IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 66930-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
ANTWAUN JAMAR OWENS,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 19, 2011
	)	

Lau, J. — Antwaun Owens broke into his former girl friend's home, threatened to kill her with a knife, and forcibly penetrated her vagina with his fingers. A jury convicted him of second degree burglary, second degree assault, harassment, interference with domestic violence reporting, obstructing a law enforcement officer, and five counts of no-contact order violations. Owens's appeal raises 44 assignments of error. We remand for resentencing consistent with this opinion because Owens's assault and harassment convictions constituted the same criminal conduct for sentencing purposes. Finding no merit in his remaining challenges, we affirm his convictions.

FACTS

Antwaun Owens and Vanita Gomez dated for over four years and had two children together. They lived together until October 2008. Afterwards, Owens still came over to her house and spent a few nights each week at her home. Gomez used Owens's truck to drive to and from work.

On November 3, 2008, Gomez had a date with a coworker. Angry about her date, Owens texted her multiple times that evening, while becoming increasingly frustrated. From the tenor of the messages, she thought he was angry and was going to hurt her.

Gomez drove Owens's vehicle to and from her date. Owens made it clear he wanted his truck back. After she got home, he went to her house, knocked on the door, and retrieved the truck keys from her without entering the house.

Gomez went to sleep. At trial, Gomez read from her victim statement, which she had written and signed under penalty of perjury after police arrived at her home to investigate.[1] She described that she woke up to a "thump" noise and soon saw Owens standing over her with a knife. Report of Proceedings (RP) (May 5, 2009) at 267. He asked to smell her vagina. When she refused, he spread her legs apart and penetrated her vagina. He put the knife to her throat and threatened to "do a double

[1] This type of victim statement is frequently referred to as a "Smith affidavit" based on State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982) (holding ER 801(d)(1)(i) permits admission of a trial witness's prior inconsistent statement as substantitive evidence when that statement was made as a written complaint (under oath subject to penalty of perjury) to investigating police officers subject to reliability analysis).

homicide."

RP (May 5, 2009) at 267. Gomez tried to call 911 with her cell phone, but Owens removed the battery. When Gomez tried to take the phone back, "he cut [her] with a knife" and twisted her arm. RP (May 5, 2009) at 267.

At trial, Gomez recanted her pretrial sworn statement. She testified instead that she woke up to find Owens standing over her; he appeared calm. Although she had not given him permission to be in the house at that time, she did not object to him coming in. He left the room and returned with a knife from the kitchen. Gomez said he did not scare her. She tried to take the knife away but suffered a small cut on her hand. Gomez testified that he asked if he could smell her vagina and she declined. She said she did not resist when he put his hand on top of her vagina. She claimed this was something they would both do to each other when accusing the other of cheating. Owens tried to take her phone when it rang, but it fell on the floor and broke open. She asked him to get into bed and go to sleep with her, but he left instead.

Gomez testified that she was concerned about getting access to Owens's truck so she could drive to work. She called him after he left but could not reach him because he went to his new girl friend's house. This angered Gomez, so she called 911 to report that she was the victim of domestic violence. She told the operator that she was no longer involved with Owens and that she had changed the locks to keep him out of her home. Police responded and later arrested Owens.

Responding officers and other witnesses testified at trial. The first responders were Vancouver Police Officers Therman Bivens and Brent Donaldson. Officer Bivens testified that dispatch had notified him that

there was a potential domestic violence situation involving a knife. When he arrived, he met Gomez and noticed wounds to her hand. He also generally described the nature of a "Smith affidavit." Officer Donaldson testified that while Gomez appeared to be in shock, he was able to review with her the statement she wrote and signed. Detective Carole Boswell and officers Donaldson and Bivens testified consistent with Gomez's sworn statement describing the incident.

Emergency room nurse Joan Sundqvist, who treated Gomez, testified about what Gomez told her. Gomez told Sundqvist that she woke up when she heard a noise, but she fell back to sleep. She woke up again at about one o'clock in the morning to find her ex-boyfriend standing over her with a knife. She told Sundqvist that he said he wanted to smell her vagina. She declined, and he forced her legs open with his left hand and with his right hand, he touched the inside of her vagina. Sundqvist testified further that Gomez said Owens took her cell phone to prevent her from calling 911. He also told her he would kill her and himself. Dr. Jason Hanley also testified about similar statements Gomez made to him while treating her injuries.

The State charged Owens with first degree rape, first degree burglary, second degree assault, residential burglary, unlawful imprisonment, felony harassment, witness tampering, interference with domestic violence reporting, obstructing a law enforcement officer, and five counts of violation of a no-contact order. The State also alleged that Owens was armed with a deadly weapon while committing five of the first six charges.[2]

[2] The State made no allegation that Owens was armed with a deadly weapon while committing the residential burglary.

The court dismissed the residential burglary and unlawful imprisonment charges at the close of the State's case. The jury failed to reach agreement on the rape and witness tampering charges, so the court declared a mistrial on those counts. The jury convicted Owens of the remaining counts.

ANALYSIS

Smith Affidavit

In his supplemental brief, Owens asserts that the trial counsel's failure to object to "irrelevant and prejudicial information" in the Smith affidavit constitutes ineffective assistance of counsel. Specifically, he argues "Ms. Gomez's allegation that Mr. Owens had 'done this type of thing' before, and her allegation that he had a '[m]ental health history/diagnosis' should have been redacted from [the Smith affidavit]." Appellant's Suppl. Br. at 3. But even if we assume, without deciding deficient performance, Owens fails to show prejudice given overwhelming evidence of Owens's guilt as discussed below.

Opinion Evidence

And Owens also argues that Officer Donaldson offered impermissible opinion testimony that he believed Gomez's statement that she was afraid.[3] The credibility of a

[3] The State counters that the testimony was proper because it responded to cross-examination testimony that Gomez was not afraid. The State fails to cite to any portion of the record to identify this cross-examination testimony. A review of the record reveals that Officer Donaldson did not testify that Gomez was not afraid on direct- or cross-examination. Neither did any of the other officers. In fact, Officer Donaldson testified that when he spoke with Gomez, "She was rather calm at that time but stated that she had been scared." RP (May 5, 2009) at 235. Moreover, as Owens correctly notes, "The inadmissible opinion testimony was Donaldson's opinion—[that he] 'believed her'—not Ms. Gomez's statement that she was afraid." Appellant's Reply

witness is a jury question. State v. Whelchel, 115 Wn.2d 708, 724, 801 P.2d 948 (1990). A witness cannot be asked, directly or indirectly, to express an opinion on another witness's credibility. ER 608(a); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). Such testimony invades the fact-finding province of the jury and thus violates a defendant's right to a jury trial. State v. Thach, 126 Wn. App. 297, 312, 106 P.3d 782 (2005). Opinion testimony from a law enforcement officer is especially likely to influence the jury. State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518 (2004). Manifest constitutional error may be raised for the first time on appeal. Thach, 126 Wn. App. at 312.

