NO. 90069-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
REYCEL PEREZ-MARTINEZ,
Appellant.

MOTION FOR DISCRETIONARY REVIEW, RAP 13.1(a)

REYCEL PEREZ-MARTINEZ
Appellant, Pro Se #356885
Stafford Creek Corrections Center
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Aberdeen, WA 98520

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A. IDENTITY OF PETITIONER

REYCEL PEREZ-MARTINEZ, the Appellant, Pro Se, asks this Honorable Court to accept review of the decision as designated in part B of this Motion.

B. DECISION

Appellant seeks review of the "UNPUBLISHED OPINION," of the Court of Appeals, Division II, which was filed on the 4th day of March, 2014, by Acting Chief Judge Johanson, Judge BJorgen and Judge Maxa, where the Court rejected the Appellant's direct appeal claims, declined to reach the merits on the Appellant's personal restraint petition claims, and affirmed the Appellant's conviction.

C. ISSUES PRESENTED FOR REVIEW

ISSUE ONE: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANTS MOTION TO APPOINTMENT OF NEW COUNSEL FOR HIS DEFENSE.

ISSUE TWO: THE STATE COMMITTED MISCONDUCT AND DENIED APPELLANT A FAIR TRIAL WHEN DURING THE STATE'S CLOSING ARGUMENTS:

1. the State presented argument that there was no evidence of self-defense;

2. the State presented argument that misstated the law on self-defense;

3. the State shifted the burden of proof in regards to the Appellant's claim of self-defense.

D. STATEMENT OF THE CASE

A brief summary of the "STATEMENT OF THE CASE," can be found in the "BRIEF OF APPELLANT," at pages 2-9.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

To justify review, a Court of Appeals (COA) decision must be in conflict with a Supreme Court decision, RAP 13.4(b)(1), another COA, (b)(2), present a significant question of law under a Constitution, (b)(3), or involve an issue of substantial public interest, (b)(4).

ISSUE ONE: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANTS MOTION TO APPOINTMENT OF NEW COUNSEL FOR HIS DEFENSE.

The Appellant argues that his Sixth and Fourteenth Amendment rights to the United States Constitution and article I § 3, 21, 22, and 30 rights to the Washington Constitution were violated when the Trial Court denied the Appellant's "MOTION FOR NEW COUNSEL," (hereafter MOTION), without specifically addressing the specific complaints as addressed in the MOTION at pages 3-4. That since the Trial Court failed to specifically address all of the 10 "Statement of Issues," that the Trial Court erred and abused its discretion in denying the Appellant's MOTION without a full and fair hearing being conducted on the record.

To support his argument the Appellant presents that from the time that David S. Kurtz, was assigned as Appellant's court appointed attorney (hereafter defense counsel) on 8/4/11 to 11/28/11 when the Appellant submitted the MOTION that the defense counsel had only seen Appellant on 3 to 4 occasions, that although the Appellant had requested any discovery and other evidence in regards to the case that the defense counsel hadn't been in receipt of any of the discovery from the State, (such as redacted police reports, any transcribed 911 calls, witness statements, any medical records in regards to the alleged victim, any video evidence, and any crime lab reports), and that of the greatest concern to Appellant was that the defense counsel from the very onset of the representation had relayed to Appellant that the alleged victim had died and "I had killed him [.]" So the Appellant had great concern about the defense counsels ability to competently and adequately represent the Appellant. (citing in part from IVRP6).

At the hearing in regards to Appellants MOTION, which was held on 12/12/11 a review of the record will show that all parties seemed to be more focused on the circumstances that the Appellants submitted MOTION was prepared by another inmate who had prepared numerous filings of the same document to several other inmates

1. The date Appellant was booked into the Clark County Jail in regards to an "INFORMATION" that was filed on 7/1/11 which alleged one count of attempted first degree murder. CP1.

and that at least four other cases were addressing the new counsel issue. IVRP 4-5, 7-8.

The Trial Court attempted to discount the Appellant's MOTION as presenting issues that didn't have any merit, such as Appellant's assertion that a private investigator hadn't been appointed to investigate the Appellant's case, when the Trial Court determined that one had been appointed. But there was no evidence presented on the record to show whether the appointment of a private investigator was done either prior to or after the Appellant's submitted MOTION or whether the Appellant was aware that a private investigator had been appointed. IVRP 5

The defense counsel relayed during the hearing that there was an issue in regards to obtaining disclosure of evidence and discovery from the State and that the defense counsel had submitted a "MOTION TO COMPEL DISCOVERY," a couple of weeks prior and that the disclosure of evidence and discovery was starting to occur. IVRP 9-10 that the defense counsel had "just got some discovery today [I] but hadn't reviewed it to see what it was. (citing in part from IVRP 10). The defense counsel was also seeking to have public funds to obtain a polygraph for the Appellant but the other avenues, the video evidence, the DNA evidence, and other avenues to mount a defense were needed prior to the approval of public funds for a polygraph. IVRP 12. That to that date those avenues hadn't been reviewed or exhausted due to the fact that the evidence and discovery hadn't been disclosed.

by the State and this had delayed the defense counsel's ability to prepare for a claim of self defense. 1VRP 11-12.

The State, at the time of the hearing, was having an issue with being able to access some of the videos obtained from the surveillance of the alleged victims residence and presented that some sort of computer forensics may need to occur. 1VRP 9-10. At no time did the State explain why, after at least three months since Appellant's arrest and four month since the start of the case, that the State hadn't been able to provide the necessary evidence and discovery to the defense counsel to commence its preparation to mount a defense against the alleged charge. That it was only after the defense counsel's filing of the "MOTION TO COMPEL DISCOVERY," that the State commenced the disclosure of evidence and discovery to the defense counsel. This being at a point in time, when the Appellant had sought by way of MOTION to obtain new counsel due to the defense counsel's failure to make substantial advances in the investigation and preparation of a defense in Appellant's case. 1VRP 12.

> The Trial Court denied the Appellant's MOTION by stating:
> "I've heard or seen nothing that would indicate basically that there's any basis for the claims and allegations made by [Appellant]."

(citing in part from 1VRP 8).

Appellant argues that although the Trial Court had a copy

of Appellant's MOTION that at no time were the specifics of the issues presented addressed to determine whether there was any valid issues presented to appoint new counsel. 1VRP8.

The Trial Court went on to rule:

"I'm going to deny the motion to remove [defense counsel]" (citing in part from 1VRP 9).

The Trial Court's denial was mainly due to the circumstances that if new appointed counsel were done that it would mean that the case would have to be started from its initial phase. See 1VRP 8-9. And the Trial Court concern of public expense. See 1VRP 5. The Trial Court urged the Appellant to work with counsel, 1VRP 14, but at the same time granted a continuance to the defense counsel to have additional time to prepare a defense due to the State's delaying in providing the evidence and discovery. 1VRP 14

On 3/8/12, the Appellant again asked for the appointment of new counsel which was based upon the Appellant not being satisfied with the defense counsel's representation and preparation of the Appellant's defense. 1VRP21, 23.

