the State informed the court and Ruffin that Wilson would not testify and the State would not seek a material witness warrant. At this point, the 911 tape had already been admitted. Ruffin could have but did not move for a mistrial. He could also have timely objected to Dr. Sternfeld's testimony on confrontation grounds or moved for a new trial "within 10 days after the verdict." CrR 7.5(b)

Because Ruffin failed to timely object to the medical testimony or move for a mistrial or new trial, he waived any claim that the evidence was erroneously admitted, unless he can demonstrate manifest constitutional error. ER 103(a)(1); State v. Warren, 134 Wn. App. 44, 57–58, 138 P.3d 1081 (2006), cert. denied, 129 S. Ct. 2007 (2009).

1. 911 Call

Ruffin asserts that admitting the recording of Wilson's 911 call violated his Sixth Amendment confrontation right. He specifically contends that because the statements were testimonial and not subject to cross-examination, their admission violated his right to confrontation.

We review whether a defendant was unconstitutionally deprived of the right to confront his accuser de novo. State v. Medina, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002). Under the Sixth Amendment, an accused has a right to confront witnesses bearing testimony against him. Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct.

1354, 158 L. Ed. 2d 177 (2004). The confrontation clause prohibits admission of testimonial statements made by a witness who did not appear at trial unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. Crawford, 541 U.S. at 53–54. But "nontestimonial" hearsay is admissible under the Sixth Amendment subject only to the rules of evidence. State v. Pugh, 167 Wn.2d 825, 831, 225 P.3d 892 (2009) (citing Davis v. Washington, 547 U.S. 813, 821,126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)). "Statements may be deemed 'testimonial' by looking at the witness's purpose in making the statements, specifically whether the witness expected the statements to be used at trial." State v. Sandoval, 137 Wn. App. 532, 537, 154 P.3d 271 (2007) (citing Crawford, 541 U.S. at 51–52)).

In Davis v. Washington, 547 U.S. 813, 823, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court addressed whether a 911 recording was "testimonial" and thus barred by Crawford. Davis clarified that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 813–14. "[Statements] are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis, 547 U.S. at 822.

And in Pugh, our Supreme Court held that a domestic violence victim's statements to a 911 operator about her husband's assault were not testimonial because they were made when her assailant still remained a danger, to help resolve a

present emergency, and to obtain medical assistance. Pugh 167 Wn.2d 833–34. The court so held even though the statements appeared to describe past events ("[m]y husband was beating me up really bad") and the victim indicated that her assailant was walking away from her when she reported the incident. Pugh, 167 Wn.2d at 833.

Likewise here, Wilson's statements to police were meant to "resolve the present emergency," rather than recounting past events. See Davis, 547 U.S. at 827. Like in Pugh, Wilson made the statements while Ruffin was still present and provided only enough information for the police to resolve the emergency. Our review of the record shows that her statements are emotional, disjointed, and interrupted by her crying and arguments with an unidentified male. And her frequent exclamations that "I just need the police here" can reasonably be viewed as a cry for help. Br. of Appellant, Appendix at 3. Davis instructs that such statements, which may fairly be described as "a cry for help" or "the provision of information enabling officers immediately to end a threatening situation" are "nontestimonial." See Davis, 547 U.S. at 832. Furthermore, like the victim in Pugh, Wilson was injured—she was bleeding and suffered a facial fracture. Finally, the 911 operator did not take any formal statements and the operator's interaction with Wilson was brief. We conclude Wilson's statements were not testimonial and their admission violated no Crawford confrontation right. Ruffin therefore fails to demonstrate a manifest constitutional error warranting review for the first time on appeal.

2. Dr. Sternfeld's Testimony

Ruffin next argues that the court violated his Sixth Amendment right to

confrontation because the State "did not call . . . Wilson as a witness, but nonetheless elicited hearsay testimony of her statements to an emergency room nurse . . . ."[3] Br. of Appellant at 11. Ruffin also argues that the admission of Dr. Sternfeld's testimony violated his confrontation right under Washington's Constitution, article I, section 22. But we need not address these contentions because we conclude that any error was harmless beyond a reasonable doubt.

"It is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be harmless." State v. Moses, 129 Wn. App. 718, 732, 119 P.3d 906 (2005). "[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). "The correct inquiry is whether, assuming that the damaging potential of the [testimony] were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. 673, 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). We "look at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt." Moses, 129 Wn. App. at 732.

