IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JERRY T. FLOWERS, Appellant.	No. 37677-6-II (Consolidated with No. 37837-0-II) UNPUBLISHED OPINION

Armstrong, J. — Jerry T. Flowers appeals his convictions of second degree assault while armed with a firearm (three counts), second degree unlawful possession of a firearm (two counts), second degree malicious mischief while armed with a firearm, and intimidating a witness while armed with a firearm. Flowers contends that the trial court erred in limiting his cross-examination of a victim and in counting two of his assaults separately in calculating his offender scores. He also argues that prosecutorial misconduct during closing argument deprived him of a fair trial. We agree with Flowers that the trial court erred in counting the assault convictions separately in calculating his offender scores. Otherwise, we find no error. Accordingly, we affirm Flowers's convictions, but we remand for resentencing for the court to consider the two assaults as the same criminal conduct.

FACTS

One evening in June 2007, Brian Lehr and Geneva Runyan returned home to discover that someone had vandalized Runyan's car. A neighbor told them she had seen two boys who lived in the same apartment complex break into the car. Lehr, who was Runyan's boyfriend, saw the boys in the alley behind their apartment. He went to confront them and Runyan followed, crying and

upset.

Flowers was sitting in a car with the boys in the alley. When he got out of the car, Lehr told Runyan to go inside, where she could see what was happening. The boys also got out of the car and joined Flowers in surrounding Lehr. One of the boys hit Lehr, and Flowers walked toward Lehr while Lehr backed away. Flowers pointed a gun at Lehr, who ran and jumped over a fence.

When Runyan came outside to stop the fight, Flowers grabbed a tire iron from Lehr's truck and threw it through a side window. He then grabbed a cement block and threw it at the windshield. Runyan approached Flowers, who grabbed her by the hair, pulled her head down, and hit her in the face with his fist while threatening to kill her. He kept her head down and struck it with the butt of his gun. After letting her go, he grabbed her hair again and said he would kill her daughter if she called the police.

Lehr called 911 on his cell phone and Officer Jacob Martin arrived shortly thereafter. He found Runyan, scared and crying, in the parking lot. She and Lehr told him what had happened, and a neighbor confirmed their stories although he did not recall seeing a handgun. Runyan also described the assaults to a paramedic at the scene and a physician's assistant at the emergency room.

Approximately a week later, Officer Christopher Martin was patrolling near the apartment complex when he spotted three young men near an alley. He had Flowers's photograph and recognized him in the group. Officer Martin tried to contact the men, but they ran away when he got out of his car. Officer Martin followed and saw Flowers try to drop something in a garbage

container. The object fell to the ground instead. Officer Martin found a black handgun on the ground near the garbage container.

Flowers was apprehended several days later, and the State charged him with three counts of second degree assault, two counts of second degree unlawful possession of a firearm, and one count each of second degree malicious mischief and intimidating a witness. The information included firearm allegations on all but the firearm possession counts.

Before trial, the State moved to exclude any history of domestic violence between Runyan and Lehr, the two victims. The State noted that the purpose of such evidence would be to argue that Lehr, rather than Flowers, injured Runyan. Flowers responded that the victims had a history of arguing and fighting and that Runyan had applied for protective orders against Lehr in 2006 and 2007, although she had never followed through with the applications. Flowers argued that this history of conflict showed that Runyan had a motive to fabricate in pointing to Flowers as the assailant. The court ruled that Flowers could use this history for impeachment purposes if Runyan testified that she and Lehr never fought but otherwise it was inadmissible. When Flowers sought to cross-examine Runyan's neighbor about prior disputes between Runyan and Lehr, the court reiterated that prior domestic violence between the two was off limits unless they testified that they had never fought.

Runyan and Lehr testified about the assaults, as did the officers and medical personnel involved. Runyan also stated that she had seen Flowers hanging around her apartment complex for a year-and-a-half and that he had a gun every time she saw him. In addition, a neighbor, who witnessed the assaults, confirmed the testimony of Runyan and Lehr. She stated on cross

examination that she had never seen Lehr and Runyan argue before that day. The State played the tape from Lehr's 911 call, which supported Runyan and Lehr's testimony.