Due to the request being done just prior to the case going to trial the Trial Court denied the Appellant's request, even though the Appellant was in agreement to waive his speedy trial rights to have the appointment of new counsel. 1VRP 22

The Trial Court allowed the Appellant to explain his

reasons why he wanted new counsel and Appellant stated:

> "The first thing is that all he's got is my testimony to defend me. He doesn't have anything -- he doesn't have any -- any evidence showing that the facts weren't such as the victim said they were. And the second thing is that he always said that he was going to get me a counteroffer, and that's the thing that I've always kept in mind."

(citing 1VRP 23).

The Appellant argues that from a review of the dialog on the record between the Trial Court, State, and defense counsel, that the representation by the defense counsel was deficient. 1VRP 24-27. The defense counsel failed to know what the sentence range for the alleged crime of attempted first degree murder would be, showing that the Appellant hadn't been apprised of what it would be. 1VRP 25. The defense counsel had failed to apprise the Appellant that the States proposed offer was the only one available, as the Appellant was promised that a second offer would be presented by the State. 1VRP 23, 24-25.

The Trial Court denied the Appellant's request for new counsel. 1VRP 33.

The case proceeded to trial on 3/12/12 and on 3/14/12 the Trial Court indicated that it had received a letter from the Appellant which raised issues of the defense counsels performance. 4RP 542-43.

Pursuant to the case of State v. Lindsey, 311 P.3d 61, (Wash App. Div. 2 2013), the court stated:

> "We review a trial court's refusal to appoint new counsel for an abuse of discretion. State v. Cross 156 Wash. 2d 580, 607, 132 P.3d 80 (2006). "There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons." State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997)."

The Cross court went on to state:

> "In assessing the trial court's decision, we look at (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into the conflict, and (3) the timliness of the motion for appointment of new counsel."

Cross, 156 Wash 2d at 607, 132 P.3d 80; In re Pers. Restraint of Stenson, 142 Wn.2d 710, 733, 16 P.3d 1 (2001)(citing from State v. Lindsey, 311 P.3d at 701).

In the Appellant's case the Trial Court at no time specifically addressed the issue in regards to what the conflict was between the defense counsel and the Appellant during the initial request, failed to address all the issues which were presented in the MOTION and when discussing the State's delay in its disclosure of evidence and discovery failed to question the State what had attributed to that delay, as it was one of the reasons that caused Appellant to seek new counsel.

> "To warrant substitution of counsel, Appellant must show good cause 'such as a conflict of interest, an irreconcilable conflict, or a complete breakdown of communication.'"

(citing from State v. Schaller, 143 Wash. App. 258, 267-68, 177 P.3d 1139 (2007)); see also State v. Stenson, 132 Wash. 2d 668, 734, 940 P.2d 1239 (1997) ("It is not enough that defendant has lost confidence or trust in his attorney").

The Appellant argues that the Trial Court failed to conduct a further inquiry without the prosecutor present to explore into further detail the conflict with the defense counsel. See State v. Thompson, 290 P.3d 996, 169 Wn App. 436 (Wash App. Div. 1 2012) (the trial court held "ex parte hearing with prosecutor absent to allow defendant and counsel to fully articulate extent of their conflict and breakdown in communication.") See also State v. Witherspoon, 286 P.3d 996, 171 Wn. App. 271 (Wash. App. Div. 2 2012).

> "The Sixth Amendment right to effective assistance of counsel advances the Fifth Amendment's right to a fair trial. That right to effective assistance includes a "reasonable investigation" by defense counsel."

See Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); In re Pers. Restraint of Brett, 142 Wash. 2d 868, 873, 16 P.3d 601 (2001) (citing State v. Boyd, 158 P.3d 54, 160 Wn. 2d 424 (Wash 2007)).

In Boyd the court stated:

"Supporting the right to effective representation, CrR 4.7(h)(4), provides that notwithstanding protective orders, the evidence must be disclosed "in time to permit ... beneficial use."

Boyd, 158 P.3d at ___, 160 Wn.2d at ___; See also State v. Grenning, 234 P.3d 169, 169 Wn.2d 47 (Wash. 2010); Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

In the Appellant's case, although four months had passed, there was no showing of why the defense counsel had delayed in seeking production of the evidence and discovery from the State. This delay had hampered the defense counsels ability to prepare a defense and was at a point in time when the State also became aware that the video's were unable to be accessed and that expert assistance may be needed. See Scholler, 143 Wash. App. at 268, 177 P.3d 1139.

The Appellant's MOTION was timely and the Appellant presents that if the appointment of new counsel had been granted that there wouldn't have been any hinderances in the presentation of the Appellant's case because the defense counsel hadn't done any due to the State's failure to provide timely disclosures. That the defense counsel sought further time due to the State's delay. That on 3/8/12 and 3/14/12 the Appellant had still addressed that he was still in conflict with the defense counsel and the ability to provide an adequate defense. That this showed that the

conflict with the defense counsel was ongoing throughout the entire process and that the Appellant had lost confidence in the defense counsel and his ability to adequately represent the Appellant. See United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002); Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970); United States v. Moore, 159 F.3d 1154, 1158 (9th Cir. 1998); see also State v. Douglas, 295 P.3d 812, 173 Wn. App. 849, (Wash. App Div. 2 2013).

In Lindsey, supra, the trial court had on three separate hearings addressed the defendant's request for new counsel. At the first hearing, the defendant waived his claim, at the second hearing the defendant "did not articulate a specific basis for withdrawal [...]" and the third hearing the reasons for new counsel seemed to change as the time for trial neared, so the trial court found that they "were fleeting requests not based on a tangible conflict." (Lindsey, 311 P.3d at ___, citing in part). That the defendant "did not raise any concerns about a conflict with counsel during trial or after the jury returned a guilty verdict. In fact at his sentencing he expressed satisfaction with counsel." (Lindsey, 311 P.3d at ___, citing in part).

In contrast is Douglas, supra, where the defendant in that case "was unwilling to give up control of the case to an attorney." (citing in part from Douglas, 295 P.3d at ___, 173 Wash. App at ___). The defendant in Douglas "had already fired two attorneys for being 'ineffective', although the attorney's alleged ineffectiveness was limited to a disagreement about trial strategy." Douglas, 295 P.3d at ___, 173 Wash App at ___).

ISSUE TWO: THE STATE COMMITTED MISCONDUCT AND DENIED APPELLANT A FAIR TRIAL WHEN DURING THE STATE'S CLOSING ARGUMENTS:

1. the State presented argument that there was no evidence of self-defense;

The Washington State Supreme Court pursuant to the case of State v. Lynch, 309 P.3d 482, 178 Wn.2d 487 (Wash 2013), stated:

> "Implicit in the Sixth Amendment is the criminal defendant's right to control his defense." Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)("Although not stated in the [Sixth] Amendment in so many words, the right ... to make one's own defense personally [] is that necessarily implied by the structure of the Amendment.") State v. Jones, 99 Wash.2d 733, 740, 664 P.2d 1216 (1983)("Faretta embodies 'the conviction that a defendant has the right to decide, within limits, the types of defense he wishes to mount.'")(quoting United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979))."

See also State v. Carney, 314 P.3d 736, 741 (Wash.App. Div.1 2013).