We conclude that overwhelming untainted evidence supports Ruffin's guilt. And Dr. Sternfeld's challenged testimony was cumulative of the other evidence presented.

[3] The trial court admitted this testimony under ER 803(a)(4)—statements for purposes of medical diagnosis. Ruffin does not assign error to that decision.

Our review of the record reveals testimony by multiple witnesses who corroborated the doctor's testimony that Ruffin assaulted Wilson and established that Ruffin's use of force was not lawful.[4]

Jody Neumann testified that she "heard a big noise upstairs, like a big thud or something on the floor" and she went upstairs. RP (May 4–5) at 71. When she got to Ruffin and Wilson's apartment, she testified,

> [NEUMANN]. [I saw] Derrick[5] . . . walking away from Naomi in front of the—I wouldn't say pacing, but kind of nervous, walking back and forth by the picture window. And Naomi was bent over. I don't know if she was getting up from the floor, but that's what I assumed. And she had her face covered, her nose, like this, covered, and she was bleeding everywhere. There was blood everywhere."
>
> [THE STATE]. And what was she saying?
>
> [NEUMANN]. She was just—I believe she said, "He hit me. He hit me."
>
> [THE STATE]. And, when you say she was bleeding, was she calm? How was she?
>
> [NEUMANN]. No. She was not hysterical, but pretty upset. Maybe a little shocked that it happened.
>
> [THE STATE]. All right. What did you do?
>
> [NEUMANN]. I just—there was a towel on the kitchen counter, and I just grabbed it and gave it to her, and then she put it over her face.
>
> [THE STATE]. Okay. How would you describe her emotional state at that point?
>
> [NEUMANN]. She was pretty—maybe just not quite hysterical, but pretty upset.
>
> [THE STATE]. And what happened next, either from you or from her?

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[4] On the second degree assault, the court instructed the jury that in order to convict the defendant, it must find beyond a reasonable doubt that "the defendant intentionally assaulted Naomi Wilson" and "thereby recklessly inflicted substantial bodily harm." And the court also instructed the jury on Ruffin's self defense claim—"The use of force . . . is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary" and that "[t]he State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful . . . ."

[5] "Derrick" is Ruffin's middle name.

> [NEUMANN]. I think she got on the phone to 911 right away.
> [THE STATE]. And when she was speaking to 911, what did you do? Do you recall?
> [NEUMANN]. I think I walked around toward where the fireplace was and behind the couch there, and I just saw all the blood, and I just couldn't believe it.

RP (May 4–5) at 73–74. She characterized the evening's events as "the domestic violence issue that went on." RP (May 4–5) at 70. And on cross-examination she testified that when she came upstairs, Wilson was in a crouched position with her hand over her face. Finally, Neumann also testified that she did not notice any injuries on Ruffin but "believed [Wilson] had a broken nose. Blood was coming from her nose." RP (May 4–5) at 78.

Dr. Sternfeld testified about Wilson's condition based on his own observations, CT scans, and treatment of her.

> I documented that she was lying on the stretcher and that she was uncomfortable and crying.
> . . . .
> She—the primary injury is that her left eye was nearly swollen shut, and it was very ecchymotic, which means that it was bruised.
> So the whole area essentially around her left eye had turned purple in color from presumably some sort of trauma.
> She also had some tenderness on the left side of the abdomen when I examined her over that area. Those were her two main findings that I found.

RP (May 6, 2009) at 156–57. Dr. Sternfeld also testified that Wilson had a facial fracture and abdominal contusions. He stated that the facial fracture was "a very common injury that you would see with someone [who] was struck in the face" and that her abdominal contusions or bruises were "consistent with someone being hit in the abdomen. Whether it be with a fist or a knee or any type of object, that would cause a contusion or a bruise." RP (May 6, 2009) at 162–63.

Deputy Cissna, the first officer on the scene, testified that when he arrived Ruffin "[w]as calm. We had just a regular one-on-one conversation. There was no—it wasn't a type of conversation where anybody had to calm down. We were talking like two men." RP (May 4–5, 2009) at 37. Wilson, on the other hand,

> looked like she had been crying and she was upset. I could smell the odor of intoxicants on her, and she had—it looked like she had been in a fight. There [were] red marks and scratches and stuff all over.
>
> . . . .
>
> [S]he had red scratches on her neck, and it was kind of swollen, like they were recent, and a bloody nose.
>
> . . . .
>
> . . . . [T]here was blood on the floor in the living room.