The jury found Flowers guilty on all counts except the unlawful possession of a firearm based on Officer Martin's pursuit of Flowers. The trial court declared a mistrial on that count. During sentencing, Flowers argued that his two assaults against Runyan should count as one offense under the same criminal conduct rule, but the court disagreed and counted them separately. The court imposed concurrent standard range sentences and consecutive firearm enhancements.

The State retried Flowers on the remaining unlawful possession charge. During closing argument, Flowers argued that Officer Martin could have been mistaken when he identified Flowers as the person who dropped the gun. "Now, I'm not saying that he's not telling the truth. But we all know that witnesses make mistakes, people observe something and they think they saw it but maybe they didn't see it." Report of Proceedings (RP) at 565-66. The State responded with:

> Defense stated that it would be a mistake, it wouldn't be lying. But it would be lying for the officer to write in his report that the defendant was who he saw without a doubt, and it would be lying for him to come up on the stand, take an oath, and state that without a doubt the person he saw was the defendant.

RP at 568. Flowers did not object. After the jury convicted Flowers of the second unlawful possession charge, the court imposed a low-end standard range sentence and ran it consecutively to his earlier sentences. Flowers now appeals his convictions and sentences.

ANALYSIS

I. Flowers's Constitutional Right to Cross Examine

Both the state and federal constitutions guarantee defendants the right to confront and cross examine adverse witnesses. Wash. Const. art. I, § 22; U.S. Const. amend. VI. The right to such cross examination, however, is not absolute. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Courts may, within their sound discretion, deny cross examination if the evidence sought is vague, argumentative, or speculative. *Darden*, 145 Wn.2d at 621. It follows that the confrontation right also is not absolute; both that right and associated cross examination are limited by general considerations of relevance. *Darden*, 145 Wn.2d at 621. The defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial. *Darden*, 145 Wn.2d at 621.

The introduction of "other suspect" evidence is similarly constrained by relevancy considerations. Before the trial court admits such evidence, the proponent must connect it to the crime with "'such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.'" *See State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (quoting *State v. Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932)). Mere evidence of another's motive, or motive coupled with threats, is inadmissible unless accompanied by evidence connecting the other person with the crime charged. *State v. Clark*, 78 Wn. App. 471, 478, 898 P.2d 854 (1995). Here, the trial court did not find such a connection in Flowers's offer of proof but explained that it would allow Flowers to explore the matter if Runyan testified that she and Lehr never fought.

In *Rehak*, we held that the defendant failed to lay a foundation supporting her defense that her son had committed the murder. *Rehak*, 67 Wn. App. at 163. The defendant admitted she was

nearby when her husband was shot and the evidence showed she had been alone in the house with her husband. *Rehak*, 67 Wn. App. at 160-61. While her son could have driven to the scene of the crime from several counties away, there was no evidence that he did so. *Rehak*, 67 Wn. App. at 161. We later clarified that where the State's case is largely circumstantial, the defendant may overcome such evidence by presenting other circumstantial evidence pointing to another possible perpetrator. *Clark*, 78 Wn. App. at 479.

Here, the State's case was not circumstantial. The victim and her boyfriend testified that Flowers was Runyan's assailant, and their neighbor largely corroborated their version of events. Runyan also identified Flowers as her assailant immediately after the incident. And there is no evidence that Lehr hit Runyan on the date in question. Flowers asserts that there was evidence pointing to Lehr as the guilty party, but the only support for this is that Runyan was crying hysterically before she approached Flowers. Runyan testified that she was crying and upset because her car had been vandalized. Her emotional state thus has an explanation and does not tend to show that Lehr had already assaulted her.

Flowers cites *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), where the Court reversed a trial court's refusal to allow the defendant to cross examine a key prosecution witness about being on probation for burglary after he identified the defendant as the perpetrator of the charged burglary. *Davis*, 415 U.S. at 311-15. Defense counsel sought to show bias and prejudice, causing the witness to wrongly identify the defendant initially and also later in court. *Davis*, 415 U.S. at 317. Further, according to the defense, the witness might have wrongly identified the defendant to shift suspicion from himself or because he was under undue

pressure from the police and feared probation revocation. *Davis*, 415 U.S. at 311. The Supreme Court held that the trial court should have allowed the cross examination as to the witness's probationary status so the jury could make an informed judgment about his credibility. *Davis*, 415 U.S. at 317-18.