Pursuant to the case of State v. Sanchez, 288 P.3d 351, 171 Wash. App 518 (Wash App Div. 3 2012), the court held that a criminal defendant enjoys "the right under both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution to obtain witnesses and present a defense." See

State v. Thomas, 150 Wash.2d 821, 857, 83 P.3d 970 (2004); State v. Maupin, 128 Wash.2d 918, 924-25, 913 P.2d 808 (1996); State v. Hudlow, 99 Wash.2d 1, 15-16, 659 P.2d 514 (1983).

Prior to the closing arguments, the State presented argument against the defense counsel's request that the jury be provided with instructions on self-defense. V VRP 622. The Trial Court in reviewing the circumstances as presented by the defense counsel, that the Appellant "had fear" and was "concerned for his safety" because they were sitting --- and ... were having the heated argument. V VRP 622-23 (citing in part). That the alleged victim commenced the pulling out of the gun slow and that the Appellant claimed that he lunged at the alleged victim in an attempt to pull the gun out of the alleged victims hand and that the gun went off. V VRP 623. That the Appellant had no direct memory if he pulled the trigger. V VRP 623.

The State presented argument that the Appellant, in order to claim self defense according to the case law, would "have to admit to having committed the criminal act to stop this other act[]" and that this criminal act was [the] shooting, not the lunging at him." V VRP 624 (citing in part with alterations). The State went on to state:

> "There are cases where there's accident. I've researched the cases where there is accident, and they say that the defendant gets the benefit at every theory of the case." (citing V VRP 624).

The State went on to present that the Appellant "never even says the gun was pointed at him." V VRP 624. (citing in part).

The defense counsel presented argument that the Appellant's testimony the prior day "was enough to show or to give [Appellant] the ability to argue self-defense. V VRP 625 (citing in part).

The defense counsel went on to state:

> "My client has said from day one that he pulled -- when the [alleged victim] pulled the gun ..., [Appellant] saw it; [Appellant] was scared; [Appellant] had a moment to react; [Appellant] lunged for the gun and they struggled. [Appellant] testified yesterday he went down on the -- as he ... -- pulled back -- ... the gun went off."

(citing from V VRP 625-26) (with alterations)

The Trial Court reviewed the States submitted case of State V. Werner, 241 P.3d 410, 170 Wn.2d 333 (Wash. 2010) and upon reviewing it determined that due to the subjective belief based upon the Appellant's view that there was "some supporting evidence and theory about it," which the Trial Court did find that there is in [Appellant's] case. V VRP 628, 630 respectively (citing in part).

The Trial Court explained that the State could argue that the Appellant hadn't shown one of the prongs which is that "the defendant such force by as a means as a reasonable prudent person [-]" V VRP 631 (citing in part). And provided the example:

> "they're four feet away, pulling the trigger, at that point when you had the gun and that far away, was not reasonable force. They can argue that prong." V VRP 631.

The only objection that the State had to the Trial Court's final instructions was the defense counsel's being allowed to present the claim of self-defense. V VRP635.

The Court in the case of State v. McCreven, 284 P.3d 793, 170 Wn.App. 444 (Wash App. Div. 2 2013), stated:

> "A prosecutor generally cannot comment on the lack of evidence because the defense has no duty to present evidence. Whether the defense has presented evidence of self-defense. Is a question for the trial court to address when decided whether to instruct the jury on the law of self-defense. Once the trial court has found evidence sufficient to require a self-defense instruction that inquiry, even if erroneous, has ended."

Although the Trial Court allowed the defense counsel to present argument in regards to self-defense the Appellant argues that the State during its closing arguments presented argument that there was no evidence of self-defense which thereby impermissibly denied the defense counsel's claimed defense. See State v. Werner, supra.

> "The defendant's right to control his defense is necessary 'to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy.'"

State v. Coristine, 177 Wash.2d 370, 376, 300 P.3d 400 (2013)(citing from State v. Lynch, 309 P.3d 482, 178 Wn.2d 487 (Wash 2013)).

2. the State presented argument that misstated the law on self defense;

The Appellant argues that the State further misstated the law when the State told the jury it did not need to consider self defense because Appellant claimed the gun went off accidentally. That the case law is well established that self-defense and accident are not mutually exclusive. See State v. Werner, supra; State v. Callahan, 87 Wn. App. 925, 931-33, 943 P.2d 676 (1997).

Pursuant to the case of State v. Bradley, 10 P.3d 358, 141 Wn.2d 731 (Wash 2000), the court ruled that:

> "It has long been the law in Washington that self defense may be justified by apparent danger to the person claiming the benefit of the defense, as opposed to actual danger."

The court referred to the case of State v. Carter, 15 Wash. 121, 123-24, 45 P. 745 (1896), where the court approved of a trial court's "self-defense instruction based on apparent danger." See also State v. LeFaber, 128 Wash.2d 896, 899-900, 913 P.2d 369 (1996).

Appellant argues that since the defense counsel presented that it was only after the alleged victim slowly brought out the gun that the Appellant "had fear" and was "concerned for his safety" that it was self defense when the Appellant lunged for the gun and it accidentally went off. That the State had the burden of proving the absence of self-defense beyond a reasonable doubt. See State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997).

3. the State shifted the burden of proof in regards to the Appellant's claim of self defense;

The Appellant argues that the defense counsel's failure to object allowed the jury panel to believe that the State's presented argument was in fact correct and more truthful because all of the evidence presented favored the State's version of what happened. See State v. Killingsworth, No. 65456-0-I, 2012 WL 255856 at *4 (Wash Ct. App Jan. 30, 2012). The State vouched for the credibility of the alleged victim, his truthfulness, not just in regards to the circumstances of the evidence, but also in regards to whether it was likely that the alleged victim owned and possessed a gun. See State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (Wash. 2011); State v. Ish, 170 Wash.2d 789, 795, 241 P.3d 389 (2010); see also State v. Sargent, 40 Wash. App 340, 344, 698 P.2d 598 (1985). Due to the State's argument that the State was relieved of its burden of proof and that the defense counsel was required to show some credible evidence to show that Appellant's shooting of the alleged victim was done in self-defense, but this conflicted with the Appellant's claim that it was accidental. See State v. Sells, 271 P.3d 952, 166 Wn.App 918 (Wash App Div.1 2012); State v. Jackson, 150 Wash App 877, 885, 209 P.3d 553 (2009). The State also presented that the Appellant would have to admit to have committed the criminal act of shooting the alleged victim to be able to claim self defense. V VRP 624 See also McCreven, supra; State v. O'Hara, 217 P.3d 756, 167 Wn.2d 91 (Wash. 2009).

In McCreven, supra, the court ruled that the prosecutor's comments on the law of self defense and defense of others

was erroneous. State v. Thorgerson, 172 Wash 2d at 467, 258 P.3d at 43.

> "While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'"

(citing from Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)).

Appellant argues that at no time did the defense counsel present evidence during its closing arguments that unfairly attacked the State's case and kept with the facts as presented by the witnesses and the evidence, but the State twisted the law, distorted the facts, and denied the defense counsel its opportunity to mount a defense. The State commended the alleged victim for his truthfulness and in serving his sentence. The State presented that the defense counsel failed to have any medical records or evidence that the Appellant had an injury to his hand and had lost feeling in it. V VRP 652. Which showed deficient performance by the defense counsel. The State also inferred that the Appellant had pulled the trigger during the struggle for the gun but the evidence presented showed that the Appellant never did acknowledge this. See V VRP 623, 625-26; See State v. Hendrickson, 81 Wash App. 397, 914 P.2d 1194 (1996) (where it was held that an explicit statement of intent is not necessary to receive a self-defense instruction and fact that a defendant does not recall the particular blow does not preclude the inferance that a

person intended to defend herself.)(citing State v. Dyson, 952 P.2d 1097, 90 Wn. App. 433 (Wash. App. Div. 1 1997). See also State v. Gogolin, 45 Wash. App. 640, 643-44, 727 P.2d 683 (1986).