RP (May 4–5, 2009) at 39–40.

Deputy Goding also described Wilson's appearance. He took photographs of her injuries, which were admitted at trial.

> A. She looked like she just had been beat up. Her nose was red and puffy. You could see blood in her nostrils. Her eye was red and puffy. She had purple on her eyelash. It looked like she had been punched and hit in the eye and nose area.
>
> She had blood on her white shirt that she was wearing, and there was blood all over the floor in the living room, the kitchen. She was holding a rag in her hands that had blood on it.
>
> Q. Did you notice anything about injury to her neck?
>
> A. She had scratches and red marks on her neck. You could see where, like, there were fingernail scratches in the neck area, and it was still red from that.
>
> . . . .
>
> . . . . I didn't see any cuts or lacerations [to her eye]. The blood appeared to be coming from her nose. The eye was red and purple. It looked like it had been hit or punched.

RP (May 4–5) at 98–99. Deputy Goding described Wilson's demeanor as "upset." "And you could tell that she had been crying and was still kind of sobbing when I first

contacted her." RP (May 4–5) at 100. As to any alleged intoxication, Deputy Goding testified, "She was able to walk around fine. Her balance seemed fine. She held a conversation fine. Her speech wasn't slurred." RP (May 4–5) at 101. Finally, regarding Ruffin's physical condition, he stated, "I asked him if he had injuries, and he said he did, so I looked with my flashlight, and he didn't have any injuries on his face, neck, or hands. . . . I didn't see any scratches, I didn't see any marks, no blood." RP (May 4–5, 2009) at 103. And Deputy Cissna testified he also examined Ruffin for injuries and saw no injuries, scratches, bumps, or bruises. Deputy Goding took photographs of Ruffin to document their observations. These photographs were admitted at trial.

Lyle Bremmeyer, a King County corrections officer assigned to jail booking, testified that Ruffin had no observed medical problems and according to Ruffin's "medical deferral screening form," "[Ruffin] stated that he has no medical problems." RP (May 6, 2009) at 118–121.

Ruffin claimed the fight started after Wilson, who was drunk, became verbally abusive.[6] He testified that Wilson began hitting him and pinned him against the couch. While trying to push her off him, his "hands slipped up to where her neck area was." RP (May 7, 2009) at 234. Ruffin described that contact by referencing a picture of Wilson's injuries.

> This is a picture of Naomi and the marks on her neck from where I had my hand on her chest and neck, right there, and I was pushing her off of me. It was more

[6] Ruffin also explained that Wilson was his girl friend and they had lived together for seven years. On the night of the assault, they discussed separating and Wilson offered to give him half of their income tax return so that he could move out.

> like on her chest and shoulder and neck area right there (indicating).
>
> I was trying to push her off me when she was on the couch, and I kept pushing her, pushing her, pushing her back. This is the only time during the entire incident that I had my hand on her neck.

RP (May 7, 2009) at 244. Wilson began "turning red because her circulation was cut off." RP (May 7, 2009) at 235. Wilson then released Ruffin, but he claimed she began hitting him in the face. Ruffin "hit her back." RP (May 7, 2009) at 236. Ruffin claimed that Wilson then started swinging at him wildly. He described what followed.

> [RUFFIN]. . . . . At this time, I hit her back, and I was trying to get her to let go of my shirt. I hit her back.
>
> [DEFENSE COUNSEL]. Do you know if you had an open hand, or closed fist? Or how did you hit her back?
>
> [RUFFIN]. I believe it was an open hand.
>
> [DEFENSE COUNSEL]. Okay.
>
> [RUFFIN]. But, at this point, things were out—way out of control. So she—I hit her. She's throwing—
>
> [DEFENSE COUNSEL]. Is that with your right hand?
>
> [RUFFIN]. Right. I hit her another punch with my right hand, and pulled away from her to try to break the grasp that she had on my shirt.

RP (May 7, 2009) at 239–40. Then, Wilson tried to pull Ruffin to the ground and they both fell down. Wilson fell first and "[s]he hit her head on the floor, on the hardwood floor, her nose immediately started gushing blood, and I landed directly on top of her." RP (May 7, 2009) at 240. Ruffin stood up, saw Neumann coming into the apartment, and the fight ended.