Officer Donaldson testified:

> [THE STATE]: Officer Donaldson did the victim tell you when you were at the scene, did she tell you whether or not she was afraid of the defendant?
> A. If I can look at my report to refresh—I put quotes in if she gave me a direct comment. I would put that in my report. If not, I kind of summarized. Yes, on the last part "she stated calmly that she was very afraid of the suspect and I believed her. She looked me directly in the eyes and stated this very matter of factly when I asked her."
> Q. Did she give you reasons for—did she tell you that something had recently occurred in the home that made her afraid of the defendant?
> A. Yes.
> Q. I don't want—That's all I'm asking.
> A. Just yes.
> Q. Did she believe that his behavior was escalating?
> A. Yes.
> Q. Earlier, you had identified a knife in the picture?
> A. That's correct.

RP (May 5, 2009) at 352-53 (emphasis added). Here, Officer Donaldson's testimony that "she was very afraid of the suspect and I believed her" constitutes impermissible

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Br. at 2.

opinion testimony on Gomez's credibility.

The State counters, without any factual analysis, that any error was harmless beyond a reasonable doubt. "[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." State v. Moses, 129 Wn. App. 718, 732, 119 P.3d 906 (2005). The State's cursory treatment fails to meet its burden. But our review of the record indicates overwhelming untainted evidence exists to support the convictions.

First, the trial court properly admitted Gomez's sworn statement made shortly after the offenses occurred:

> I heard a thump, went back to sleep. Antwaun was standing over me with a knife saying he was going to kill me. He asked who I had been with. Then he asked if he could smell my pussy. I said no. He said I'm going to ask you one more time, "Can I smell your pussy?" I said no. He pulled the covers over me. Spreaded my legs apart and put his two fingers in my pussy. I asked him to stop. Then, he said that I was a hoe. I was sleeping around in the whole relationship. He put the knife to me and saying that he was going to do a double homicide. He said that he did not give a fuck anymore. I had my cell phone under my pillow trying to call 911. He took—he took it from me. He took the—took it from me and took the battery out. I found my cell phone under the bed and the batteries in the hallway. I tried to get my cell phone back from him and he—he cut me with a knife. I tried to get the knife from him and—and, me (sic) twisted my arm.

RP (May 5, 2009) at 266-67. On direct-examination, Gomez also read the following

portion of her statement to the jury:

> [THE STATE]. And, here it says -- what does -- can you read that for the jury, please?
> [GOMEZ]. Were you put in fear of being hurt during this incident?
> Q. What did you say?
> A. I said, yes.

RP (May 5, 2009) at 267. And Gomez testified she received 5 missed calls and 21 text messages from Owens during a four-hour period on November 3, 2008. She read numerous text messages from Owens into the record. One text message read, "You gonna make hurt you [sic]." RP (May 5, 2009) at 249. Gomez testified that she told responding officers, "I thought it meant that he was going to hurt me." RP (May 5, 2009) at 251. After Gomez read the text messages, the prosecutor asked her, "[I]t appears with the series that we have just read that he was getting ang[r]ier and ang[r]ier as he was sending these text messages?" RP (May 5, 2009) at 252. Gomez responded, "Correct. Because I did have his vehicle." RP (May 5, 2009) at 252.

Gomez testified that early on November 4, she heard a thump and saw Owens standing by the bed. He told her she "was fucking with the wrong niggar (sic) . . . ." RP (May 5, 2009) at 256. He left the room and came back with a knife from the kitchen. Gomez said he didn't scare her and tried to take the knife away, receiving a small cut on her hand. According to Gomez, he asked if he could smell her vagina and she said no. He told her "I'm going to ask you one more time." RP (May 5, 2009) at 257. She again told him no, but she did not resist when he put his hand on top of her vagina. She claimed this was something they would both do to each other when accusing the other of cheating. Owens tried to take her phone when it rang, and it fell to the floor and broke open. She asked him to get

into bed and go to sleep with her, but instead, he left.

Gomez conceded that Owens called her bad names via text message and "repeatedly told [her] that he would kill [her] and do a double homicide." RP (May 5, 2009) at 261. And she admitted that she told the officers that she tried to call 911 for help and that Owens had taken her cell phone.

Regarding the calls from jail, Gomez testified that Owens had another inmate call her and warn her that there was a warrant out for her arrest since she did not want to testify. The inmate told her to leave her work and to "stay low." RP (May 5, 2009) at 300.

Detective Bachelder testified that on November 4, he called Owens. Owens said he had been at Gomez's house on the evening of the crimes to get his truck. Furthermore, he stated that he was concerned he was going to jail before the detective told him what he was investigating. The next day, Owens turned himself in and Bachelder was able to meet with him. Owens told him that he went to Gomez's house, where he no longer lived and did not have permission to enter, to get his truck keys. He went to the bedroom window to ask for his keys. Owens later returned to Gomez's home and entered the house through the kitchen window and stood next to Gomez's bed. He twisted her arm behind her back but then left the room to get a knife from the kitchen. After he returned, Gomez's "cell phone rang and he grabbed it and Ms. Gomez tried to grab it back and . . . he whacked at her with the knife." RP (May 6, 2009) at 413. Owens then took the phone apart. Owens conceded that he was angry that Gomez had gone on a date with another man. And Owens admitted that he had touched Gomez's vagina, but claimed it

was a game they played to see if she had cheated on him. Finally, Owens told Detective Bachelder that he had told Gomez that he was going to kill her, but he claimed it was a joke.

Officer Bivens testified that when he arrived at Gomez's house, Gomez was hesitant to open the door and seemed nervous. He described her as having a "real calm, nervous . . . fearful look" and that "[s]he continued to wipe tears from her face." RP (May 5, 2009) at 211, 214. He described her demeanor—"her arms were folded from what I can recall. She looked down a lot. Kind of nervous or almost embarrassed of what had happened." RP (May 5, 2009) at 212. He noticed that Gomez had two small abrasions on her hand. He testified that after being informed it was voluntary, Gomez wrote her statement about what happened.