The Appellant argues that the defense counsel's failure to object to the State's improper closing arguments was further evidence that the defense counsel was deficient in his representation of Appellant. See U.S. Const. amend. VI, XIV; Wash. Const. art. I, §22; see also State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251 (1995); Strickland, supra. The defense counsel's failure to object to the State's remarks which 1) attacked the defense counsel's ability to argue self defense, 2) argued that the burden of proof shifted to the defense counsel to present evidence of self-defense, and 3) that there needed to be imminent peril to be able to present a claim of self defense denied the Appellant, through his defense counsel, the constitutional right to mount a defense. State v. Strine, 293 P.3d 1177, 176 Wn.2d 742 (Wash 2013); Yakus v. United States, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

Reversal is required, notwithstanding the lack of defense counsel's objection, if the State's misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice. See State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Warren, 127 Wn.2d 17, 43, 195 P.3d 940 (2008); See also State v Sublett, 292 P.3d 715, 176 Wn.2d 58 (Wash 2012). The court in State v. Beskurt, 293 P.3d 1159, 176 Wn.2d 441 (Wash 2013), has a two-fold inquiry to determine if review is appropriate.

"First, the court determines whether the claimed error is truely of constitutional magnitude, and second the court must determine whether the error is "manifest." "

In the Appellant's case the States improper tactics presented to the jury through closing arguments impermissibly prejudiced the defense counsel's claimed defense thereby denying Appellant a fair trial. See In re Pers. Restraint of Glassman, - Wn.2d -, 286 P.3d 673 (2012). Any curative instruction would not have cured the "manifest" error. See State v. Powell, 62 Wn. App. 914, 920, 816 P.2d 86 (1991). The error cannot be considered harmless. See State v. Russell, 125 Wash.2d 24, 86, 882 P.2d 747 (1994); State v. Fiallo-Lopez, 78 Wash. App. 717, 729, 899 P.2d 1294 (1995); See also U.S. Const. amedd. VI, XIV; Wash. Const. art. I, §22.

F. CONCLUSION

This Honorable Court should reverse and remand the Appellant's case for a new trial.

Dated this 2 day of May, 2014.

REYCEL PEREZ-MENDEZ
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. REYCEL PEREZ-MARTINEZ, Appellant.	No. 43384-2 (Consolidated With Nos. 43517-9-II, 43569-1-II)) UNPUBLISHED OPINION

BJORGEN, J. — A jury convicted Reycel Perez-Martinez of first degree assault for shooting Eric Luna-Claro. Perez-Martinez appeals, alleging that (1) the trial court erred by denying his motion to replace his appointed counsel, (2) the prosecutor committed three different types of misconduct, and (3) insufficient evidence supports his conviction. He also raises numerous other issues in two personal restraint petitions (PRPs) consolidated with his direct appeal.

We reject Perez-Martinez's direct appeal claims. The trial court's decision to deny Perez-Martinez's motion for new counsel was not an abuse of its discretion, Perez-Martinez waived two of his prosecutorial misconduct claims and the third has no merit, and sufficient evidence supports his conviction. Because Perez-Martinez does not present his PRP claims in a

way that allows us to review them in an informed manner, we decline to reach the merits of these claims. We affirm.

FACTS

Perez-Martinez and Luna-Claro were "best friend[s]" in Cuba before each separately immigrated to this country. II Trial (Mar. 12, 2012) at 136. After arriving in Washington, Luna-Claro worked as a maintenance worker, but he supplemented his legitimate income by selling illegal drugs, becoming a distributor for a drug cartel in 2010. After reconnecting with Luna-Claro, Perez-Martinez began asking him for assistance in obtaining work in the drug trade. Luna-Claro gave Perez-Martinez the name and information of his contact in the cartel, which led to a meeting between Perez-Martinez and members of the cartel and attempts to train Perez-Martinez as a drug courier.

A few months after Luna-Claro introduced Perez-Martinez to his cartel contact, law enforcement officials seized five kilograms of cocaine, valued at approximately $150,000, that the cartel had sent to Luna-Claro. Unfortunately for Luna-Claro, the cartel considered him liable for payment on the shipment regardless whether he received it. Luna-Claro managed to pay some $30,000, but he could not pay the balance of the debt.

Not long after Luna-Claro's difficulties with the cartel began, Perez-Martinez showed up at his door with an associate.[1] At trial, Luna-Claro and Perez-Martinez presented starkly different accounts of what transpired after Perez-Martinez entered Luna-Claro's house.

[1] Perez-Martinez testified at trial that he did not know the man's surname and knew him only as "Arnaldo" despite travelling from Las Vegas to Vancouver with him. IV Trial (Mar. 14, 2012) at 534-36.

According to Luna-Claro, he, Perez-Martinez, and Perez-Martinez's associate went into his garage, where they began "talking about business, about drugs." II Trial (Mar. 12, 2012) at 144-45. Luna-Claro sat down in a chair, and Perez-Martinez, unexpectedly and without provocation, pulled out a pistol and shot him in the abdomen from a distance of four or five feet. While Luna-Claro lay on the ground, Perez-Martinez walked up to him and pulled the trigger to shoot him again, but the gun did not fire. Perez-Martinez then kicked Luna-Claro several times, turning to leave when Luna-Claro's wife came to the garage to investigate the shot and yelled for him to get out. At trial, Luna-Claro opined that the cartel had sent his best friend to kill him because of his unpaid debt.

According to Perez-Martinez, he arrived at Luna-Claro's house to confront him about a storage locker Luna-Claro had opened in his name, ostensibly so that Perez-Martinez would have a local bill to establish residency in Washington. Perez-Martinez was upset about the locker because he believed Luna-Claro was using it for his drug trade. After Perez-Martinez entered Luna-Claro's house with his unknown associate, they all went to the garage where they discussed the dispute. Luna-Claro became angry at Perez-Martinez, swore at him, and then pulled a gun from his waistband "very slow[ly]." IV Trial (Mar. 14, 2012) at 553-54. Perez-Martinez lunged at Luna-Claro, and the two struggled for the gun, which discharged during the struggle. Perez-Martinez, who testified he was "in fear for [his] life," later explained that nerve damage in his hand might have caused him to fire the gun without knowing that he had pulled the trigger. IV Trial (Mar. 14, 2012) at 555-56. After the shot, Luna-Claro asked Perez-Martinez to take the gun and flee because the sound might draw a police response. Perez-Martinez complied and later disposed of the gun off a local freeway.

The State charged Perez-Martinez with first degree attempted murder and first degree assault, seeking enhanced penalties for each charge due to his use of a firearm.

