IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DONALD THOMAS KING, Appellant.	No. 42153-4-II UNPUBLISHED OPINION

Van Deren, J. — Donald Thomas King appeals his convictions and sentence for two counts of assault in violation of a pretrial no contact order and one count of tampering with a witness. He argues that (1) the trial court erred by refusing to give his requested self-defense instruction; (2) the prosecutor committed misconduct during closing argument by inflaming the jury and using evidence for an improper purpose, which deprived him of due process and the right to a jury trial; and (3) the trial court abused its discretion at sentencing by not finding that the two counts of assault were the same criminal conduct. We agree that the trial court erred by not instructing the jury on self-defense on the second assault charge and reverse King's conviction on that charge and remand for further proceedings. But we also hold that the trial court did not err in sentencing in finding that the two counts of assault were not the same criminal conduct and that the prosecutor's use of evidence for a purpose outside the trial court's ruling on the motion in

limine was improper, but it was not so flagrant and ill intentioned that it caused an enduring and resulting prejudice incurable by a jury instruction. Thus, we affirm the remaining convictions.

FACTS

On October 25, 2010, King and Angelina Brockley resided together in violation of a no contact order stemming from a May 2010 domestic violence incident.[1] On the afternoon of October 25, 2010, King and Brockley argued about Brockley's son. Both King and Brockley had been drinking. The argument became physical when Brockley asked King to leave their home. In the living room or hallway, King kicked Brockley in the stomach, knocking the wind out of her. Later, Brockley and King moved into the bedroom.[2] Although Brockley testified that she believed their fight was over, as King lay on the bed with his eyes closed, Brockley sat on his lap and then punched King in the face. King pushed Brockley, and she fell on a glass table that broke when Brockley's head hit it.

Brockley crawled from the bedroom to the living room and then went into the bathroom. In the mirror, Brockley saw that she was bleeding from a cut on her face. In response to her call for help, King retrieved a towel to put on her head and told her to lie down. Instead, she ran to the neighbors, who called the police.

Brockley told the 911 operator that she ran to the neighbors because King was at her house and there was a no contact order in effect. When the 911 operator asked Brockley if she

[1] In May 2010, King was charged with assault for allegedly kicking Brockley. Thurston County District Court issued a domestic violence no contact order restraining King from having any contact with Brockley. Near the end of November 2010, King went to trial on the May assault charge. Brockley reluctantly testified on behalf of the State, but a jury acquitted King.

[2] The sequence and time between the events that occurred in the bedroom is not clear from the record.

was injured, Brockley said, "Yes, ma'am, I am. I'm bleeding from the head. He threw me through a glass table." Report of Proceedings (RP) (Mar. 21, 2011) at 12. She also told the 911 operator, "My head hurts real bad"; and that it "[f]eels like my ear is going to explode." RP (Mar. 21, 2011) at 13-14. Brockley explained, "[King] threw me (unintelligible) after he kicked me." RP (Mar. 21, 2011) at 15.

Medical personnel transported Brockley to the hospital, where she willingly wrote a statement for law enforcement. Under penalty of perjury, Brockley wrote that King "became violent, punched me in the face, kicked me in the stomach, and threw me through a glass coffee table." I RP (Mar. 22, 2011) at 63-64.[3]

When officers arrested King, he told them that Brockley had assaulted him. Officers on the scene did not notice King's injuries, but the booking officer at the jail saw redness in King's right eye and an abrasion on his right eyebrow and lower part of the right side of his mouth. The next day, King's defense counsel observed bruising around King's right eye and redness in the white of his right eye.

The State charged King with two counts of assault in violation of the no contact order. Later, it added eleven counts of violation of a no contact order and one count of tampering with a witness based on telephone calls and letters from King to Brockley while King was in jail.

At King's request, Brockley provided a statement to his counsel that was inconsistent with the statement she had provided to law enforcement. Brockley wrote:

[3] The trial record as filed is confused as to dates and volumes. Trial testimony from March 22, 2011, is in two volumes, one of which also contains trial testimony from March 23. For clarity, we cite to the March 22, 2011 record as "I RP (Mar. 22, 2011)" and "II RP (Mar. 22, 2011)." The covers of both these volumes I RP and II RP list the dates March 8, 22, and 23, 2011; but the trial testimony from March 23, 2011, is found only in volume II RP. References to the record for March 23, 2011, we cite as "II RP (Mar. 23, 2011)."