Officer Donaldson responded to the scene after Bivens. He learned through his computer that Bivens was responding to a possible assault, burglary, and breaking into a house. Bivens spoke with Gomez, who he described as being "in shock" and noted that she had been crying. RP (May 5, 2009) at 222. At some point, Gomez's step-father arrived to comfort her. Donaldson explained the victim statement form to Gomez, who was willing to fill it out and did so in private. Donaldson testified about numerous photographs taken at the scene that were admitted into evidence. For example, he testified that exhibit 31 shows the knife, a domestic violence flier, and the victim statement form. Exhibit 32 showed the knife and the cell phone. Exhibit 36 showed Gomez's hand with the cut she received and showed to Donaldson. Exhibits 43 to 47 showed the window Owens climbed through and the window sill with a leaf and debris. Finally, exhibit 48 showed Gomez's bed

with leaves and dirt similar to what officers found near the window.

Nurse Sundqvist treated Gomez at the Southwest Washington Medical Center emergency room. She testified that Gomez came to the triage desk complaining of sexual assault by her "ex-boyfriend." RP (May 5, 2009) at 321. Gomez told Sundqvist that the prior evening her boyfriend called and texted her several times. That night, she heard a noise and awoke to her ex-boyfriend standing over her with a knife. He asked to smell her vagina. When she refused, he forcibly spread her legs open and touched her vagina and penetrated her. He told Gomez he would do a "double homicide" killing her and himself. When she tried to call 911, he took her cell phone and removed the battery. When she tried to get the phone back, she received a cut on her hand. She later tried to take the knife from him, but he bent her arm behind her back. Gomez told Sundqvist "she was sitting up when they were talking on the bed because she was scared that he would knife her in the stomach." RP (May 5, 2009) at 324.

Dr. Jason Hanley testified that he treated Gomez at Southwest Washington Medical Center. He said Gomez had a superficial wound to her hand caused by her ex-boyfriend. Dr. Hanley stated that Gomez said she had been sexually assaulted and woke up to find her ex-boyfriend next to her bed. He asked to put his fingers in her vagina and smell it. Dr. Hanley testified that the man had forcefully opened her legs and put his fingers inside her vagina.

Domestic violence victim's advocate Amy Harlan testified that she met with Gomez on November 5 and generally explained the court process to her. Harlan next spoke to Gomez on November 7. Gomez

told Harlan that Owens had contacted her from jail, which surprised Gomez because Harlan had told her on November 5 that there was a no-contact order in effect. On November 17, Harlan faxed Gomez a letter that explained that charging decisions are made by the prosecutor and Gomez could not unilaterally end the case. On December 16, Gomez told Harlan she had reservations about proceeding with the case. Up to this time, Gomez never expressed to Harlan any reluctance to assist in Owens's prosecution or that she may have lied to the police. Around March 12, Gomez told Harlan that she had "exaggerated certain parts of her account to law enforcement. She was clearly frustrated that we were proceeding."
RP (May 5, 2009) at 335. When she spoke to Gomez on April 26, Gomez said, "[S]he just didn't know what the defendant wanted her to do." RP (May 5, 2009) at 343.

We conclude that the evidence here is "so overwhelming that it necessarily leads to a finding of guilt." Moses, 129 Wn. App. at 732, 119 P.3d 906.

Prosecutorial Misconduct

Owens next alleges numerous instances of prosecutorial misconduct that deprived him of a fair trial.[4] Owens asserts the misconduct included appealing to the jury's passion and prejudice, remarks unsupported by evidence, vouching for credibility, and misstating the law. 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

[4] Given Owens's ineffective assistance claim based on counsel's failure to object, we also address the merits of Owens's prosecutorial misconduct claims.

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). The court reviews 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). 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). The record shows defense counsel made no objections to the challenged remarks.

Owens first argues that the prosecutor committed misconduct by vouching for certain evidence. He argues, "[T]he prosecutor vouched for evidence and made argument that conflicted with the court's instructions when she told the jury that out-of-court statements to a medical professional were deemed 'trustworthy.'" Appellant Br. at 27 (quoting RP (May 7, 2009) at 733). Vouching will be found only when it is "clear and unmistakable" that counsel was expressing a personal opinion. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). The prosecutor argued:

> You get to take certain evidence into consideration. Evidence that happened prior to testimony. And, there is a reason for that. It is deemed somewhat--how should I say the word--you can--trustworthy due to the nature of the evidence itself. For instance, medical testimony. Things that you give--tell a doctor and things that you tell a nurse for medical treatment. You can consider that as direct evidence, not as hearsay. Not used simply to impeach someone,

> which means to contradict what they are saying. You get to use it as a fact of the case. You get to use that and when you think about what you heard over the last three days from the doctor and from the nurse, she was very clear about what happened. And it is reasonable. That's reasonable.

RP (May 7, 2009) at 733-34.

In addition Owens argues that the prosecutor's argument that domestic violence victims prepare victim statements because they are "more likely than not going to come in and have to alter [their] testimony" was improper. RP (May 7, 2009) at 749. The prosecutor argued:

> This domestic violence statement, as I said, is one of those statements that you get to use--use as a fact. And, there is a reason for that because these statements, at the time, are sworn statements by a victim of domestic violence who is more likely than not going to come in and have to alter her testimony.

RP (May 7, 2009) at 749. Owens maintains that this argument improperly argued facts not in evidence since there was no testimony that domestic violence victims are likely to recant or alter their testimony.

But the prosecutor's "trustworthy" argument is proper under State v. Sandoval, 137 Wn. App. 532, 154 P.3d 271 (2007). There, "the State told the jury that certain 'exceptions [to the hearsay rules] are allowed because they have been deemed reliable.'" Sandoval, 137 Wn. App. at 537. The court held:

> Mr. Sandoval has not shown the deputy prosecutor's comments vouched for the witness's credibility since the deputy prosecutor did not directly or indirectly state a personal belief that a witness was telling the truth. [State v.] Fiallo-Lopez, 78 Wn. App. [717,] 730-31, 899 P.2d 1294 [1995]. A prosecutor can tell the jury to believe one witness over another. Emphasizing the reliability of one witness over another is not witness vouching.[5]

[5] The court also noted that Sandoval had failed to show prejudice.