Here, any former conflict between Runyan and Lehr is of minimal relevance to the charged assaults. There was no record of physical conflict between the two victims on the day of the assaults. And unlike *Davis*, where a probation record clearly affected the witness's credibility, here there was at most a history of conflict with no connection to the crime charged. Moreover, Runyan was not the sole witness to identify Flowers as her assailant.

Thus, this case is unlike another that Flowers cites. Where the entire prosecution depended on the credibility of the complaining witness, the court found error where the defense was not allowed to cross examine her about her threat to sue the owner of the building where she was allegedly raped. *State v. Whyde*, 30 Wn. App. 162, 165, 632 P.2d 913 (1981). The question of a possible lawsuit related directly to the bias, prejudice, and interest of the witness, and it was error to exclude this issue from her cross examination and prevent the defense from supporting its theory that she fabricated the rape story for her financial benefit. *Whyde*, 30 Wn. App. at 167.

In *Whyde*, therefore, as in *Davis*, there was evidence of a record or act that directly affected the credibility of the State's key witness. Here, the relevance of prior conflict between Runyan and Lehr is far more speculative, particularly where Runyan's version of events was confirmed by other witnesses and where no one testified that Lehr hit her. The trial court did not abuse its discretion in ruling that the prejudicial effect of the "other suspect" evidence outweighed

its relevance.

II. Same Criminal Conduct

Under the Sentencing Reform Act, ch. 9.94A RCW, multiple current offenses generally count separately in determining the defendant's offender score. RCW 9.94A.589(1)(a). If the sentencing court finds that two or more offenses encompass the same criminal conduct, however, those offenses count as one for offender score purposes. RCW 9.94A.589(1)(a). Crimes constitute the same criminal conduct if they "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). We will reverse a sentencing court's same criminal conduct determination only where there is a clear abuse of discretion or misapplication of the law. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

The defendant's intent is crucial in a same criminal conduct analysis. *State v. Adame*, 56 Wn. App. 803, 810, 785 P.2d 1144 (1990). In this context, we look at the offender's objective criminal purpose in committing the crime. *Adame*, 56 Wn. App. at 811. The relevant inquiry is to what extent did the criminal intent, viewed objectively, change from one crime to the next. *State v. Tili*, 139 Wn.2d 107, 123, 985 P.2d 365 (1999). Where sexual assaults were interrupted by a brief period of time that allowed the defendant to cease his criminal activity or form the intent to commit another crime, they were sequential rather than continuous and constituted separate offenses. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). But where three rapes were continuous, uninterrupted, and committed within a two-minute period, the defendant's intent did not change and his crimes constituted the same criminal conduct. *Tili*, 139 Wn.2d at

124-25.

During closing argument, the State argued that Flowers's actions in striking Runyan in the nose and hitting her with the gun supported the two assault charges concerning Runyan: "We have one count for the broken nose and we have one count for the defendant striking with the firearm." RP at 409.

When the defense argued during sentencing that the two assaults against Runyan constituted the same criminal conduct, the State responded that one of the assaults involved a broken nose while the other involved Flowers pointing a gun at Runyan with the intent to cause apprehension and fear rather than physical injury.[1] The defense argued that the second incident went more toward the intimidation count, but the trial court disagreed:

> Well, I think that my recollection of the facts were--was that the second assault, while it may have been geared towards intimidation of a witness, was really done for a different purpose and [that] wasn't to cause physical injury to her necessarily, but to make her believe that she was at risk of being shot if she either went to the police and/or somehow harm would come to her daughter.

RP at 473.