> The day of the accident I was drinking alcohol. After the doctor had taken me off all of my med[ication]s, the paranoia became increasingly more present after a call from the school that triggered the [posttraumatic stress disorder] of the last trauma. Unable to tell reality from not [sic], I remember clearly Don King screaming I'm not the enemy and pushed me away. That's when I landed into the glass table. Not knowing I was cut, I ran to the bathroom and looked in the mirror. It scared me [be]cause I was bleeding a lot and panicked. Don and I both tried to get the bleeding to stop. Being drunk and unsure of what was happening at that time, while Don got dressed I ran to the neighbor's to call for help. Don did not purposely assault me. I had a blackout, and when I came to, he was only trying to protect himself and me. The cut was an accident, not an assault. When Don told me I'm not the enemy, I had hit him.

I RP (Mar. 22, 2011) at 94-95.

Before trial, the State asked the trial court to admit evidence of earlier acts of domestic violence between King and Brockley, specifically the alleged May 2010 assault, which resulted in an acquittal at trial. The State argued that the alleged assault and acquittal should be admissible to rebut a claim of accident and to allow the jury to "assess [Brockley's] credibility with full knowledge of the dynamics and the history of the relationship between [King and Brockley]." The trial court allowed introduction of the prior incident only to show that the current conduct was not an accident or mistake. The court ruled, "I believe that there is relevance not to show that the defendant acted in conformity therewith, but on the issue of whether or not there is a[n] accident or mistake as far as the charges here." RP (Mar. 7, 2011) at 26.

At trial, Brockley's recitation of the events of October 25, 2010, was confusing and inconsistent. She testified that when King pushed her, she and King were no longer arguing and that she was sitting on King's lap while he was lying on the bed. Brockley also testified that she punched King before he pushed her. Brockley testified:

> [The State:] Before the defendant pushed you, did you — immediately before he pushed you, did you punch him?
> [Brockley:] Yes.

> [THE State:] And when did you do that?
> [Brockley:] (Crying) Umm, we were — we were in the bedroom. I don't remember if he was l[ ]ying on the bed or not.
> [THE State:] So at the time that the defendant pushed you through the table, you had not just pushed him or physically assaulted him in any way?
> [Brockley:] We had already been fighting. By the time we got to the bedroom —
> [THE State:] Had the argument in your opinion ended at that point?
> [Brockley:] Yes.

I RP (Mar. 22, 2011) at 69-70. On cross-examination, Brockley testified that she punched King within seconds before he pushed her off his lap:

> [Defense Counsel:] Ms. Brockley, in those taped recordings from the jail you stated that on the incident of October 25th that you hit Don just right before he pushed you?
> [Brockley:] Yes.
> [Defense Counsel:] How did you hit him?
> [Brockley:] I punched him.
> . . . .
> [Defense Counsel:] And how much after that did Mr. King push you? Was it instantaneous?
> [Brockley:] After — the same — I don't — I don't understand.
> [Defense Counsel:] Did it happen about the same time that he pushed you, when you hit him and he pushed you — was it all about the same time?
> [Brockley:] Yes.
> [Defense Counsel:] Was it like right away, instantaneous, within seconds?
> [Brockley:] Umm, yeah. It was in seconds, yeah.

I RP (Mar. 22, 2011) at 169. Regarding the time between King's kicking Brockley in the stomach, which happened in the living room, and King's pushing Brockley, which happened in the bedroom, Brockley testified:

> [THE State:] And do you recall about how much time there was between the two incidents, the kicking in the stomach and the pushing through the glass table?
> [Brockley:] No. It was all the same thing.
> [THE State:] It was all part of the same argument?
> [Brockley:] Yeah, yeah.
> [THE State:] Did it happen within seconds of — did each event happen within seconds of each other —

[Brockley:] Yeah.
[THE State:] — or was there some time in between?
[Brockley:] Umm, I don't understand.
[THE State:] How far apart is the living room where you were kicked in the stomach from your bedroom where you were pushed through the table?
[Brockley:] There's only a wall separating the two.

I RP (Mar. 22, 2011) at 164.