Sandoval, 137 Wn. App. at 541. And the record fails to support Owens "facts not in evidence" argument because the prosecutor never said that domestic violence victims are likely to recant or alter their testimony. While arguably nonsensical, the prosecutor's argument was not flagrant, ill intentioned, or improper.[6]

Owens next argues that "the prosecutor committed misconduct by making arguments that contradicted the court's instructions." Appellant's Br. at 32. Owens quotes out of context a portion of the prosecutor's closing arguments: "[T]he moment she wakes up to having this man standing over her with a knife obviously he has committed that crime [assault]." RP (May 7, 2009) at 670. Owens maintains that this comment was improper for three reasons: (1) assault requires an overt "act" and the prosecutor's argument "directed the jury to disregard [that] requirement;" (2) the argument encouraged the jury to ignore the requirement that the act create "a reasonable apprehension and imminent fear of bodily injury;" (3) "the argument improperly suggested Mr. Owens's intent was irrelevant." Appellant Br. at 33.

When the prosecutor's argument is read in context, Owens's assertions are not persuasive. The prosecutor argued:

> We are talking about the whole act of him holding the knife to her. And, if you look at -- flip quickly to the next page, which is Instruction #20, it says an assault is an intentional -- an intentional touching or striking of another person that is harmful or offensive and so then, assault in the second degree would be that with a deadly weapon or an assault, in the second paragraph, is an act done with the intent to create in another reasonable apprehension of fear or bodily injury and, in fact, creates that fear and bodily injury. And, in this case, the moment she wakes up to having this man standing over her with a knife

[6] And the jury is presumed to follow the court's instructions. The court instructed the jury to disregard any arguments not supported by evidence, and the lawyers' remarks are not evidence.

> obviously he has committed that crime. But, you know, today she says she wasn't afraid. She was very clear with the officers and the doctor and the nurse and in her own statement. You will have an opportunity to say that -- see that she did say that, in fact, she was in fear. She didn't -- she even said on the 911, I don't -- I didn't know what he could do -- what he could do -- I don't know what he would do.

RP (May 7, 2009) at 669-70. The prosecutor's entire argument is properly tied to the jury instruction. As to Owens's specific arguments, the prosecutor explicitly references each element that Owens complains he either ignored or directed the jury to disregard. The prosecutor stated, "[S]o then, assault in the second degree would be that with a deadly weapon or an assault, in the second paragraph, is an act done with the intent to create in another reasonable apprehension of fear or bodily injury and, in fact, creates that fear and bodily injury." RP (May 7, 2009) at 669-70 (emphasis added). This is a correct statement of jury instruction 20. And the testimony at trial indicates that Owens had forcibly entered Gomez's house, stood over her in a bedroom, and held a knife at his side. Based on this testimony, the prosecutor argued that when Gomez saw Owens over her with a knife to his side, the elements of second degree assault were satisfied. This is a permissible inference from the testimony that was explicitly tied to the jury instruction. The prosecutor properly argued the law and the facts. No misconduct occurred.

Owens next argues that the prosecutor committed misconduct by extolling the jury to "protect" Gomez. The prosecutor argued that Gomez had to get a protection order and a warrant to protect herself from Owens. He went on:

> Hopefully, that was enough for him. Hopefully that will protect her from him. But, your job today is to really protect her. Your job today is to say that you are not going to put up with that. You're not going to put up with him pressing

> her like this. That's not okay. He's not going to get away with this. Every single phone call he made was for a purpose. He called the moment after the court gave the protection order protecting her. He called the moment that the Court tried to make sure that she was picked up so that she could come in here and testify for you. He has tried to orchestrate this from the beginning to the end. And, like I said, he only lost control for one minute and when he did, he made admissions. "I don't want to go to jail for the rest of my life."
>
> Please do your job. Please follow the law.

RP (May 7, 2009) at 756. The prosecutor has a duty to "seek a verdict free of prejudice and based on reason." State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). It is improper to present argument not based on the evidence that appeals to the jury's passion and prejudice. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) ("Appeals to the jury's passion and prejudice are improper."). The State may properly comment on the evidence presented at trial. State v. Fleming, 83 Wn. App. 209, 215 n.3, 921 P.2d 1076 (1996).

Although these arguments improperly appealed to the jury's sympathy and misstated the jury's role, defense counsel never objected. In the context of the issues at trial, these remarks are not "so flagrant and ill intentioned" that any misconduct could not have been cured by a jury instruction. And Owens fails to establish any prejudice from the prosecutor's argument. To establish prejudice from prosecutorial misconduct, the defendant has the burden of demonstrating "there is a substantial likelihood the misconduct affected the jury's verdict." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). As discussed above, the record shows overwhelming evidence to support the convictions. The prosecutorial misconduct claims fail.

CrR 8.3 Mismanagement

Owens next argues that the trial court erred in denying his CrR 8.3 motion to dismiss charges amended two days before trial. Before dismissal is appropriate under Criminal Rule 8.3(b),[7] the defendant must show both "arbitrary action or governmental misconduct" and "prejudice affecting the defendant's right to a fair trial." State v. Michielli, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997). The government's misconduct need not be evil or dishonest. Simple mismanagement is sufficient. State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). "Although mismanagement is sufficient to establish governmental misconduct, dismissal under CrR 8.3(b) is an extraordinary remedy used only in truly egregious cases." State v. Flinn, 119 Wn. App. 232, 247, 80 P.3d 171 (2003). And the defendant must show that actual prejudice, not merely speculative prejudice, affected his right to a fair trial. State v. Rohrich, 149 Wn.2d 647, 657, 71 P.3d 638 (2003). The trial court's decision is reviewed for an abuse of discretion. Michielli, 132 Wn.2d at 240.

Here, Owens claims prejudice based on amendments to the information: (1) second degree to first degree rape, (2) the addition of several deadly weapon enhancements, and (3) adding counts for "tampering with a witness, violating a no contact order, and obstructing a law enforcement officer." Appellant Br. at 38.