On cross-examination, Ruffin testified that he was about a foot taller than Wilson and 45 pounds heavier. He stated that his only injury was a cut to the inside of his mouth. Ruffin maintained that his testimony was consistent with Wilson's medical report, a portion of which he read into the record. "'Patient has welts and scrape marks

bilaterally along neck where she states, "He strangled me."'" RP (May 7, 2009) at 280. Finally, Ruffin testified that on three prior occasions Wilson had assaulted him and he had defended himself physically. Ruffin conceded that in each of those incidents, he was arrested and convicted for fourth degree assault,[7] but no charges were filed against Wilson.[8]

Finally, the jury heard the properly admitted 911 tape.

CALLER: I'm bleeding really bad.
911(1): Who . . . what happened?
CALLER: My . . . he hit me bad.
911(1): Who did? Who hit you?
CALLER: (Unintelligible).
911(1): Who hit you?
CALLER: My Derrick hit me.
911(1): Your, your boyfriend or your parent?
CALLER: Yes.
911(1): Which one?
CALLER: My boyfriend.
911(1): Okay. Where did he hit you?
CALLER: In my . . . everywhere.
. . . .
CALLER: I'm bleeding really bad. I need the police.
911(1): Where . . . okay. I understand that. Where you bleeding from? Hello?
CALLER: Yes.
911(1): Naomi, what's your last name?
CALLER: Wilson.
911(1): 'Kay. What's his name?
CALLER: He's gonna leave.
911(1): Okay. That's fine if he does. What's, what's his name?
UNKNOWN MALE: (Unintelligible) . . . I'm going to jail . . . (unintelligible).
CALLER: Good!
UNKNOWN MALE: (Unintelligible).

[7] Ruffin was also convicted of third degree malicious mischief for the destruction of Wilson's property on August 28, 2004.

[8] This testimony was admitted for the limited purpose of assessing "the reasonableness of the defendant's self-defense claim." Ruffin does not assign error to the admission of this limited purpose evidence.

CALLER: I'm sorry. What?
911(1): What's his name?
CALLER: James Ruffin. R-U-F-F-I-N.
911(1): Okay. Where you bleeding from?
CALLER: My nose.
911(1): 'Kay. Stay on the phone with me while I get the medics with us, okay?
CALLER: (Crying)

Br. of Appellant, Appendix at 3–5.

We conclude that properly admitted evidence overwhelmingly established the elements of second degree assault and that the force used by Ruffin was not lawful. Accordingly, any alleged confrontation violation was harmless beyond a reasonable doubt.

Prosecutorial Misconduct

Ruffin next argues that several closing remarks by the prosecutor deprived him of a fair trial. Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who alleges prosecutorial misconduct must "first establish the prosecutor's improper conduct and, second, its prejudicial effect." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). 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. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). "A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury."

Boehning, 127 Wn. App. at 519. But a prosecutor may not make statements that are unsupported by the evidence and unfairly prejudicial to the defendant. Boehning, 127 Wn. App. at 519. It is improper for a prosecutor to invite the jury to decide any case based on emotional appeals or their passions and prejudices. In re Det. of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998); State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

A defendant establishes prejudice only if he shows a substantial likelihood that the instances of misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). The defendant bears the burden of showing both prongs of prosecutorial misconduct. Hughes, 118 Wn. App. at 727.

Ruffin first points to the following argument, contending it improperly suggested that he was responsible for Wilson's absence from trial.

> [The State]. So, I guess conflicted is accurate. She didn't come. It's hard to understand.
>
> [Defense Counsel]. Objection as to comment.
>
> THE COURT. Overruled.[9] I will just remind the jury though immediately that remarks and statements by counsel are not evidence and the jury can consider the evidence that is before it or the lack of evidence. You may proceed, Ms. Gregson.
>
> [The State]. Thank you. It's disappointing. It's hard to understand, hard to relate to, hard to grasp. They have been talking for months on a weekly

[9] We note that Ruffin does not assign error to any trial court decision overruling objections to claimed prosecutor misconduct.