[THE State:] You testified earlier today that you were kicked in the stomach by the defendant in the living room, and then your testimony was that you were then in your bedroom when he pushed you; isn't that true?
[Brockley:] Yes
[THE State:] Okay. And your testimony this morning was that when the defendant pushed you, you had been sitting in his lap and that he was calm?
[Brockley:] He wasn't talking. He wasn't saying anything or doing anything. He was just l[ ]ying there.
[THE State:] And in your mind the argument was over?
[Brockley:] Yeah.
[THE State:] And did you punch him right then when you thought the argument was over?
[Brockley:] No. It was before that.
[THE State:] So the time that you punched the defendant happened prior to when you were sitting in his lap in bed?
[Brockley:] No. It was when I was sitting on his lap on the bed is when I punched him.
[THE State:] And how much time elapsed between the time that you punched him and the time that he then calmed down, the fight was over, but he pushed you into the table?
[Brockley:] Umm, not — not very long. I don't —

I RP (Mar. 22, 2011) at 178-79.

[THE State:] Were you telling the truth earlier today when you testified that he had been calm and that you thought the fight was over when you were pushed through the table?
[Brockley:] Yeah, but I — I was sitting on him when 1 punched him.
[THE State:] Angelina, did you believe the fight was over for a period of time —
[Brockley:] Yeah.
[THE State:] — before the defendant pushed you and you flew through the

table?
[Brockley:] Yeah.

I RP (Mar. 22, 2011) at 181-82.

At trial, King asked for a self-defense instruction based on Brockley's testimony that she punched him immediately before he pushed her off his lap. During an exchange with counsel, the trial court asked whether a self-defense instruction is available when the defendant does not testify. Defense counsel argued that the self-defense instruction was appropriate, but the trial court refused to give the instruction. The trial court ruled, "I am going to find that there is no evidence from which a jury can conclude that the defendant believed he was about to be injured since he has not testified himself. Accordingly, the self-defense instruction will not be given." II RP (Mar. 22, 2011) at 210. Defense counsel objected.

The trial court gave a limiting instruction indicating that jurors were to consider the May 2010 alleged assault for which King was acquitted to determine only whether the current charges were the result of an accident or mistake. The court instructed, "Evidence of an alleged prior assault in May of 2010 was admitted for your consideration as to whether the allegations in Count I and Count II were accidents or mistakes. You are to consider that evidence for no other purpose." II RP (Mar. 23, 2011) at 236.

During closing arguments, the State mentioned the May 2010 assault as evidence that the current assault was not an accident. The State also argued that in light of the subsequent acquittal, Brockley was susceptible to pressure from King to change her story. Defense counsel did not object during the State's closing.

The jury convicted King as charged. At sentencing, King argued that the assault

conviction based on his kicking Brockley, count I, and the assault conviction based on his pushing her off his lap, count II, were the "same course of criminal conduct" and, thus, should be treated as one offense for sentencing. RP (Mar. 5, 2011) at 8. The trial court disagreed and sentenced King accordingly. King timely appeals.

ANALYSIS

I. Self-Defense Jury Instruction

King argues that the trial court erred by refusing to instruct the jury on self-defense. We agree and reverse King's conviction on the assault count relating to King's pushing Brockley off his lap, count II.[4]

A. Standard of Review

The standard under which we review a trial court's refusal to instruct the jury on self-defense depends on why the trial court refused the instruction. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

> If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of [injury],[5] an issue of fact, the standard of review is abuse of discretion. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo.

[4] Based on the trial testimony and King's briefing, we presume that the self-defense instruction would have applied only to count II, which corresponds to King's having pushed Brockley off his lap. The evidence supporting King's self-defense instruction is Brockley's testimony that she punched King in the face immediately before he pushed her, King's statement to arresting officers that Brockley punched him before he pushed her, and the correction officer's and King's defense counsel's observation and photographs of injuries to his eye and face following arrest. The punch occurred after King kicked Brockley in the stomach, which was the assault charged in count I. Accordingly, we reverse only count II.

[5] Where nondeadly force is used, the defendant need only have reasonably believed that he was in danger of mere injury, rather than great bodily harm. *State v. L.B.*, 132 Wn. App. 948, 953, 135 P.3d 508 (2006).

Read, 147 Wn.2d at 243 (citing *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998)). Here, the trial court refused to give the self-defense instruction for lack of evidence of King's subjective belief of imminent danger—a factual issue that we ordinarily review for abuse of discretion. But, the trial court ruled that King's decision not to testify precluded a self-defense instruction, which is a legal error we review de novo.

"A court abuses its discretion when an 'order is manifestly unreasonable or based on untenable grounds.'" *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quoting *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). "A discretionary decision 'is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" *Rafay*, 167 Wn.2d at 655 (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). "[A] court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.'" *Rafay*, 167 Wn.2d at 655 (quoting *Fisons*, 122 Wn.2d at 339). Here, the trial court applied the wrong legal standard to determine whether a self-defense instruction was warranted by the evidence, thus, committing legal error and abusing its discretion.

B. The Defendant's Burden: Some Evidence of Self-Defense

A defendant is entitled to a self-defense instruction if some evidence supports the instruction. *State v. Werner*, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010). A trial court's refusal to instruct on a party's theory of the case supported by evidence is reversible error when it prejudices a party. *Werner*, 170 Wn.2d at 337.

"To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable." *State v. Dyson*, 90 Wn. App. 433, 438-39, 952 P.2d 1097 (1997). "To determine whether a defendant is entitled to an instruction on self-defense . . . the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees." *Read*, 147 Wn.2d at 242. "Accordingly, . . . the trial court applies both a subjective and objective test." *Read*, 147 Wn.2d at 242-43.

"Considering both the subjective and objective inquiries, the trial court must determine whether the defendant produced any evidence to support the claim he or she subjectively believed in good faith that he or she was in imminent danger of [injury] and whether this belief, viewed objectively, was reasonable." *Read*, 147 Wn.2d at 243; *see also* RCW 9A.16.020(3) (The use of force upon the person of another is not unlawful when "used by a party about to be injured . . . in case the force is not more than is necessary."). "The trial court must view the evidence in the light most favorable to the defendant." *State v. George*, 161 Wn. App. 86, 95-96, 249 P.3d 202, *review denied*, 172 Wn.2d 1007 (2011). "The defendant's burden of 'some evidence' of self-defense is a low burden." *George*, 161 Wn. App. at 96 (quoting *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)).

Here, the trial court refused to instruct the jury on self-defense. It reasoned, "I am going to find that there is no evidence from which a jury can conclude that the defendant believed he was about to be injured since he has not testified himself." II RP (Mar. 22, 2011) at 210. But a defendant is entitled to a self-defense instruction if there is "some evidence" of self-defense. *Werner*, 170 Wn.2d at 336-37. As our Supreme Court stated in *State v. McCullum*, 98 Wn.2d

484, 488, 656 P.2d 1064 (1983):

> In order to properly raise the issue of self-defense, there need only be some evidence admitted in the case from whatever source which tends to prove a [crime] was done in self-defense. *State v. Adams*, 31 Wn. App. 393, 395, 641 P.2ed 1207 (1982); *State v. Stallworth*, 19 Wn. App, 728, 733, 577 P.2d 617 (1978). Although it is essential that some evidence be admitted in the case as to self-defense, there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of the jurors on that issue. *See State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977); *State v. Adams, supra.* The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense. *State v. Roberts, supra* at 346.

Evidence of self-defense may come "from 'whatever source' and . . . the evidence does not need to be the defendant's own testimony." *State v. Walker*, 164 Wn. App. 724, 729 n.5, 265 P.3d 191 (2011) (quoting *State v. Jordan*, 158 Wn. App. 297, 301 n.6, 241 P.3d 464 (2010), *petition for review filed*, No. 85410-6 (Wash. Dec. 15, 2010)), *petition for review filed*, No. 86790-9 (Wash. Dec. 8, 2011). In denying the instruction because the defendant did not testify, the trial court misapplied the law; accordingly, we reverse and remand for a new trial on this count.

The State argues that the trial court did not suggest that "King could not claim self-defense because he invoked his constitutional right not to testify." Br. of Resp't at 12. Instead, the State construes the trial court's decision to have "merely found that one reason that King failed to produce evidence demonstrating self-defense was because he did not testify." Br. of Resp't at 12. We disagree.

The trial court stated, "[T]here is no evidence from which a jury can conclude that the defendant believed he was about to be injured *since he has not testified himself*." II RP (Mar. 22, 2011) at 210 (emphasis added). The trial court articulated its refusal to instruct on self-defense as based on its perception that a defendant must testify to receive a self-defense instruction. This

perception is further illustrated by the trial court's discussion with counsel on proposed jury instructions. The trial court asked counsel whether self-defense was available to a defendant that did not testify. Defense counsel argued that it was available, but the trial court was not persuaded.