The trial court denied the CrR 8.3(b) motion on two grounds—(1) the new elements alleged were contained in other previously charged counts and (2) Owens

[7] CrR 8.3(b) provides: "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order."

could move for a trial continuance within speedy trial. The trial court agreed with the prosecutor's argument that for first degree rape, the State would need to prove a deadly weapon and unlawful entry which were elements previously alleged in the second degree assault, first degree burglary, and residential burglary charges. As such, the new amendments caused no prejudice to Owens's ability to prepare for trial. And if necessary to trial preparation, Owens could request a continuance without implicating his speedy trial rights. The trial court observed:

> Yes, there was a waiver setting a new commencement date of March 26th of 2009. The trial date was then reset. The elapsed days were not indicated in the new scheduling order but by looking at my calendar, I can see that our trial date today is 39 days elapsed. Therefore, we would have potential time, if the defense did feel that going ahead to trial was prejudicial there. There was some additional time without the necessity of giving up any speedy trial rights that had not previously been waived. So, it -- in arguing about whether it placed the defendant in that position of making a choice, that does not appear to be the -- entirely the situation.

RP (May 4, 2009) at 84. Unlike in Michielli, on which Owens relies, there was no prejudice here from amending the rape charge from second to first degree. Michielli, 132 Wn.2d at 244-45 (new charges added only three days before trial that would require continuance beyond expiration and which were based on facts long known to the State). The trial court did not abuse its discretion.

As to the deadly weapon enhancements, Owens was on notice well before trial that the State intended to charge the deadly weapon enhancements. The second amended information filed on March 2, 2009, alleged deadly weapon enhancements for both the first degree burglary and second degree assault charges. As to the unlawful imprisonment and harassment charges, the State informed the court that

> in discussing [a plea] offer repeatedly we talked about these deadly weapon enhancements. In fact, we talked about the fact that his client needs to know that if we go to trial and were to win, that these weapons enhancements are consecutive and he had -- defense counsel indicated to me at that time that, in fact, he explained that to the defendant and -- and, in great detail, how much time he would be facing because the enhancements would be placed on him consecutively.
>
> . . . . So, our argument for the -- regarding the deadly weapon enhancements was, in fact, there was actual notice of the deadly weapon enhancements, that they would be filed prior to trial.

RP (May 4, 2009) at 78-79. The State's April 25, 2009 plea offer notes that these charges carry a deadly weapon enhancement. The court accepted this argument, ruling, "[T]he attachment does indicate and the statement of counsel, which wasn't contradicted, was that the deadly weapon enhancements were discussed both in writing and verbally between counsel." RP (May 4, 2009) at 82. The court also noted that the deadly weapon enhancement did not involve new factual allegations: "Clearly, the idea of a knife being involved is present from -- from the earlier amendments to the information." RP (May 4, 2009) at 82. We find no abuse of discretion here.

As to Owens's CrR 8.3 argument relating to the tampering with a witness, violating a no-contact order, and obstructing a law enforcement officer charges, he failed to raise these arguments below and they are therefore waived.[8] RAP 2.5(a); Appellant's Br. at 38. Owens clarified below that his CrR 8.3 motion to dismiss related only to the rape charge and the new deadly weapon enhancements:

> [THE COURT]: -- Counts 1, 2, 3, 5, and 6 and the change in degree in Count 1 from rape in the second degree to count -- to rape in the first degree, is that right?
>
> [COUNSEL FOR OWENS]: Rape in the first degree and the addition of a

[8] In fact, it is unclear whether he intends to argue these charges violated CrR 8.3 on appeal—the heading for this section challenges only counts 1, 2, 3, 4, and 6.

deadly weapon enhancement.

RP (May 4, 2009) at 76. The CrR 8.3 challenges fail.

Evidentiary Challenges

Owens challenges numerous evidentiary rulings by the trial court to admit evidence of telephone conversations absent sufficient foundation or authentication. "The decision to admit evidence lies within the sound discretion of the trial court and should not be overturned absent a manifest abuse of discretion." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The court's decision must not be "'manifestly unreasonable or based upon untenable grounds or reasons.'" Neal, 144 Wn.2d at 609 (quoting Stenson, 132 Wn.2d at 701). The court should admit the evidence if there is sufficient proof to permit a reasonable trier of fact to find in favor of authentication or identification. State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984).

Owens first argues that the trial court erred by admitting testimony from Detective Bachelder regarding a conversation he had with Owens because Bachelder did not know where he got the telephone number he called. The identity of a party during telephone communication may be established by either direct or circumstantial evidence. Danielson, 37 Wn. App. at 472. Both are equally reliable. State v. Martinez, 105 Wn. App. 775, 786, 20 P.3d 1062 (2001). Telephone calls may be authenticated even where the witness reaches the person at a number other than that assigned to him in a telephone directory. ER 901(b); 5C Karl B. Tegland, Washington Practice: Evidence § 901.11, at 299-300 (5th ed. 2007). Such calls may be authenticated where the person called self-identifies and provides other circumstantial indications of identity. See Danielson, 37 Wn. App. at 471; 5C

Tegland, supra, at 298.

Here, Owens identified himself to Detective Bachelder. He admitted being at Gomez's house on the evening of the crimes to get his truck. These facts are consistent with other testimony known to the detective about the evening. Before the detective explained his investigation, Owens disclosed his concern about going to jail. Based on this offer of proof, the court allowed the testimony. There was no abuse of discretion.

Owens next argues that the court erred by admitting four recorded telephone conversations and associated transcripts between Owens and Gomez's mother, Denise Minnifield. Owens argues that neither participant was properly identified and the conversations therefore lacked sufficient authentication and foundation. As to Owens's voice identification, Detective Boswell testified that she could identify it by its unique characteristics and by the calls' content. She testified that she reviewed recordings of Owens's calls to the jail telephone customer service where he self-identified and calls he made with his unique prison identification number (CFN number). Based on those calls, she became familiar with the tone, speed, and inflection of his voice, as well as his slight accent and tendency to repeat himself. She was then able to identify Owens's calls that he made using another inmate's CFN number. In addition, she also identified Owens by the calls' content. As to exhibit 69 for example, the caller "discussed his bail

. . . [and] his record in Georgia." RP (May 6, 2009) at 483. As to Minnifield's identity, Detective Boswell testified that she learned Minnifield's phone number based on a call in which Owens mentioned the number.

Detective Boswell also became familiar with and identified Minnifield's voice based on a number of calls. The trial court acted well within its discretion by admitting the exhibits. ER 901(b).

Owens next challenges the admission of exhibits 61 and 67 on lack of authentication grounds. Exhibit 61 is a recorded telephone call. At trial, Gomez vouched for the recording's accuracy and identified her own voice. As to exhibit 67, a transcript of a recorded conversation, Owens objected below on best evidence grounds. Owens argues for the first time on appeal that the exhibit lacked proper foundation and authentication. That argument is waived. RAP 2.5(a).