Before trial, Perez-Martinez moved for new appointed counsel. When asked why he wanted new counsel, Perez-Martinez stated that his attorney was "not doing a good job for" him, that his attorney worked for the prosecution, and that his attorney said that he had killed Luna-Claro. I Motions (Dec. 12, 2011) at 5-7. The trial court explained to Perez-Martinez that his attorney did not work for the prosecution and that, since the State had not charged him with murder, he must have misheard or misunderstood what his attorney had said. The court denied the motion for new counsel.

When the court again considered the issue several months later, Perez-Martinez stated that he wanted new counsel because his attorney had found no other witnesses to help defend him and his attorney had misled him into believing the State would present some kind of plea deal. He then stated that he simply did not trust his attorney. The trial court noted that, given the facts the State had alleged, it seemed unlikely that Perez-Martinez's attorney could find other witnesses, because he could not give the attorney the information necessary to find Arnaldo. Concerning the plea deal, the State informed the court that it had offered a plea, but that Perez-Martinez had rejected it. Perez-Martinez then again refused the offer in open court. Finally, the court attempted to allow Perez-Martinez to speak in private with his attorney about the offer, but Perez-Martinez refused, saying he would not speak with counsel. Again, the court declined to appoint Perez-Martinez new counsel.

At trial, the State presented Luna-Claro and witnesses whose testimony corroborated his account. Police officers testified that their repeated searches of Luna-Claro's house disclosed no evidence that he possessed a gun. Officers also testified that searches of the garage disclosed one spent and one live round. One officer testified that this evidence was consistent with Luna-Claro's story that Perez-Martinez attempted to shoot him twice, but that only one bullet fired. Another officer testified that, based on the lack of gunshot residue on Luna-Claro's clothes, he was not shot at close range, as in a struggle for control of a gun, but from a distance, as Luna-Claro testified. Luna-Claro's neighbors testified that Perez-Martinez approached the house and left in different directions, suggesting a plan to avoid identification and capture.

Perez-Martinez testified in his own defense. Given Perez-Martinez's testimony about his fear for his life, the trial court determined it would instruct the jury on self-defense over the State's objections.

During closing arguments, the State argued that the evidence indicated that Perez-Martinez had fabricated his self-defense story. It also challenged whether Perez-Martinez had acted in self-defense, even if the jury accepted his version of events, claiming that Perez-Martinez had stated that he accidentally shot Luna-Claro instead of shooting him in self-defense.[2] Finally, the State told the jury that Luna-Claro had been "open" with them and had

[2] The prosecutor's argument stated in part:

> You're going to get a self-defense instruction the Court told you in your jury instructions. The interesting thing about that is he's never claimed that it was self-defense. He said that what happened on that day was not that he--that the gun was ever pointed at him, but that he lunged for the gun once he slowly saw it coming out in the middle of an argument. He was never faced with imminent danger. He was arguing with his friend, which he himself said is something you can do.

"told the truth" based on his admission of his criminal activities and the corroborating physical evidence. V Jury Trial & Sentencing Hearing (Mar. 15, 2012) at 689, 693.

The jury found Perez-Martinez not guilty of attempted murder, but convicted him of first degree assault with a firearm enhancement. Perez-Martinez timely appeals.

Perez-Martinez also pursued collateral post-conviction relief. He filed two separate motions in the trial court asking for, among other things, a vacation of his conviction, arrest of the judgment against him, a writ of habeas corpus, and a new trial. The superior court transferred these motions to us for consideration as a timely PRP under CrR 7.8(c)(2). This court's commissioner consolidated Perez-Martinez's PRPs, Nos. 43517-9-II and 43569-1-II, with his direct appeal.

ANALYSIS

I. DENIAL OF THE MOTION FOR NEW COUNSEL

Perez-Martinez first argues that the trial court erred by denying his motion for new counsel. He maintains that the trial court failed to give proper consideration to his claims of an irreconcilable conflict with his attorney and denied his motion on improper grounds. Under governing standards, the trial court properly denied the motion.

Criminal defendants have a constitutional right to counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The right to counsel secures the defendant a fair trial by ensuring a

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> He's not claiming self-defense. He's claiming it was an accident. He's claiming it was an accident because his hand has lost feeling.

V Jury Trial & Sentencing Hearing (Mar. 15, 2012) at 651-52. Perez-Martinez does not cite to it, but the State repeated the argument that he was claiming an accident as opposed to self-defense a few minutes later.

functioning adversarial process, rather than a meaningful attorney-client relationship. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). Therefore,

> [t]o justify the appointment of new counsel, 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."

State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004) (quoting *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997)). We review a trial court's denial of a motion for the appointment of new counsel for an abuse of discretion. *Varga*, 151 Wn.2d at 200.

Perez-Martinez claims that he had an irreconcilable conflict with his attorney, requiring new counsel. To determine whether this conflict entitled Perez-Martinez to new counsel, we examine three factors: the extent of the conflict, the adequacy of the trial court's inquiry into the conflict, and the timeliness of the motion to substitute counsel. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (citing *United States v. Moore*, 159 F.3d 1154, 1158-61 (9th Cir. 1998)).

A. The Extent and Causes of the Conflict

We first consider "the extent and nature of the breakdown in the relationship and its effect on the representation." *State v. Schaller*, 143 Wn. App. 258, 270, 177 P.3d 1139 (2007). With regard to the first part of this inquiry, we look at how difficult the defendant's relationship with his or her attorney had become and the causes of the conflict. *Stenson*, 142 Wn.2d at 724-31. New appointed counsel may be justified if the attorney-client relationship is marked by such things as "'quarrels, bad language, threats, and counter threats'" because these suggest the attorney cannot diligently represent his or her client's interests. *Stenson*, 142 Wn.2d at 724

(quoting *United States v. Williams*, 594 F.3d 1258, 1260 (9th Cir. 1979)). However, the origin of the difficult relationship matters just as much as the conflict itself; a defendant must show the breakdown exists because of "'identifiable objective misconduct by the attorney.'" *Stenson*, 142 Wn.2d at 725 (quoting *Frazer v. United States*, 18 F.3d 778, 783 (9th Cir. 1994)). A defendant's "loss of confidence or trust" in his or her counsel does not suffice to require the appointment of new counsel. *Varga*, 151 Wn.2d at 200. With regard to the second part of the inquiry into the first *Stenson* factor, unless the defendant shows that the breakdown of the attorney-client relationship resulted in "the complete denial of counsel," he or she must show prejudice to demonstrate that the trial court erred in denying a motion for new counsel. *Stenson*, 142 Wn.2d at 722.

The nature and extent of the claimed conflict does not rise to the level justifying the appointment of new counsel. First, Perez-Martinez's relationship with his attorney was never marked by the type of outright quarrels, threats of violence, or threats to render deficient performance that indicate an attorney cannot represent the client in a diligent manner. *See Stenson*, 142 Wn.2d at 724-25. Perez-Martinez's mistaken beliefs that his counsel worked for the prosecutor and that his counsel had stated that he had killed Luna-Claro do not show misconduct by his attorney. Perez-Martinez's other grievances with his attorney are the types of loss of confidence or trust that do not justify the appointment of new counsel under the case law above. While Perez-Martinez's refusal to speak with his counsel in some instances does create concern about a breakdown in the adversarial process, "[i]t is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorneys." *Schaller*, 143 Wn. App. at 271.