Even if the trial court did not base its decision on the defendant's failure to testify on these facts, the court abused its discretion by refusing to give the requested self-defense instruction because Brockley's testimony and her affidavit provided some evidence supporting the instruction, as did the officers' testimony that King told them Brockley hit him, and both the correction officer's and defense counsel's observations and photographs of injuries consistent with King's and Brockley's statements that she punched him in the face just before he pushed her off his lap. In determining whether some evidence exists to support a proposed jury instruction, the court must "draw all reasonable inferences in the light most favorable to the requesting party." *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011); *see also George*, 161 Wn. App. at 95-96.

Brockley testified that she punched King in the eye immediately before he pushed her off his lap where she fell on a glass table. Also, Brockley wrote in an affidavit under penalty of perjury, which was admitted at trial, that at the time of the incident she was drunk, not taking her usual paranoia medicine, and had a blackout. She explained that "when [she] came to, [King] was only trying to protect himself and [her]." I RP (Mar. 22, 2011) at 95. When King told Brockley that he was not the enemy, she punched him and then he pushed her away. Testimony from the jail booking officer, King's prior counsel, and photographic exhibits showed that King sustained facial injuries which corroborated Brockley's testimony that she punched King in the face. Taken

in the light most favorable to King, there was "some evidence," which, if believed by the jury, showed that King subjectively believed that Brockley would further injure him.

On these facts, failure to give the requested self-defense instruction was manifestly unreasonable. Whether the trial court denied the instruction because King did not testify, which was an error of law, or because it determined that no evidence demonstrated that King was entitled to a self-defense instruction, which was an abuse of discretion; refusal to give such an instruction was error. Since the verdict turned on which version of the incident the jury believed, the trial court's failure to give a self-defense instruction prejudiced King. *See Werner*, 170 Wn.2d at 337-38. Thus, we reverse King's conviction on count II.

II. Prosecutorial Misconduct

King also argues that the prosecutor committed misconduct by arguing that the evidence of the prior alleged domestic violence incident was central to the jury's credibility determination about Brockley's testimony, contrary to the trial court's instructions and that this argument appealed to the passions and prejudices of the jury. In particular, King alleges that the prosecutor (1) highlighted King's prior assault allegation for an improper purpose—explaining why Brockley changed her story—in violation of the trial court's ER 404(b) ruling and jury instruction, and (2) suggested that the jury should convict King to rectify harm allegedly caused by the prior acquittal. King argues that the prosecutor's misconduct requires reversal of all of his convictions. We disagree.

"To prevail on a claim of prosecutorial misconduct, the defendant must establish 'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (internal

quotation marks omitted) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). If the defendant failed to object to the prosecutor's misconduct at trial, reversal is appropriate only if the "prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

"[T]he defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). We review statements alleged to be prosecutorial misconduct in the context of the entire case. *Thorgerson*, 172 Wn.2d at 443.

The trial court admitted evidence of the alleged May 2010 prior assault under ER 404(b) to show that the current assaults were not accidents or mistakes. Although the State argued that the prior domestic violence allegation should also be admissible for purposes of assessing Brockley's credibility, the trial court disagreed.[6] Accordingly, the trial court instructed the jury to

[6] Although neither party appeals the trial court's ruling denying the use of the prior domestic violence incident for the purpose of evaluating Brockley's credibility, we address the State's argument to aid the trial court on remand. This case presents the issue of whether prior allegations of domestic violence are admissible to be considered when judging credibility of the alleged victim. Settled law states:

> Under ER 404(b), a trial court can admit evidence of other crimes or wrongs only if it "(1) find[s] by a preponderance of the evidence that the misconduct occurred, (2) identif[ies] the purpose for which the evidence is sought to be introduced, (3) determine[s] whether the evidence is relevant to prove an element of the crime charged, and (4) weigh[s] the probative value against the prejudicial effect."

In re Det. of Coe, ___ Wn.2d ___, 286 P.3d 29, 34 (2012) (alterations in original) (internal quotation marks omitted) (quoting *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007)). In *Magers*, our Supreme Court considered whether a domestic violence arrest, which resulted in a criminal charge later dismissed, was admissible for credibility. 164 Wn.2d at 184. The *Magers* court held that "prior acts of domestic violence, involving the defendant and the

consider the prior assault only for the purpose of rebutting a claim of accident or mistake, and no other purpose.

During closing, the prosecutor referred to the prior assault and acquittal multiple times. During closing arguments, the prosecutor said:

> We don't know what sort of, what happened in that case, but we do know that Angelina knew that, despite the fact that she had reported an assault and had testified at trial, still some things are out of her hands and the jury found him not guilty. So knowing that, in the back of her mind, she is now confronted with the situation where she has to testify again. She's probably lost confidence at this point; most people would have.
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> . . . .

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crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim." 164 Wn.2d at 186; *see also State v. Grant*, 83 Wn. App. 98, 105, 109, 920 P.2d 609 (1996) (holding that prior misconduct of a defendant could be admitted under ER 404(b) to explain why the victim's statements and conduct might appear inconsistent with the victim's testimony at trial).

Here, Brockley recanted the version of events she had reported to law enforcement in an affidavit she wrote at King's urging. The affidavit was admitted at trial. At trial, Brockley testified inconsistently and attempted to minimize the assault. Under *Magers*, prior acts of domestic violence between King and Brockley, if proven by a preponderance of the evidence, such as the May 2010 assault allegation, are admissible to help the jury evaluate Brockley's credibility. Here, the trial court found by a preponderance of the evidence that the May 2010 assault occurred notwithstanding that a jury acquitted King of the assault. The trial court necessarily found that the probative value of the evidence outweighed its prejudicial effect when it allowed the evidence to be admitted to rebut a claim of accident or mistake. Accordingly, the May 2010 assault allegation was also admissible to assess Brockley's credibility. *See Magers*, 164 Wn.2d at 186.

The trial court's admission of evidence regarding an alleged prior domestic violence incident to rebut claims of accident or mistake is unique because King was acquitted of the assault charge stemming from the incident. Because neither party addresses the effect of the acquittal on the evidence's admissibility under 404(b), we too decline to address it. However, on remand, we caution the trial court to consider whether the acquittal reduces the probative value of the evidence when weighing the evidence's probative value against its prejudicial effect under ER 404(b). *See State v. Stein*, 140 Wn. App. 43, 63-68, 165 P.3d 16 (2007) (holding that the trial court did not violate the double jeopardy clause or due process by admitting evidence under ER 404(b) of the defendant's participation in a prior murder, of which he was acquitted, as evidence that the defendant was part of an on-going conspiracy to eliminate people he saw as obstacles to his prospective wealth; and also holding that although an acquittal may reduce the probative value of evidence, the trial court did not abuse its discretion in admitting it after balancing the probative value of the acquittal evidence against its potential prejudicial effect).

> After Angelina has had her confidence shaken by the whole process, the legal process, she receives a letter explaining to her how to end it, and she wants to cooperate. She goes to Mr. Shackleton's office and writes a statement, a statement which she testified yesterday was not entirely truthful.
>
> . . . .
>
> She knew the defendant could very well get out of jail again and come back in her life. She had just gotten a not guilty verdict. She had doubts that the system would work for her, and the defendant reinforced and took advantage of those doubts. He emphasized the isolation of Angelina. He told her God is large and in charge. He told her God loves us, wants us to be together. When referring to the case and how it would be resolved, he stated this is in God's hands. He told her I'll be home when God wants me to as long as — well, it will be okay, honey. As long as what? As long as she did what he told her to. No matter what they try, it isn't going to work. Angelina knew calling the police hadn't worked. Testifying the first time hadn't worked. And no matter what it takes I want to be with you.

II RP (Mar. 23, 2011) at 252-53, 274-75.

But contrary to King's allegation, the prosecutor's arguments did not "encourage[ ] jurors to see themselves as responsible for Brockley's well-being, and suggest[ ] that a guilty verdict could be based on the need to make the legal system work to protect Brockley from future harm, rather than on the evidence." Br. of Appellant at 12. The prosecutor's statement did not invite the jury to determine guilt on improper grounds such as passion or sympathy. That allegation is without merit.

The prosecutor's challenged remarks were in the context of explaining Brockley's continued contact with King, her susceptibility to King's influence, and her changed story. In closing arguments, defense counsel also referred to the prior assault case to explain Brockley's changed story.[7] The State agrees that the prosecutor sought to explain why Brockley changed her

[7] So she goes to Mr. King's attorney, that is, me. Perhaps she thought someone might listen to her because other people weren't listening to her. She said that they didn't even tell her what happened at the first case. They discouraged her from coming back to the case. Members of the jury, she probably felt simply left out by the prosecutor and being excluded by the prosecutor and the police. Therefore, probably it was natural she didn't necessarily go to them right away.

story and to suggest that Brockley's testimony could be trusted. But, as King correctly points out, this purpose is outside the trial court's ER 404(b) ruling and instruction to the jury. Thus, the prosecutor's use of the prior assault allegation for the purpose of evaluating Brockley's credibility was misconduct under the trial court's ruling.

In addition, the prosecutor's statements about what Brockley felt after King was acquitted in the earlier case were not supported by the evidence. Prosecutors have "'wide latitude' in making arguments to the jury" and may "draw reasonable inferences from the evidence in closing arguments," *State v. Kennealy*, 151 Wn. App. 861, 892, 214 P.3d 200 (2009) (quoting *Gregory*, 158 Wn.2d at 860); but here, the prosecutor embellished the evidence and it was, therefore, improper argument. Brockley's testimony did not support the prosecutor's argument that her "confidence [was] shaken by the whole process" or that she "had doubts that the system would work for her." II RP (Mar. 23, 2011) at 253, 274.

But because King did not object to any of the prosecutor's closing arguments at trial, he must show that the prosecutor's misconduct was so flagrant and ill intentioned that it caused prejudice incurable by a jury instruction. *See Emery*,174 Wn.2d at 760-61. The prosecutor's statements did not focus on the details of the prior assault or suggest that King had a propensity for assault. And both parties focused on Brockley's credibility when referring to the prior trial. Although the prosecutor impermissibly referred to the prior assault case to partially explain why Brockley changed her story, the State presented other strong evidence to explain Brockley's inconsistency in the form of telephone calls and a letter from King to Brockley pressuring

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> She's saying that there's mitigating or different information that was first provided that shut her down.

II RP (Mar. 23, 2011) at 263.

Brockley to change her story.

Defense counsel similarly referred to the earlier assault case in discussing Brockley's credibility. The prior assault acquittal was simply history through which the jury viewed King and Brockley's interactions and behavior. In the entire context of the trial, King fails to show that he was prejudiced by the prosecutor's statements. Furthermore, "the absence of an objection by defense counsel '*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'" *State v. McKenzie*, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis in original) (quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

Moreover, a timely objection and instruction would have cured any perceived prejudice, particularly because the court instructed the jury regarding the purpose of the ER 404(b) evidence. *See State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). We presume the jury followed the trial court's instructions. *State v. Grisby*, 97 Wn.2d 493, 499, 509, 647 P.2d 6 (1982); *Kennealy*, 151 Wn. App. at 892. Under the facts here, we hold that the prosecutor's improper comments were not so flagrant and ill intentioned that it caused incurable prejudice to King because we conclude that there is no substantial likelihood that the challenged comments affected the jury's verdict on any count. Thus, we hold that the prosecutor did not commit reversible misconduct in closing arguments.

III. Sentencing

Next, King argues that the trial court abused its discretion by not finding that the conduct underlying both the assault convictions, counts I and II, constituted the same criminal conduct for purposes of calculating King's offender score. We hold that the trial court did not abuse its

discretion when it found that counts I and II did not constitute the "same criminal conduct." *See State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011) (abuse of discretion standard of review).

"'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). The trial court applied the correct standard and found that there was a break between count I, the assault that took place in the living room area, and count II, the assault in the bedroom; and that the assaults were separated events rather than a continuation of the same event. The record supports the trial court's finding that counts I and II were not the same criminal conduct.

We reverse the conviction on count II, the assault conviction based on pushing Brockley off of King, and remand for further proceedings on that count. We affirm the conviction on count I, the assault conviction arising from King kicking Brockley, and the conviction on count III, tampering with a witness.[8] If on remand, the State decides not to retry King on count II, we direct the trial court to resentence King based on his revised criminal history and offender score.

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

Van Deren, J.

We concur:

[8] King did not appeal counts IV-XIV, violation of a pretrial no-contact order.

Hunt, J.

Bridgewater, J. Pro Tem