Exhibits 70 and 71 were recorded phone calls between a man and a woman named "Varnia." Detective Boswell testified that she recognized Owens as the male voice. Owens called a woman who self-identified as "Varnia." During a previously admitted recorded telephone conversation, Gomez instructs an unidentified inmate to tell Owens to call Varnia at a specific phone number, if Owens needed to reach Gomez. Detective Boswell testified that exhibit 70 was a phone call made to that number. Based on Gomez's instructions to the inmate and Varnia's self-identification, the trial court ruled the exhibit properly authenticated. That decision was a proper exercise of discretion. Exhibit 71 is a transcription of that telephone call, which Detective Boswell testified was a true, accurate, and complete transcription. Transcripts are admissible as a listening aid where the party offering it makes a foundation as to accuracy. 5C Tegland § 1002.8, supra, at 371.

Finally, Owens contends that the trial court improperly allowed Officer Bivens and Detective Boswell to testify that

Gomez said Owens was not allowed in her house at the time of the offense. Citing to ER 613(b), Owens argues that these statements constitute improper impeachment because the State never confronted Gomez with them. The record fails to support this assertion. The State did confront Gomez about whether Owens was allowed in her home

> [THE STATE]: Okay. Do you remember telling him that he moved out of the home with his belongings?
> [GOMEZ]: Possibly.
> Q. Do you remember telling him that you, in fact, changed the locks and he wasn't allowed back in the home?
> A. Yes.
> Q. All right. And, do you remember telling the officer whenever he would come to the home, you would step outside and speak with him?
> A. No.
> Q. Okay. Were you truthful with the officers?
> A. No.
> Q. So, he hadn't moved out of your home?
> A. Huh?
> Q. Had he moved out of your home?
> A. His belongings were still in the home. He did, I guess, move out, I guess, yes. But, his belongings were still there. Yes. And, we were still in a relationship.

RP (May 5, 2009) at 260 (emphasis added). Gomez also testified on direct examination that Owens entered her home through the window "[b]ecause he couldn't come into the door. He didn't have a key." RP (May 5, 2009) at 264. Owens's evidentiary challenges fail.

True Threat

Owens next argues that his felony harassment conviction must be reversed because the information failed to allege

an essential element of the crime—a "true threat." He argues that alleging a true threat is necessary to protect his first amendment rights. But this court considered and rejected an identical argument in State v. Tellez, 141 Wn. App. 479, 483, 170 P.3d 75 (2007), holding:

> No Washington court has ever held that a true threat is an essential element of any threatening-language crime or reversed a conviction for failure to include language defining what constitutes a true threat in a charging document . . . so long as the court defines a true threat for the jury, the defendant's First Amendment rights will be protected.

The court's instruction 22A defined threat:

> Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened or to any other person.
>
> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or idle talk.

This instruction mirrors WPIC 2.24, which incorporates the constitutional requirements. Owens's argument is without merit.

Motion for New Attorney

Owens next asserts that the trial court improperly denied his motion for a new attorney without fully inquiring into his request. Trial court decisions relating to attorney-client differences are generally reviewed for abuse of discretion. State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). A defendant is not entitled to discharge appointed counsel unless the motion is timely and made upon proper grounds. Cross, 156 Wn.2d at 606. A defendant must show good cause to warrant substitution of counsel, "such as a conflict of interest, an irreconcilable conflict, or a complete

breakdown in communication between the attorney and the defendant." Stenson, 132 Wn.2d at 734 (citing Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir.1991)). We consider three issues when reviewing the denial of a request for new counsel: (1) the extent of the conflict; (2) the adequacy of the trial court's inquiry; and (3) whether the motion was timely. Cross, 156 Wn.2d at 607. Mere disagreements about trial strategy are insufficient grounds of conflict to require appointment of substitute counsel. Cross, 156 Wn.2d at 608-10. Generally, "'where the request for change of counsel comes during the trial, or on the eve of trial, the Court may, in the exercise of its sound discretion, refuse to delay the trial to obtain new counsel and therefore may reject the request.'" In re Pers. Restraint of Stenson, 142 Wn.2d 710, 732, 16 P.3d 1 (2001) (quoting United States v. Williams, 594 F.2d 1258, 1260-61 (9th Cir.1979)).

Here, Owens requested a new attorney one business day before trial commenced. The trial court's response indicated concern over the motion's tardiness.

> [COUNSEL FOR OWENS]: Mr. Owens wants me to make a motion to the Court removing me—asking the Court to remove me from his—from his case as counsel.
>
> [THE COURT]: A little late. The trial date is Monday?
>
> [THE STATE]: Correct. And, we had to get a material witness warrant in this case. We finally have the victim personally served. She is prepared to be there and prepared to testify. To cause another delay in this case by putting another attorney on the case would make it very difficult for us to again get her back into court.

RP (Apr. 30, 2009) at 21-22. The court then proceeded to arraign Owens on the charges. While the court did not explicitly rule on the motion for new counsel, the court's remarks make clear it denied the motion on tardiness and prejudice grounds. Indeed, Owens's appellate brief notes, "The judge commented that it was too late for such a motion." Appellant Br. at 10.

Under the circumstances here, the trial court properly denied Owens's motion for new counsel.

Ineffective Assistance

Owens asserts numerous ineffective assistance of counsel claims. To prevail on a claim of ineffective assistance, a defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it fell below an objective standard of reasonableness. Stenson, 132 Wn.2d at 705. This court's scrutiny of defense counsel's performance is highly deferential and it employs a strong presumption of reasonableness. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995). "To rebut this presumption, the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'" State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have been different absent counsel's deficient performance. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Failure on either prong of the test defeats a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 697.

Owens first argues that his counsel was deficient for not requesting a fourth degree assault lesser included offense instruction. "The decision to not request an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as part of a legitimate trial strategy to obtain an acquittal." State v. Hassan, 151 Wn. App. 209, 218, 211

P.3d 441 (2009). In Hassan, we held that an "all- or-nothing" strategy was a legitimate trial tactic because a lesser included offense instruction would have weakened Hassan's claim of innocence. Hassan, 151 Wn. App. at 218, 221 ("On this record, because the only chance for an acquittal was to not request a lesser included instruction, we conclude that the decision to pursue an all-or-nothing strategy was not objectively unreasonable."). And in Grier, our Supreme Court rejected an ineffective assistance of counsel claim because "[a]lthough risky, an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal." Grier, 171 Wn.2d at 42.