On appeal, the State alters its argument once again. It first asserts that one assault occurred when Flowers hit Runyan in the face, while the second occurred when he hit and threatened her with the gun. The State contends that in striking Runyan with his fist, Flowers intended to inflict harm and that his intent in hitting and threatening her with the gun was to inflict fear, thus rendering this case similar to *State v. Lopez*, 142 Wn. App. 341, 174 P.3d 1216 (2007),

[1] Contrary to Flowers's argument on appeal, the instructions did not prevent the jury from basing one of the assaults involving Runyan on a threat of injury. The "to convict" instruction for Count I charged Flowers with assaulting Runyan with a deadly weapon, and the court defined an assault as either an intentional touching or an act done with the intent to create apprehension and fear of bodily injury.

review denied, 164 Wn.2d 1012, 195 P.3d 87 (2008). In *Lopez*, the defendant assaulted the victim first by beating her in the bedroom and then by cutting her with a knife in the living room after she attempted to flee. The court concluded that the first act was intended to yield information while the second was intended to threaten. In addition, the beating ended before the knife attack occurred in a different room. The two acts did not constitute the same criminal conduct. *Lopez*, 142 Wn. App. at 352-53.

The State also argues on appeal that the two assaults were separated by time during which Flowers had the opportunity to cease his criminal activity. It contends that Flowers hit Runyan in the face, grabbed her hair and pulled her head down, and then hit her with his gun and threatened her. Under this theory, the assaults were separated in time when Flowers pulled Runyan's head down and were sequential rather than continuous. *See*, *e.g.*, *Lopez*, 142 Wn. App. at 352-53; *Grantham*, 84 Wn. App. at 859.

Runyan testified, however, that Flowers struck her in the face and hit her on the head with a gun while holding her head down. He inflicted those injuries, released her, and then grabbed her again before threatening her daughter. The State differentiated the assaults from the threat when it described Flowers's offenses to the jury:

> The things that he did, these are the crimes that he's been charged with: Assault in the second degree, for breaking [Runyan's] nose; assault in the second degree, for striking [Runyan] with a gun; intimidating a witness for putting a gun to [Runyan's] forehead and threatening to kill [her daughter] if she called the police.

RP at 407. We agree with Flowers that on the record, his purpose in both assaults was to inflict physical pain to fortify his threat against Runyan and her daughter. The two assaults are continuous rather than sequential, and committed with the same intent. Consequently, the trial

court abused its discretion in failing to count the two assaults against Runyan as one offense in calculating Flowers's offender scores.

III. Prosecutorial Misconduct

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed under the state and federal constitutions. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A defendant who alleges improper conduct on the part of a prosecutor must first establish the impropriety and then its prejudicial effect. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). We consider the allegedly improper statements in the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *Dhaliwal*, 150 Wn.2d at 578. A defendant establishes prejudice only where there is a substantial likelihood that the misconduct affected the jury's verdict. *Dhaliwal*, 150 Wn.2d at 578.

A defendant who fails to object to improper statements waives a subsequent claim of misconduct unless the statement is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). If a jury instruction could have cured the prejudice but the defense did not request one, we will not reverse. *Brown*, 132 Wn.2d at 561.

It is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). Flowers argues that the prosecutor committed such misconduct after the defense argued during closing that Officer Martin could be mistaken about identifying Flowers as the person who ran from him and dropped the gun by the waste container. "I'm not

saying that he's not telling the truth. But we all know that witnesses make mistakes[.]" RP at 565. The prosecutor responded by stating that Officer Martin had seen several pictures of Flowers before he pursued him and added:

> Defense stated that it would be a mistake, it wouldn't be lying. But it would be lying for the officer to write in his report that the defendant was who he saw without a doubt, and it would be lying for him to come up on the stand, take an

oath, and state that without a doubt the person he saw was the defendant.

RP at 568.

The defense did not object to this statement, which does not assert that the jury must find that Officer Martin was lying to acquit Flowers. Instead, the prosecutor appears to be arguing that the officer would be lying if he stated with certainty that the person he saw was Flowers. It actually seems more helpful than harmful to the defense, and an instruction could have cured any impropriety. Flowers waived any possible error.

We affirm Flowers's convictions, but we remand for resentencing for the court to consider the two assaults against Runyan as the same criminal conduct.

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.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Van Deren, C.J.