> basis.
>
> [Defense Counsel]. Objection.
>
> THE COURT. Overruled. And I—the defense does have the right to offer objections and may continue to do so and the Court may sustain an objection. But again, the Court believes that it's only necessary to remind the jurors that as the Court has said a couple of times in the written instructions goes that the only evidence is the evidence that you heard from the witness stand and the law is the Court's instructions and you should disregard any remark that you believe is not supported by the evidence that you heard. Please proceed Ms. Gregson.
>
> [The State]. They have been talking for months on a weekly basis, never about this case, he says. But when trial rolls around she does not appear. He smugly testifies about the years of abuse that he has suffered at the hands of Naomi Wilson, this drunk, violent woman.

RP (May 11, 2009) at 19–20.

Ruffin contends that this argument was improper because "the prosecutor suggested Ms. Wilson's failure to testify was Mr. Ruffin's fault." Br. of Appellant at 40. We agree that the prosecutor's argument was improper because the prosecutor knew before closing argument that Wilson refused to testify, claiming the stress of trial was affecting her pregnancy and causing her to bleed. And the prosecutor declined to request a material witness warrant. Yet the prosecutor's argument implied that Ruffin improperly influenced Wilson's absence from trial. While we are troubled by these improper remarks, they do not rise to the level of reversible misconduct. In view of the overwhelming evidence of guilt discussed above, there is no substantial likelihood that this misconduct affected the jury's verdict.

Ruffin next argues, "[T]he prosecutor committed misconduct by urging the jury to convict Mr. Ruffin on grounds other than the evidence presented at trial." Br. of Appellant at 45. Specifically, he points to the following remarks:

> [THE STATE]: [Ruffin] has received a fair trial; and it is now time for him to get his just desserts

> [Defense Counsel]: Objection
> THE COURT: Objection is overruled.
> [THE STATE]: Convict the defendant because he beat Naomi Wilson like a dog. Convict the defendant because then he termed it her fault; that she deserved it. Convict the defendant because he attempted to assassinate the character of the mother of his children in the hope that it would excuse or distract you from his conduct in the case.
> But most of all I want you to convict the defendant because he is guilty.

RP (May 11, 2009) at 36. Ruffin objected only to the "just desserts" argument. As such, he must show that the remaining argument was flagrant and ill intentioned such that "it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Russell, 125 Wn.2d at 86. In the context of the facts and issues at trial, we conclude that any error here could have been cured by a prompt instruction. Also, Ruffin establishes no prejudice given the overwhelming evidence supporting guilt.

Ruffin also argues that the prosecutor committed misconduct by arguing "to the jury they had heard 'two versions' of what had happened—one presented by the State's witnesses and one by Mr. Ruffin—and only one version was true." Br. of Appellant at 46. The prosecutor argued,

> And a nice thing about this case is that there are really only two versions of the incident that you heard. The version that Judy Neumann, Deputy Cissna and Goding, Officer Bremmeyer and [Dr.] Sternfeld from the emergency room told you, and the version the defendant told you. And to a large degree they are mutually exclusive. One of them is true, and one of them is not.

RP (May 11, 2009) at 23.

This argument did not constitute misconduct. It is improper for the prosecutor to argue that in order to acquit a defendant or to believe a defendant's testimony the jury

must find that the State's witnesses are lying. See State v. Barrow, 60 Wn. App. 869, 874–75, 809 P.2d 209 (1991); State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995), superseded by statute on other grounds by RCW 9.94A.364(6). Such an argument is improper because it misstates the jury's duty, since it need only find that the State has failed to prove all the elements beyond a reasonable doubt. Barrow, 60 Wn. App. at 875–76. But "[w]here, as here, the parties present the jury with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other." Wright, 76 Wn. App at 825 (footnote omitted). The Wright court so held because the prosecutor's argument that "the jury would need to believe that the State's witnesses were mistaken" did not foreclose the possibility that the testimony was "'incorrect . . . without any deliberate misrepresentation. . . .'" Wright, 76 Wn. App. at 824. Likewise here, the prosecutor's remarks merely pointed out that Ruffin's self-defense claim and testimony from the State's witnesses could not both be correct.[10]

For the reasons discussed above, we affirm Ruffin's second degree assault

[10] Ruffin argues that Wright is inapplicable because it is limited to situations where "'the parties present the jury with conflicting versions of the facts and the credibility of witnesses is a central issue.'" Reply Br. of Appellant at 13 (quoting Wright, 76 Wn. App. at 825). But given that the only evidence to support Ruffin's self-defense theory was his testimony, witness credibility was crucial to the case.

conviction.

WE CONCUR: