IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28039-0-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JAMES LOUIS VANN, JR.,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — James Vann, Jr., appeals his convictions for second degree assault, felony harassment, and the deadly weapon enhancements. On February 6, 2009, Mr. Vann assaulted and threatened Danielle Espinosa. The trial court admitted evidence of a prior altercation between Mr. Vann and Ms. Espinosa that occurred on December 17, 2007.

On appeal, Mr. Vann asserts that (1) the trial court abused its discretion by admitting evidence of the December 17, 2007 event, (2) the prosecuting attorney committed prosecutorial misconduct, (3) the court erred by failing to dismiss the deadly weapon enhancement, and (4) his convictions violated his state and federal rights to be

free from double jeopardy. In his statement of additional grounds for review, Mr. Vann contends the court erred by not allowing defense counsel to question Deborah Espinosa about her potential bias and Lori Torres about her possible sexual interest in Danielle Espinosa. Mr. Vann also complains of several posttrial incidents.

We affirm the second degree assault conviction and its deadly weapon enhancement. On double jeopardy grounds, we reverse the felony harassment conviction and its deadly weapon enhancement.

FACTS

On March 26, 2009, the State charged Mr. Vann with one count of second degree assault (based on felony harassment) and two counts of felony harassment. Each count carried a deadly weapon allegation.

Mr. Vann's convictions arose from an incident occurring on February 6, 2009. Evidence of an earlier incident, occurring on December 17, 2007, was also admitted at trial.

December 17, 2007. Prior to trial, defense counsel filed a motion to exclude testimony about the December 17, 2007 incident. The court denied the motion, ruling that the evidence related to Ms. Espinosa's state of mind and/or credibility. Defense counsel unsuccessfully made the same request regarding testimony from Officer Darrin

Meiners and Officer Josh Sullivan of the Kennewick Police Department.

On December 17, 2007, Ms. Espinosa and Mr. Vann had a fight while driving home. Mr. Vann stopped the car. They both got out of the car and continued arguing. They began to shake one another. Mr. Vann pushed Ms. Espinosa to the ground.

Later, Officer Meiners and Officer Sullivan contacted Ms. Espinosa at her home. Officer Sullivan described Ms. Espinosa as upset and puffy-eyed. The officer stated that it "[l]ooked like she had had a rough night." Report of Proceedings (RP) at 94. Ms. Espinosa's demeanor was very passive and she appeared to have been crying. Officer Meiners observed a small cut on the right side of Ms. Espinosa's forehead, as well as scratches on her neck and across her forehead.

Ms. Espinosa told the officers that Mr. Vann had pulled her out of the car by her arm and hair and that he had threatened to kill her. Officer Sullivan testified that when he asked Ms. Espinosa if Mr. Vann choked her, she would not respond.

After the December 17, 2007 incident, Ms. Espinosa sent a text message to a friend, Lori Torres. Ms. Torres testified that Ms. Espinosa told her that Mr. Vann hit Ms. Espinosa and pulled her out of the car by her hair. Ms. Torres also testified that Ms. Espinosa told her that Mr. Vann choked Ms. Espinosa and threatened to kill her.

At trial on the charges here, Ms. Espinosa testified that she did not remember

talking to the police on the night of December 17, 2007, and that she did not remember if she told them the truth or if she lied. She testified that Mr. Vann did not hit and kick her once she was out of the car, but that he did push her down to the ground. Ms. Espinosa said that she did not remember telling the police that Mr. Vann threatened to kill her and that she did not remember if that was true. She also did not remember telling Ms. Torres that Mr. Vann pulled her out of the car by her arm and hair, that Mr. Vann had choked her, that Mr. Vann had threatened to kill her, that Mr. Vann had taken her to Finley and tried to throw her out of the car, and that she had had to beg to get back in the car so she could go home. Ms. Espinosa also did not remember whether she refused to give a written statement to police.

February 6, 2009. On February 6, 2009, Danielle Espinosa sent a text message to her mother, Deborah Espinosa, that consisted of three dots (…). Deborah Espinosa and her daughter had an agreement that if Ms. Espinosa needed help, she would send her mother a blank text and her mother would come to her assistance. When her daughter did not answer the telephone, Deborah Espinosa drove to her daughter's house.

Ms. Espinosa answered the door. Deborah Espinosa noticed that her daughter was physically and emotionally upset, and looked frightened. Ms. Espinosa had scratches on her neck and over her eyebrow, and also had an indentation across her nose. Deborah

Espinosa saw that Mr. Vann was in the house. Deborah Espinosa and her daughter left the house and called 911. Ms. Espinosa told her mother that Mr. Vann had put a rope around her neck and punched her.

Ms. Espinosa also called Mr. Vann's mother on February 6, 2009. His mother, Phyllis Barcot, stated that Ms. Espinosa was upset and crying. Ms. Barcot testified that Ms. Espinosa stated that Mr. Vann beat her up and that he told her he had a piece of rope and "one for your family." RP at 66.

Officer Isaac Merkl of the Kennewick Police Department responded to the 911 call. When he contacted Ms. Espinosa, he saw that her eyes were watery, that she was upset, and that she had scratch marks on her upper chest and neck. At the time, Ms. Espinosa was reluctant to provide details to the police. She told Officer Merkl that, "'If [Mr. Vann] is this angry now, he will be much more angry when the police get involved.'" RP at 85. She also told Officer Merkl that: "'If [Mr. Vann] comes to find me, there is not going to be a next time.'" RP at 85.

During her testimony, Ms. Espinosa admitted that she and Mr. Vann had quit court-ordered counseling imposed after the December 17 incident. When testifying about the February 6 incident, Ms. Espinosa denied that Mr. Vann tried to kill her and that he hit her. Ms. Espinosa described the rope as 6 to 8 inches long and stated that Mr. Vann held

it up to her neck. She conceded that he said that the rope was for her and that he had a piece for every member of her family.

Ms. Espinosa admitted telling her mother that Mr. Vann had put the rope around her neck. She explained that she could not remember all of the things that she said and Mr. Vann said and that she may have embellished things a bit when talking to her mother.

When Ms. Espinosa's mother again met with her daughter a few days after the incident, her mother saw bruises on her daughter's face and around her neck, and a broken blood vessel in her right eye.

Ms. Torres testified that Ms. Espinosa told her that Mr. Vann put a rope around her neck and choked her with it. Ms. Espinosa testified concerning a discussion she had with Ms. Torres following the February 6 incident. She told Ms. Torres that Mr. Vann had shoved and pushed her. Ms. Espinosa denied telling Ms. Torres that Mr. Vann hit her. Ms. Espinosa agreed that she told Ms. Torres that Mr. Vann wanted to cut her and let her bleed out in the tub. She also admitted telling Ms. Torres that Mr. Vann put a rope around her neck. Following the February 6 incident, Mr. Vann sent a text message to Ms. Espinosa apologizing.

Convictions. Mr. Vann was found guilty of second degree assault (based on felony assault of Danielle Espinosa) and one count of felony harassment of Danielle

Espinosa. The jury also determined that Mr. Vann was armed with a deadly weapon as to each offense. The court sentenced Mr. Vann to 30 months' confinement plus 18 to 36 months of community custody. This appeal follows.

ANALYSIS

Mr. Vann contends the court abused its discretion by admitting Ms. Espinosa's statements to investigating officers as excited utterances. A reviewing court will not overturn a trial court's evidentiary ruling absent an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.* (quoting *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

We will affirm an admission of evidence "if a proper basis exists for admitting the evidence even though that was not the basis relied upon by the trial court." *State v. Butler*, 53 Wn. App. 214, 217, 766 P.2d 505 (1989). The crime of felony harassment requires proof that the victim believed the defendant would carry out his threat to kill her and that her fear was reasonable. RCW 9A.46.020(1)(a)(i), (2)(b)(ii). While Ms. Espinosa's statements to other witnesses concerning the 2007 event were not admissible as excited utterances, these statements were admissible as evidence of her state of mind and credibility. *See* ER 803(a)(3); ER 607. In her trial testimony, Ms. Espinosa was

recanting her previous statements concerning the December 17 incident as well as her descriptions of the events in February 2009. These recantations were evidence of Ms. Espinosa's state of mind and credibility. Evidence of the December 17, 2007 incident was relevant to establish the victim's fear and the reasonableness of that fear.

The court did not abuse its discretion by admitting Ms. Espinosa's December 17, 2007 statements to investigating officers and other witnesses.

Impeachment. Mr. Vann concedes that prior acts of domestic violence may be relevant to an impending charge of domestic violence. But Mr. Vann argues that the prosecuting attorney impeached Ms. Espinosa in an improper manner. In Mr. Vann's view, the prosecuting attorney exploited the jury. Mr. Vann maintains that "[t]his combination of impeaching Ms. Espinosa and portraying Mr. Vann as a repeat domestic perpetrator" violated the pretrial limitations set by the court. Appellant's Br. at 20. We disagree.

Felony harassment requires proof that Ms. Espinosa believed Mr. Vann would carry out his threat to kill her and that her fear was reasonable when Ms. Espinosa recanted her statements about the December 17 incident. The State properly impeached her with her inconsistent statements and statements to others about the February incident. These statements were relevant to show Ms. Espinosa's fear and the reasonableness of

that fear.

Further, the court instructed the jury that the evidence was for the "limited purpose of the victim's state of mind and her credibility. You must not consider this evidence for any other purpose." RP at 128.

Prosecutorial Misconduct. Mr. Vann contends the State's questioning of Ms. Torres and Ms. Espinosa about their conversations with defense counsel violated his right to counsel. Mr. Vann also asserts that the prosecuting attorney's questions to Ms. Espinosa were highly improper and undermined defense counsel's effectiveness.

A defendant claiming prosecutorial misconduct has the burden of establishing that the State's comments were improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). When a finding of prosecutorial misconduct is made, such misconduct will constitute prejudicial error only where there is a substantial likelihood that the instances of misconduct affected the jury's verdict. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). To preserve an issue of prosecutorial misconduct for appeal, the defendant must make a timely objection. *State v. Stith*, 71 Wn. App. 14, 20, 856 P.2d 415 (1993). If no contemporaneous objection or request for a curative instruction is made, reversal is required only if the misconduct was flagrant and incurably prejudicial. *Id.* Here, Mr. Vann made no contemporaneous objections or requests for

curative instructions.

Mr. Vann first contends the prosecuting attorney's questioning of Ms. Torres violated his right to counsel because defense counsel is charged with the duty of choosing the witnesses on behalf of his or her client. Mr. Vann challenges the following exchange. The prosecuting attorney asked Ms. Torres if defense counsel asked her what happened. Ms. Torres replied in the affirmative. The State asked whether defense counsel asked her if she thought there were any exaggerations. Ms. Torres said that she did not remember. The State then asked Ms. Torres what she remembered defense counsel asking her. She responded that defense counsel asked her if she would do and say the same thing over again—and that Ms. Torres told him she would. Ms. Torres stated that defense counsel then told her that "he wouldn't be using me as a witness because I would do more harm than good." RP at 243.

Mr. Vann also complains of the prosecuting attorney's questioning of Ms. Espinosa. When questioned by the prosecuting attorney, Ms. Espinosa stated that she met alone with defense counsel concerning the case and later met with Ms. Torres and defense counsel. In contrast, Ms. Espinosa refused to speak with the State until a court-ordered deposition.

Mr. Vann contends that this questioning by the prosecuting attorney was designed

to establish that defense counsel coached Ms. Espinosa in her testimony. Mr. Vann maintains that this questioning was improper and undermines defense counsel's representation of his client. Mr. Vann asserts that the prosecuting attorney's conduct constitutes disparagement.

In *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002), the court held the prosecutor disparaged the role of defense counsel by stating, in closing: "'I have a very different job than the defense attorney. I do not have a client, and I do not have a responsibility to convict. I have an oath and an obligation to see that justice is served.'" *Id.* at 283. In contrast, in *State v. Yates*, 161 Wn.2d 714, 777, 168 P.3d 359 (2007), the court held the prosecutor had not disparaged defense counsel by stating: "'On behalf of all of the decent and law-abiding citizens of the state whom we are honored to represent.'" The court explained that unlike the prosecuting attorney in *Gonzales*, this prosecuting attorney "did not refer to defense counsel's role and drew no direct contrast between the roles of prosecutors and defense attorneys." *Id.* at 778. The court held that the "criticism of defense counsel was far too attenuated to have been prejudicial." *Id.*

Similarly, here the State made no sharp comparison between the role of the prosecuting attorney and the role of defense counsel. And any criticism was too indirect to be prejudicial. The exchanges do not constitute flagrant and incurably prejudicial

conduct. The State did not commit prosecutorial misconduct.

Mr. Vann next argues that the State's threat of charging Ms. Espinosa with perjury is clearly a violation of its duty as described in *State v. Montgomery*, 56 Wash. 443, 105 P. 1035 (1909).

At a hearing on March 31, 2009, the prosecuting attorney requested an opportunity to take Ms. Espinosa's deposition. The prosecuting attorney agreed to grant Ms. Espinosa immunity for the actual things she said during the deposition, but not for perjury. At trial, *defense counsel* elicited testimony from Ms. Espinosa that she had immunity for her testimony, but that she felt that she was threatened with perjury. Relying on *Montgomery*, Mr. Vann contends that this questioning by the State constitutes prosecutorial misconduct.

This argument is without merit. In *Montgomery*, the prosecuting attorney deliberately stated that the witness had told him contrary facts many times and that the witness had been tampered with and bought many times. *Id.* at 444. Moreover, in *Montgomery*, the record showed that the prosecuting attorney had told the witness he could send her to the penitentiary for perjury, that the witness was under duress, and that her testimony was involuntary. *Id.* at 444-45. Here, defense counsel elicited testimony concerning the immunity granted to Ms. Espinosa for his client's own purposes.

Double Jeopardy and Merger. Mr. Vann argues that the trial court erred by rejecting his claims of double jeopardy and merger as to his convictions for second degree assault and felony harassment. Courts may not enter multiple convictions for the same offense without offending double jeopardy. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

Instruction 21, the to convict instruction for felony harassment in count II, required the jury to find that Mr. Vann knowingly threatened to kill Ms. Espinosa and placed her in reasonable fear that the threat to kill would be carried out. Instruction 9, the to convict instruction for second degree assault in count I, required the jury to determine that Mr. Vann assaulted Ms. Espinosa by intending to commit felony harassment. Instruction 20 defined felony harassment:

> A person commits the crime of felony harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out and the threat to cause bodily harm *consists of a threat to kill the threatened person or another person*.

Clerk's Papers at 54 (emphasis added).

Mr. Vann argues that he was subjected to multiple punishments for the same offense in violation of his state and federal constitutional rights against double jeopardy. Mr. Vann points out that the to convict instructions for second degree assault and felony

harassment list only one victim, Danielle Espinosa. To support his argument, Mr. Vann relies on *State v. Leming*, 133 Wn. App. 875, 138 P.3d 1095 (2006).

In *Leming*, the State proved felony harassment by proving that Paul Leming (1) threatened to kill his wife, and (2) that she feared he would carry out the threat. *Id.* at 889. To prove second degree assault, the State had to prove that Mr. Leming assaulted his wife by intending to place her in fear that he would carry out his threat. *Id.* The court concluded that under the same evidence test, the convictions were based on the same acts, thereby subjecting Mr. Leming to multiple punishments for the same offense. *Id.*

Similarly here, the State had to prove felony harassment by proving that Mr. Vann threatened to kill Ms. Espinosa and that she feared he would carry out this threat. Counts I and II specified that the assault and threat was directed at Danielle Espinosa. The jury found Mr. Vann not guilty of count III, threatening Ms. Espinosa's mother.

Reading the instructions presented to the jury, Mr. Vann's convictions on count I and count II were based on the same acts and subjected him to multiple punishment for the same offense. As such, these convictions violate his state and federal rights to be free from double jeopardy. We reverse the felony harassment conviction and the related deadly weapon enhancement. *See State v. Weber*, 159 Wn.2d 252, 255, 265-69, 149 P.3d 646 (2006).

Deadly Weapon Enhancement. Mr. Vann contends that the 6- to 8-inch rope that he put to Ms. Espinosa's neck was not a deadly weapon.

"[A] deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." Former RCW 9.94A.602 (1983). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

Viewing the evidence in the light most favorable to the State, a rational trier of fact could have concluded that this rope, when placed at the neck of another, may easily and readily produce death.

STATEMENT OF ADDITIONAL GROUNDS

Mr. Vann has filed a statement of additional grounds raising three issues.

Testimony of Deborah Espinosa. Mr. Vann contends the trial court erred by not allowing defense counsel to question Deborah Espinosa about her bias and motives in giving her testimony against Mr. Vann. He contends this constitutes a violation of his rights under the Sixth Amendment right.

Mr. Vann refers to an exchange where defense counsel attempted to ask Danielle Espinosa:

> Q. Has your mother told you she is upset with [Mr. Vann] for any particular reason?
>
> . . . .
>
> Q. How old were you when you had your first child?
>
> . . . .
>
> Q. Has your child always called you mother?

RP at 208-09. The prosecuting attorney objected, based on hearsay and relevance.

The court sustained the objections, stating:

> I just don't see how it's relevant to get into this specific event of fifteen years ago when the relationship started and [Mr. Vann] apparently told [Ms. Espinosa] that that was wrong of the child . . . to call the grandmother "mother" and call the mother "Danielle."

RP at 211. Moreover, later, the court allowed defense counsel to ask:

> Q. Does your mom dislike [Mr. Vann]?

. . . .
Q. Has she disliked [Mr. Vann] from the get-go?
. . . .
Q. Does her dislike of [Mr. Vann] continue to this day?

RP at 212.

The court did not abuse its discretion.

Testimony Concerning Ms. Torres. Mr. Vann contends the court erred when it prevented defense counsel from presenting evidence to show that Ms. Torres had motives to embellish her testimony. He maintains that the excluded testimony would have shown the history of Ms. Torres's attempts to break up Ms. Espinosa and Mr. Vann because of her personal bi-sexual interest in Danielle Espinosa. The court would not allow this testimony. The court concluded that this evidence was not relevant.

The court did not abuse its discretion by excluding testimony concerning Ms. Torres's possible sexual interest in Ms. Espinosa. Such testimony was not relevant.

Posttrial Events. Mr. Vann contends that after the trial, he was returned to the Benton County jail for possible retrial on count III. Mr. Vann claims that he was threatened by the prosecuting attorney and that these threats constitute prosecutorial misconduct.

This court cannot address these claims because they involve matters outside the record before the court.

We affirm the conviction for second degree assault and accompanying deadly weapon enhancement. We reverse the felony harassment conviction and deadly weapon enhancement and remand for resentencing.

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

_____
Kulik, C.J.

WE CONCUR:

_____ _____
Brown, J. Korsmo, J.