Second, the effect of any conflict on the representation Perez-Martinez received does not justify new counsel. To determine if an irreconcilable conflict resulted in the complete denial of counsel, we scrutinize the record and consider evaluations of the attorney's performance by the trial court and defendant. *Stenson*, 142 Wn.2d at 728-30. The record contains no evidence that Perez-Martinez received "anything approaching inadequate representation" or that his "right to effective assistance of counsel was jeopardized by his continued representation" by his attorney. *Schaller*, 143 Wn. App. at 270. Reflecting this, the trial court noted that Perez-Martinez's attorney had done "a very good job at [Perez-Martinez's] defense." IV Trial (Mar. 14, 2012) at 545. Perez-Martinez himself echoed this assessment, stating, "I've seen really during this trial [that his attorney] has done a good job"; indeed, Perez-Martinez apologized to his attorney for the allegations he made in requesting new counsel after agreeing that his attorney had represented him well. IV Trial (Mar. 14, 2012) at 545. Because he fails to show that his difficulties with his attorney affected his representation at trial, Perez-Martinez must show prejudice to prevail on this factor, and he does not even make an argument in this regard.

The first *Stenson* factor therefore weighs in favor of affirming the trial court's denial of Perez-Martinez's motion. Perez-Martinez fails to show a conflict arising from grounds we accept as bases for appointing new counsel and the representation he received rebuts any concerns that the adversarial process guaranteed by the Sixth Amendment's right to counsel broke down.

B. The Trial Court's Inquiry

We next look to the adequacy of the trial court's inquiries about the conflict. Perez-Martinez claims that the trial court erred under this prong by failing to question him "'privately

and in depth.'" Br. of Appellant at 15 (quoting *United States v. Nguyen*, 262 F.3d 998, 1004 (9th Cir. 2001). In support, Perez-Martinez cites several Ninth Circuit cases that hold that the trial court must indeed privately question a defendant and ask "'specific and targeted questions'" to determine whether new counsel is warranted. Br. of Appellant at 15 ((quoting *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777-78 (9th Cir. 2001)).

While decisions from the federal circuit courts can provide persuasive authority concerning federal questions, they "are not binding upon the Washington Supreme Court or this court." *Feis v. King County Sheriff's Dep't*, 165 Wn. App. 525, 547, 267 P.3d 1022 (2011). We are instead bound by decisions from the Washington Supreme Court and the United States Supreme Court interpreting the federal constitution. Perez-Martinez cites no United States Supreme Court opinion requiring that the trial court inquire privately about a defendant's conflict with his or her attorney. Opinions of our state Supreme Court hold that the trial court makes an adequate inquiry into "the merits of [the defendant's] complaint" by affording the defendant "the opportunity to explain the reason[s] for [his or her] dissatisfaction with counsel" and questioning counsel about the "merits of [the] complaint." *Varga*, 151 Wn.2d at 200-01 (affirming the denial of a motion for new counsel where the trial court inquired about the conflict in the presence of the defendant and his attorney); *Stenson*, 142 Wn.2d at 726-30 (same). Here, the trial court offered Perez-Martinez two separate opportunities to explain why he wanted new counsel, and engaged in lengthy discussions about the merits of his requests. The trial court also explored the issue with his counsel during those same two hearings. The trial court conducted an adequate inquiry.

C. Timeliness

Finally, we examine the timeliness of the motion for substituting counsel. Perez-Martinez makes two arguments on this point. First, he alleges that he made a timely motion that the trial court rejected over impermissible concerns about its trial schedule. He cites *Nyugen*, which held that even a motion for substituting counsel made the day of trial was timely where denied for impermissible reasons. 262 F.3d at 1003. However, the trial court's consideration of the delay involved with the appointment of new counsel did not revolve around a desire to keep to its own trial schedule. Instead, its consideration of the delay focused on its attempt to honor all of Perez-Martinez's Sixth Amendment rights, including his right to a speedy trial.

Second, Perez-Martinez argues the trial court made inconsistent rulings because, after denying his motion for new counsel, it allowed his attorney a continuance to prepare. Again, while the federal cases Perez-Martinez cites provide persuasive authority, we are bound by our Supreme Court's decisions. Our Supreme Court has held that the delay resulting from the substitution of counsel can weigh against the defendant in consideration of the third *Stenson* factor. 142 Wn.2d at 732. Here, the trial court noted that the time necessary to allow a new attorney to familiarize himself or herself with the case would have been extensive and reached long past any continuance it would grant his current attorney. This delay shows Perez-Martinez's motion to be untimely under the third *Stenson* factor. 142 Wn.2d at 732.

We hold that the trial court properly exercised its discretion in denying Perez-Martinez's motion for the substitution of new counsel. Each of the factors we use to review the trial court's

decision indicates the trial court properly denied the motion. We cannot say that the trial court made a decision that "no reasonable person would take" or one based on "'untenable grounds'" or "'untenable reasons.'" *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

II. PROSECUTORIAL MISCONDUCT

Perez-Martinez next alleges that the prosecutor committed three different types of misconduct. First, he claims that the prosecutor's closing arguments misstated the law and burden of proof regarding self-defense. Second, Perez-Martinez contends that the prosecutor's closing argument impermissibly vouched for Luna-Claro's credibility. Finally, Perez-Martinez maintains that the prosecutor violated her duty to prevent the admission of false testimony and her duty to correct any false testimony in the record. We hold that Perez-Martinez waived his first two claims and failed to make the necessary showings on his third.

Because prosecutors "represent[] the people" as "quasi-judicial officers" they owe a "duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant." *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009). A defendant claiming that a prosecutor has violated this duty bears the burden of showing that "the prosecuting attorney's conduct was both improper and prejudicial." *Fisher*, 165 Wn.2d at 747. Demonstrating prejudice requires the defendant to show that the improper conduct had a "substantial likelihood of affecting the jury's verdict." *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). When, as here, the defendant fails to object at trial to the challenged conduct, he or she waives the misconduct claim unless the argument was "flagrant and ill[-]intentioned" such that "'no curative instruction would have obviated any prejudicial effect on the jury.'" *Emery*, 174 Wn.2d at 760-61 (quoting

State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In evaluating possible waiver under this standard, we focus our analysis on the trial court's ability to remedy the impropriety, rather than whether it was flagrant and ill-intentioned. *Emery*, 174 Wn.2d at 762.

A. Closing Argument on Self-Defense

Perez-Martinez alleges two types of misconduct in the prosecutor's closing argument about his self-defense claim. First, Perez-Martinez argues that the prosecutor impermissibly shifted the burden of proving self-defense to him by stating that he never testified that Luna-Claro pointed the gun at him, meaning that he never faced imminent danger. Second, Perez-Martinez claims that the prosecutor's closing argument incorrectly stated that a self-defense claim was mutually exclusive with a defense of accident, "eas[ing] the State's burden" of disproving self-defense. Br. of Appellant at 22. To support this argument he cites the prosecutor's statement that "[h]e's not claiming self-defense. He's claiming it was an accident. He's claiming it was an accident because his hand has lost feeling." V Jury Trial & Sentencing Hearing (Mar. 15, 2012) at 651-52. We find no impropriety in the first of these arguments and, although we find the second argument improper, we affirm Perez-Martinez's conviction as he waived his claim of error by failing to object.

1. Impropriety

We begin with the threshold question of whether the prosecutor made improper comments. For this inquiry, we examine the remarks in "the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Perez-Martinez first alleges that the prosecutor shifted the burden of proof to him by arguing that "there was no evidence of self-defense." Br. of Appellant at 20. He analogizes his case to *State v. McCreven* and contends that our opinion there makes this argument improper. *See* 170 Wn. App. 444, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). In *McCreven*, the prosecutor argued that the defendants had to prove self-defense by a preponderance of the evidence before the State had any duty to disprove self-defense beyond a reasonable doubt. 170 Wn. App. at 468-71. *McCreven*, however, offers no support to Perez-Martinez. The prosecutor here did not suggest that Perez-Martinez had a duty to prove self-defense or that the State did not bear the burden of disproving self-defense beyond a reasonable doubt until he did so. Instead, the prosecutor attacked the fit of the evidence in the record with Perez-Martinez's theory of self-defense in order to shoulder the State's burden of disproving self-defense beyond a reasonable doubt. A prosecutor may permissibly argue that the evidence does not support the defense's theory of events. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994); *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990); *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). There was no impropriety with this argument.

Perez-Martinez also alleges that the prosecutor improperly told the jury to disregard his claims of self-defense when she told them "[h]e's not claiming self-defense. He's claiming it was an accident." V Jury Trial & Sentencing Hearing (Mar. 15, 2012) at 651-52. At trial, Perez-Martinez claimed that the shooting of Luna-Claro, though an accident, resulted from his use of force to defend himself from Luna-Claro. Under facts like these, self-defense is not mutually exclusive with accident. *State v. Callahan*, 87 Wn. App. 925, 930-33, 943 P.2d 676 (1997). While the prosecutor certainly could argue that the facts did not fit with a claim of self-defense,

she did more than that here. Even in the context of an argument concerned with disproving self-defense beyond a reasonable doubt, at best the prosecutor's argument misstated the law of self-defense and, at worst, invited the jury to disregard the trial court's instructions on self-defense. Viewed either way, the argument was improper. *State v. Asaeli*, 150 Wn. App. 543, 594-96, 208 P.3d 1136 (2009) (a prosecutor makes an improper argument by misstating the law of self-defense in a way suggesting that defendant cannot avail himself or herself of the defense because of the misstatement); *State v. Cardus*, 86 Hawaii 426, 433, 439, 949 P.2d 1047 (Haw. Ct. App. 1997) (prosecutor makes improper argument by "urg[ing] the jury to, in effect, ignore the jury instructions").

2. Waiver

We next turn to whether Perez-Martinez is entitled to relief for the prosecutor's improper argument about accident and self-defense. As noted, Perez-Martinez failed to object at trial. To obtain relief he must show both a substantial likelihood that the argument affected the jury's verdict and that the argument was flagrant and ill-intentioned such that the court could not have addressed the argument's impropriety with a curative instruction. *Emery*, 174 Wn.2d at 762. Because a curative instruction would have eliminated any prejudicial effect created by the improper argument, we hold Perez-Martinez waived his claim of error.

Perez-Martinez argues that he did not waive his claim because the prosecutor's argument was flagrant and ill-intentioned because it disregarded the trial court's decision that Perez-Martinez had introduced sufficient evidence to require a self-defense instruction. Perez-Martinez contends that the argument "presented the jury with a distorted view of its function" that a curative instruction would not have rectified. Br. of Appellant at 23. The Supreme Court has,

however, several times in recent years rejected arguments similar to the one Perez-Martinez makes and held that, even where a prosecutor's argument undermines the State's burden of proof, the trial court may cure the impropriety with an instruction that educates the jury on its role and the State's burden of proof. *Emery*, 174 Wn.2d at 764; *State v. Warren*, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008). We have held that a curative instruction can eliminate any prejudicial effect arising from a prosecutor's misstatement of the law of self-defense. *Asaeli*, 150 Wn. App. at 595-96. Had Perez-Martinez objected, the trial court could have explained to the jury that it needed to both consider Perez-Martinez's self-defense theory despite the prosecutor's statements and hold the State to its burden of disproving self-defense beyond a reasonable doubt. *See Emery*, 174 Wn.2d at 764. We presume that jurors follow these instructions. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990).

Perez-Martinez also argues that, because the improper argument concerned the "heart of the defense case," no curative instruction could have obviated the prejudicial effects of the argument, citing *State v. Powell*, 62 Wn. App. 914, 919, 816 P.2d 86 (1991). Br. of Appellant at 23. In *Powell*, the prosecutor argued that a failure to convict would send a message inviting the sexual abuse of children, an argument feeding on the jury's desire to protect children and its revulsion at child-molestation. 62 Wn. App. at 918 & n.4. The *Powell* court found this flagrant and ill-intentioned and determined that the argument denied Powell a fair trial because, in the context of the argument, a curative instruction could not have eliminated the prejudice it caused. 62 Wn. App. at 918-19. We may readily distinguish the argument made in *Powell* from the one made in Perez-Martinez's case: the prosecutor's argument here concerned how the jury should

evaluate the evidence, not an appeal to its passions or prejudices. The prosecutor's argument was simply not the type that a curative instruction cannot rectify.

B. Vouching

Perez-Martinez also contends that the prosecutor impermissibly vouched for Luna-Claro during closing argument by personally attesting to his credibility and referencing matters outside the record. We hold that the prosecutor improperly vouched for Luna-Claro, but that Perez-Martinez waived any claim of error.

1. Impropriety

A prosecutor acts improperly if he or she vouches for the credibility of a witness by stating a personal belief in the veracity of a witness or referencing matters outside the record to bolster the witness's credibility. *State v. Ish*, 170 Wn.2d 189, 196, 206, 208, 241 P.3d 389 (2010) (Chambers, J. lead opinion) (Sanders, J. concurring and dissenting). Vouching improperly puts the prestige of the prosecutor's office behind the witness's testimony and violates a prosecutor's "special obligation to avoid 'improper suggestions, insinuations, and especially assertions of personal knowledge.'" *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)).

Perez-Martinez alleges the first type of vouching occurred here when the prosecutor informed the jury that Luna-Claro had been open and honest with them. We give prosecutors "wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *Stenson*, 132 Wn.2d at 727. However, the prosecutor may not implicitly or explicitly express a personal belief about the veracity of a witness. *State v.*

Reed, 102 Wn.2d 140, 143-48, 684 P.2d 699 (1984). The prosecutor's statements that Luna-Claro had been honest with the jury was an implicit expression of the prosecutor's personal belief in Luna-Claro's credibility and therefore improper. *See Reed*, 102 Wn.2d at 145-46.

Perez-Martinez also argues that the second type of vouching occurred because the prosecutor's closing argument "[wa]s riddled with prejudicial statements of 'fact' that are not in evidence." Appellant's Statement of Additional Grounds (SAG) at 18. Perez-Martinez fails to identify a single one of these multiple references to matters outside the record. While we do not require a defendant to cite to the record for arguments made in a statement of additional grounds made under RAP 10.10, we do require that the arguments be sufficiently "specific for us to identify any error in the record." *State v. Kipp*, 171 Wn. App. 14, 35, 286 P.3d 68 (2012), *rev'd by State v. Kipp*, No. 88083-2, ___ P.3d ___, 2014 WL 465635 (Wash. Feb. 6, 2014); RAP 10.10(c). Perez-Martinez's argument provides no basis to even begin looking for any alleged instances of the second type of vouching, and we decline to address the merits of this argument.

2. Waiver

Again, Perez-Martinez did not object at trial to the vouching he now objects to. Had Perez-Martinez objected, the trial court could have informed the jury that it alone could measure the credibility of witnesses. The trial court also could have explained that the prosecutor's statements about Luna-Claro's credibility were arguments that it could not consider as evidence. We presume that jurors follow these instructions and have no reason to disregard that presumption here. *Swan*, 114 Wn.2d at 661-62. Because the court could have addressed the argument's impropriety with a curative instruction, Perez-Martinez's failure to object waives this claim of error. *Emery*, 174 Wn.2d at 762.

C. Countenancing False Testimony

Perez-Martinez next alleges that the prosecutor committed misconduct by using testimony known to be false in order to convict him. Perez-Martinez points to what he claims are several inconsistencies between Luna-Claro's statements to the police and his testimony at trial and argues that the prosecutor's failure to ask Luna-Claro about the inconsistencies constituted misconduct.

The due process clause of the Fourteenth Amendment to the United States Constitution imposes on prosecutors a duty not to introduce perjured testimony or use evidence known to be false to convict a defendant. *State v. Finnegan*, 6 Wn. App. 612, 616, 495 P.2d 674 (1972) (citing *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957)). This duty requires the prosecutor to correct state witnesses who testify falsely. *Finnegan*, 6 Wn. App. at 616 (citing *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). To succeed on his claim that the prosecutor used false evidence to convict him, Perez-Martinez must show that "(1) the testimony [or evidence] was actually false, (2) the prosecutor knew or should have known that the testimony was actually false, and (3) that the false testimony was material." *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003). We must deny Perez-Martinez relief based on this claim, because he fails to make the necessary showing for the first two of these elements.

First, Perez-Martinez offers no evidence to demonstrate the falsity of Luna-Claro's testimony at trial other than his own version of events, which contradicts Luna-Claro's. However, "[i]ndisputable falsehood is not established by a simple swearing contest." *Rosencrantz v. Lafler*, 568 F.3d 577, 585-86 (6th Cir. 2009). Where the jury hears from

witnesses and determines to credit one, but not the other, we may not overturn that determination. *See Rosencrantz*, 568 F.3d at 586 (6th Cir. 2009) (quoting *United States v. Bortnovsky*, 879 F.2d 30, 33 (2d Cir. 1989)). The jury heard from Luna-Claro and from Perez-Martinez, and it accepted Luna-Claro's version of events. We must defer to this determination. *See, e.g., State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Second, even if we were to assume that Luna-Claro testified falsely, Perez-Martinez offers no evidence that suggests the prosecutor knew or should have known that the testimony was false. The evidence recovered at the scene corroborated Luna-Claro's account and the prosecutor would have had no reason to doubt his version of events.

III. SUFFICIENCY OF THE EVIDENCE

Perez-Martinez next asserts that the State did not present sufficient evidence to disprove his claim of self-defense beyond a reasonable doubt. We disagree.

The Fourteenth Amendment's due process clause requires that the State prove every element of an offense beyond a reasonable doubt. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). We review challenges to the sufficiency of the State's evidence by examining "'whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of [the crime] beyond a reasonable doubt.'" *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1980)), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). A defendant challenging the sufficiency of the evidence used to convict him or her must "admit[] the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence." *State v. Caton*, 174 Wn.2d 239,

241, 273 P.3d 980 (2012) (per curium). As noted above, we defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of the evidence. *Camarillo*, 115 Wn.2d at 71.

Perez-Martinez's challenge to the sufficiency of the evidence underlying the first degree assault conviction asks us to reweigh the evidence against him. Specifically, he asks us to determine that he did not bring a gun to Luna-Claro's house and that Luna-Claro was not credible. Our constitutionally mandated respect for the jury as a finder of fact prevents us from doing what Perez-Martinez asks. *See Green*, 94 Wn.2d at 221. Luna-Claro's testimony, which Perez-Martinez must accept as true for purposes of his sufficiency challenge, shows that Perez-Martinez shot Luna-Claro while Luna-Claro sat in a chair posing no threat to him. This evidence, in and of itself, not only satisfied the State's burden of proof for first degree assault, but also satisfied the State's burden of proving Perez-Martinez did not act in self-defense. *See State v. Flett*, 98 Wn. App. 799, 805, 992 P.2d 1028 (2000) (witness testimony that they did not threaten their attacker sufficient for a first degree assault conviction when defendant suggested that he shot at them in self-defense). Significantly, the State's other witnesses testified that physical evidence found at the scene corroborated Luna-Claro's account. Sufficient evidence supports Perez-Martinez's conviction.

IV. PEREZ-MARTINEZ'S PRP CLAIMS

Finally, Perez-Martinez raises numerous issues in his two consolidated PRPs. These include violations of the disclosure duties found in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); various species of ineffective assistance of counsel claims; a violation of his right to confront witnesses against him; claims of instructional error; claims that

he did not receive proper interpretation; claims of errors in denying his motions to suppress; violations of his fair trial rights; claims of evidentiary errors; and claims of due process violations due to insufficient evidence sustaining his conviction. Motion to Merge Counts and Vacate Conviction and Relief of Confinement, No. 11-1-01115-1 (Wash. Super. Ct. May 21, 2012); Affidavit in Support for Relief from Confinement, Vacate Conviction for Order, No. 11-1-01115-1 (Wash. Super. Ct. May 21, 2012); Affidavit in Support of Judgment of Arrest, No. 11-1-01115-1 (Wash. Super. Ct. May 22, 2012); Petition for Writ of Habeas Corpus, No. 11-1-0115-1 (Wash. Super. Ct. May 22, 2012); Affidavit in Support for New Trial, No. 11-1-0115-1 (Wash. Super. Ct. May 21, 2012).

Perez-Martinez presents his claims in a manner leaving us unable to review them. While we may show some solicitousness to pro se litigants filing PRPs, we do require, at a minimum, that they provide the "facts [or] evidence" necessary to decide the issues they raise so that we "make an informed review." *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813-14, 792 P.2d 506 (1990). Failure to do so requires us to decline to reach the merits of their claims. *Cook*, 114 Wn.2d at 814. While Perez-Martinez offers numerous affidavits in support of his various claims, these affidavits offer only "[b]ald assertions and conclusory allegations." *See In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). Perez-Martinez does not identify a single point in his trial where an alleged error occurred, and he provides no evidence that would allow us to determine that the effect of any alleged error was prejudicial. Under *Cook* and *Rice*, we decline to reach the merits of his claims.

CONCLUSION

We rule against Perez-Martinez's direct appeal claims and affirm his conviction. Because Perez-Martinez fails to make his PRP claims in a manner that we can review, we cannot reach their merits.

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 in accordance with RCW 2.06.040, it is so ordered.

BJORGEN, J.

We concur:

JOHANSON, A.C.J.

MAXA, J.