Like counsel's "all or nothing" strategy in Grier, Owens's defense strategy here constitutes a legitimate trial tactic. The second degree assault charge required the State to prove that Owens committed a harmful or offensive touching or created a fear thereof while armed with a deadly weapon. RCW 9A.36.021(1)(c). By contrast, fourth degree assault required the State to prove only that Owens intentionally touched or struck Gomez in a way that was harmful or offensive. RCW 9A.36.041; 11 Washington Pattern Jury Instructions: Criminal § 35.50, at 547 (3d ed. 2008). At closing, Owens argued that the State could not establish fear: "[W]e know she wasn't in fear. She has testified to that." RP (May 7, 2009) at 718. Owens then argued that the State had to establish the assault by showing a touching associated with the knife:

> Now, the touching. What was the touching? Was it pulling back -- he pulls -- he didn't go towards her. He didn't try to cut. He pulled the knife back as she was reaching for the knife to take it out of his hands, he pulls it back and she gets a small abrasion on her thumb. That's what she gets.

RP (May 7, 2009) at 718-19. A fourth degree assault instruction would have exposed Owens to a gross misdemeanor conviction based solely on proof of a harmful or offensive touching.[9] And Gomez testified that Owens forcibly opened her legs and put his hand on her vagina. By not requesting a fourth degree assault instruction, Owens narrowed the conduct on which the jury might convict, thus promoting his acquittal strategy.

Owens next argues that his counsel was ineffective for failing to object to the Smith affidavit's admission due to insufficient foundation. Where a claim for ineffective assistance rests on a failure to object, the appellant must show that an objection would likely have been sustained. To determine whether a statement is admissible, the trial court considers the Smith factors. State v. Nelson, 74 Wn. App. 380, 387, 874 P.2d 170 (1994). Those factors are: (1) whether the witness voluntarily made the statement,

(2) whether there were minimal guaranties of truthfulness, (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause, and (4) whether the witness was subject to cross-examination when giving the subsequent inconsistent statement. Smith, 97 Wn.2d at 861-63. Owens fails to address these factors. Accordingly, this challenge fails.

Owens also contends that his counsel was ineffective for failing to object

[9] The maximum sentence for a gross misdemeanor is one year in jail and a $5,000 fine. And the court may impose conditions not generally allowed for Sentencing Reform Act offenses.

on hearsay grounds to Officer Bivens's testimony that dispatch told him Gomez's "'ex-boyfriend had broke into her house, stood over her with a knife, made some threatening gestures and comments." Appellant Br. at 56; (quoting RP (May 5, 2009) at 210). But Owens demonstrates no prejudice from his counsel's failure to object since the properly admitted Smith affidavit and other witnesses' testimony disclosed the same information.[10]

Owens likewise argues that his counsel was ineffective for failing to object to testimony by Detective Boswell that

> relayed statements made by Ms. Gomez including: (1) that she'd had Mr. Owens name removed from her lease prior to the offense date, (2) a graphic and detailed description of the alleged rape, (3) a description of her fear on the night of the incident, and (4) that she was concerned about her safety after leaving the hospital.

Appellant's Br. at 57. But all of this testimony was admissible as impeachment evidence since Gomez had claimed she had an ongoing relationship with Owens, that she was not afraid of him, and that he had not penetrated her vagina with his fingers. Owens's counsel objected frequently throughout Boswell's testimony on the grounds of both hearsay and cumulative testimony. As to the lease testimony, his counsel objected to the State's question, "Did Gomez tell you whether or not the defendant was welcome in the home?" RP (May 6, 2009) at 519. That objection was overruled on

[10] Owens also argues that his counsel was deficient for not objecting to Officer Bivens's statement that Gomez told her she had changed the locks on her home and Gomez's description of the offense. But his counsel did object to the State's question about whether Owens was allowed in Gomez's house. As to the description of the offense, Officer Bivens's testimony was admitted for impeachment and a hearsay objection would therefore not have been sustained. ER 801(d)(i).

impeachment grounds. The claims fail.[11]

Owens next asserts that his counsel was ineffective for failing to object to Officer Donaldson's testimony that he believed Gomez when she said she was afraid. While the testimony constitutes an improper opinion, Owens fails to establish prejudice. As discussed above, overwhelming evidence demonstrates that any error from the improper testimony was harmless beyond a reasonable doubt.

Owens also argues that his counsel was ineffective for failing to object to victim advocate Amy Harlan's testimony that domestic violence victims frequently recant their testimony.

> [THE STATE]: Is it uncommon for victims to not want to speak with the prosecutor?
> [HARLAN]: No.
> Q. Do they generally still recant or minimize their statement to you so that you can let the prosecutor know in those cases?
> A. Absolutely.

RP (May 5, 2009) at 337. This testimony was arguably irrelevant. And no tactical or strategic reason exists for not objecting. But Owens fails to show any prejudice, given the extensive evidence properly admitted on Gomez's undisputed trial recantation. At trial, Gomez told the jury she changed her testimony. And Officers Bivens and Donaldson, Detective Boswell, and nurse Sundqvist testified to her inconsistent statements. On this record, Owens fails to establish a reasonable probability that the outcome of the trial would have been different had his counsel objected. Thomas, 109 Wn.2d at 226.

[11] We note that the record shows other witnesses properly testified to similar facts. So the evidence was also admitted for substantive purposes.

Finally, Owens reasserts his prosecutorial misconduct argument, contending that his counsel was ineffective for not objecting to the alleged misconduct. But Owens shows no prejudice from any alleged deficiency. As discussed above, any alleged misconduct was neither improper nor prejudicial.

Mistrial

Owens next contends that because the court improperly declared a mistrial on the first degree rape and witness tampering counts, double jeopardy bars retrial. The State counters that the court properly discharged the jury based on deadlock. "The double jeopardy clause of the Fifth Amendment protects the criminal defendant from repeated prosecutions for the same offense." State v. Juarez, 115 Wn. App. 881, 886, 64 P.3d 83 (2003). It also protects the right of the defendant to be tried by the jury he selected. State v. Jones, 97 Wn.2d 159, 162, 641 P.2d 708 (1982) (citing Arizona v. Washington, 434 U.S. 497, 503 n.11, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)).

When a trial court grants a mistrial without the defendant's consent and after jeopardy has attached, retrial is barred by double jeopardy principles unless the mistrial was justified by manifest necessity. Juarez, 115 Wn. App. at 889. Manifest necessity exists when "'extraordinary and striking'" circumstances clearly indicate that substantial justice cannot be obtained without discontinuing the trial. Juarez, 115 Wn. App. at 889 (quoting Jones, 97 Wn.2d at 163).

When a jury acknowledges, through its presiding juror and on its own accord, that it is deadlocked, there is a factual basis sufficient to constitute the "extraordinary and striking" circumstance necessary to

justify discharge. Jones, 97 Wn.2d at 164. We accord great deference to a trial court's decision to discharge a jury due to deadlock. See Jones, 97 Wn.2d at 163.

Here, the jury sent a question to the court indicating a lack of unanimity on some of the charges: "If we turn in an incompleat [sic] verdict i.e.[ ] some deadlocked counts and some completed, will the whole verdict be invalid?" After consulting counsel, the court responded, "I am unable to answer your question other than to refer you to Instruction No. 4 as well as all of the instructions. You are instructed to continue your deliberations." Three hours later, the jury sent another question to the court: "We are unable to agree on Charge[s] 1 & 7. How long should we continue to deliberate these charges?" The court summoned the jury and the parties into the court room and asked the presiding juror whether "there [was] reasonable probability of the jury reaching an agreement within a reasonable period of time as to all of the counts?" The presiding juror replied, "No." RP (May 7, 2009) at 767. These facts establish extraordinary and striking circumstances sufficient for the court to exercise its discretion to discharge the jury. See Jones, 97 Wn.2d at 164.

And the record fails to support Owens's contention that he "did not explicitly consent to discharge of the jury." Appellant's Br. at 65. CrR 6.10, discharge of jury, provides, "The jury may be discharged by the court on consent of both parties or when it appears that there is no reasonable probability of their reaching agreement." (Emphasis added.) Under this rule, Owens's consent to discharge is not required because the presiding juror answered, "No" when the court asked him if there was a reasonable probability of the jury reaching an agreement within a reasonable time. And as discussed above, this constitutes a

reasonable basis on which to discharge the jury. The court also discussed the deadlock and mistrial procedures with both counsel and Owens present in court. No one objected to the proposed procedures.

> [THE COURT]: The -- if the jury returns a verdict as to some counts then that would be the final verdict as to those counts. Any verdict -- or, any count on which the jury is unable to reach a verdict would be considered a mistrial and would potentially be a matter which could be re-tried. So, I wanted to be sure that [Counsel for Owens] had had an opportunity to explain that procedure to his client.
>
> [COUNSEL FOR OWENS]: Yes, I have fully discussed that with my client, Your Honor.

RP at 764-65. This challenge fails.

Same Criminal Conduct

Owens next contends that his convictions for burglary, felony harassment, and second degree assault constituted the same criminal conduct for sentencing purposes.

RCW 9.94A.589(1)(a) treats all "current and prior convictions as if they were prior convictions for the purpose of the offender score." That section, however, recognizes an exception "if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime." "'Same criminal conduct' . . . means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). If any one of these elements is lacking, a finding of same criminal conduct is inappropriate. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). In deciding whether crimes involve the same intent, we focus on whether the defendant's intent, objectively viewed, changed from one crime to the

next. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This is determined, in part, by whether one crime furthered the other. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

We narrowly construe the same criminal conduct analysis. State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Saunders, 120 Wn. App. 800, 824, 86 P.3d 232 (2004). And we review the trial court's determination on the issue of same criminal conduct for an abuse of discretion or misapplication of the law. Haddock, 141 Wn.2d at 110; State v. Tili, 139 Wn.2d 107, 122-23, 985 P.2d 365 (1999).

Here, there is no genuine dispute that Owens committed assault and harassment at the same time and place, involving the same victim. The critical question is whether his intent, when viewed objectively, changed between the crimes and whether the commission of one crime furthers the other. Second degree assault requires the intent either to cause bodily harm or to create apprehension of bodily harm. State v. Byrd, 125 Wn.2d 707, 711, 887 P.2d 396 (1995). Felony harassment requires a person to knowingly threaten to cause bodily injury immediately or in the future to the person threatened. RCW 9A.46.020(1)(a)(i).

Crimes that Owens objectively intended to commit include causing bodily harm and threatening to commit bodily injury, which created an apprehension of bodily harm. There was no discernible change in intent between the crimes. Moreover, inflicting bodily harm and threatening to kill Gomez furthered the crime of creating apprehension of more bodily harm. Finally, there was no temporal break where Owens paused and had time to form a new criminal intent to commit a second offense. Cf. State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144

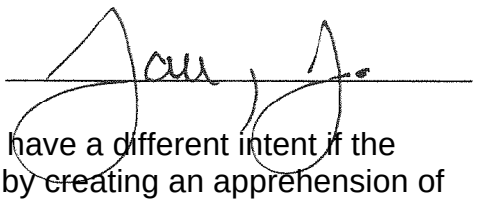
(2007) (where the defendant had time to complete the assault and form a new intent to threaten the victim, the crimes of assault and felony harassment had different objective intents and were not the same criminal conduct); State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997) (defendant had time after first rape to form intent to commit the second, so the two rapes counted separately). Because one crime furthered the other and because Owens's criminal intent did not change from one crime to another, his actions encompass the same criminal conduct. The trial court abused its discretion in finding otherwise.[12]

Owens's argument regarding the burglary charge is without merit because "the [burglary] antimerger statute gives the sentencing judge discretion to punish for burglary, even where it and an additional crime encompass the same criminal conduct." State v. Lessley, 118 Wn.2d 773, 781, 827 P.2d 996 (1992). Here, the trial court expressly ruled, "I do apply the anti-merger statute." RP (Jan. 28, 2010) at 815. That decision was not an abuse of discretion.

Statement of Additional Grounds

Owens raises several additional arguments regarding voire dire in his SAG. These arguments are without merit and unsupported by the record.

We affirm Owens's convictions, but remand for resentencing in accordance with this opinion.



[12] Furthermore, while the two crimes arguably have a different intent if the assault is proved by actual touching and not merely by creating an apprehension of bodily harm, the State argued that Owens's actions satisfied both ways of proving the assault.

WE CONCUR:

Leach, A.C.J.

Grosse, J.