Case # 307646

Statement of Additional Grounds for Review

State of Washington

v.

Steven M. Swinford

ORIGINAL

No. 30764-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN M. SWINFORD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CHELAN COUNTY
Cause No. 11-1-00039-8

The Honorable Lesley A. Allen, Judge

STATEMENT OF ADDITIONAL GROUNDS / RAP 10.10

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A. STATEMENT OF THE CASE[1] & [2]

1. Procedural Facts

The State charged Steven M. Swinford with second degree intentional murder based on the shooting death of his friend, Paul Raney. CP 1-4. Swinford asserted he shot Raney in self-defense. 2RP 226, 4RP 611.

Swinford's first trial ended in a mistrial after the jury could not reach a verdict. CP 150-155. For Swinford's first trial the court's instructions to the jury on self-defense included the definition of "great personal injury." CP 150 (Court's Instructions No. 18); WPIC 2.04.01.

A second jury convicted Swinford as charged. CP 70-71. For Swinford's second trial the court's instructions to the jury on self-defense failed to define "great personal injury." CP 223 (Court's Instructions Nos. 17-19).

The record indicates the same self-defense instructions given at Swinford's first trial were proposed for his second trial. 3RP 531-32; 4RP 583 & 591. Defense counsel Jeremy Ford took no exceptions to the court's instructions and the record is silent

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[1] This brief refers to the verbatim reports as follows: 1RP - 2/3/12 and 2/6/12; 2RP - 2/7/12; 3RP - 2/8/12; 4RP - 2/9/12 and 2/10/12; and 5RP - 3/30/12.

[2] Swinford hereby adopts and incorporates by reference section B. STATEMENT OF THE CASE, pages 2-9, set forth in his Brief of Appellant filed by Appellate Counsel Jennifer M. Winkler.

as to why the definition of "great personal injury" was given at Swinford's first trial, but not his second trial. 4RP 590-91.

The standard "to convict" instructions for second degree murder and manslaughter in the first and second degree were given advising the jury it had a "duty to return a verdict of guilty." CP 223 (Court's Instructions Nos. 8, 11 & 15); WPIC 27.02, 28.02 & 28.06. No exception was taken for these instructions.

Swinford later moved for a new trail based on prosecutorial misconduct, including the comments below. CP 233. The motion was denied. CP 72-106 118-24; 5RP 9-19. The court sentenced Swinford to 264 months (22 yrs.), a sentence within the standard range. CP 107-116; 5RP 45.

2. Trial Testimony

Steven Flick testified that it was common at their home "to have handguns wedged in between the cushions of ... the arm of the chair." 2RP 259. When Flick returned home from working out no one was home and he noticed all the guns were gone. 2RP 260. Around 9:00pm his roommates Swinford, Raney and Jessy Juarez returned home. 2RP 261. Juarez went upstairs directly after returning home and was not present when the shooting occurred. 2RP 261. According to Flick, Swinford and Raney sat downstairs where Flick watched a movie. 2RP 262. Swinford and Raney were drinking alcohol and playing a drinking game. 2RP 261-62. Flick eventually joined them but did not think he drank as much as them.

2RP 262-64, 270, 276, 300.

They were all "joking around" and having a good time. 2RP 263. The mood changed when Raney got mad because Swinford decided to plug an ipod into the stereo system. Raney wanted to charge the ipod and listen to music later, but Swinford wanted to plug it into the stereo system. 2RP 264. According to Flick, there discussion was not aggressive and appeared to be an ordinary "talking match (about) who was going to be correct or not." 2RP 265. Just prior to the shooting, Flick heard Raney advise Swinford to "stop being a fucking badass." 2RP 266, 281. At this time, Raney was leaning forward in the chair. 2RP 266.

After the (stop being a fucking badass) statement was made by Raney, Flick reached to grab his beer and heard a gun cocking and shots being fired. 2RP 266, 281 & 284. The shots occurred within two or three seconds after Raney made the statement. 2RP 267. According to Flick, he didn't see (Raney's) hands at this point because his back was turned. 2RP 284. At one point, Flick said Raney's hands were up and then fell as he was being shot, but that they were not up in a defensive position. 2RP 268, 307. Directly after the shooting, Swinford put the gun down and called 911. 2RP 268.

Jessy Juarez testified that he went target shooting with Swinford and Raney for a few minutes "until it got dark basically." 2RP 312, 321. After they finished target shooting they got some

food and a movie and returned home. According to Juarez, "Everybody (was) getting along ... nobody (was) having any problems." 2RP 312. When they returned home, Juarez went upstairs and Skyped (talked to) his girlfriend in Canada. 2RP 313-14. Juarez eventually fell asleep and was awoke by what sounded like seven gunshots. 2RP 314. After putting some clothes on, he heard Swinford coming up the stairs. He asked Swinford what happened. According to Juarez, Swinford said "I don't know ... (I) shot Paul and (I am) going to jail." 2RP 315. Juarez asked Swinford why and he said he didn't know ... "Paul got mad and then he said he didn't know, that he couldn't tell me what happened ..." 2RP 315, 323. Juarez testified that they were all in shock over the incident, including Swinford. 2RP 322-24.

Swinford's version of events was very similar to that of his roommates. 4RP 539-42. After returning from target shooting, Swinford disassembled his .45 caliber pistol and Raney his .40 caliber pistol, intending to clean them. Instead of cleaning the pistols, Swinford and Raney reassembled and loaded them. 4RP 453. Swinford knew Raney loaded the .40 caliber pistol to maximum capacity, putting 14 rounds in the magazine and one in the chamber. 4RP 543-44. Swinford knew Raney could competently handle and fire the pistol. 4RP 541, 542-43. Swinford also knew Raney had the loaded .40 caliber pistol tucked in the cushion of the right side of the chair. 4RP 547.

While Swinford and Raney reassembled and loaded the pistols, Flick watched a movie. 4RP 544. After the movie was over, Flick, Swinford, and Raney decided to listen to music. 4RP 545. Swinford retrieved his ipod and plugged it in so it could play and charge at the same time. 4RP 545. Raney became annoyed and angrily told Swinford to "quit being a fucking badass." Swinford attributed the comment to Raney's drunkenness. 4RP 547. After hearing Raney make this comment, Swinford turned and saw Raney's hand wrap around the grip of the .40 caliber pistol tucked in his chair. Swinford feared he was about to be shot and, with only a spit second to make his decision, reached for the pistol on the coffee table, closed his eyes, and shot Raney. 4RP 547, 549, 551, 557-58. After shooting Raney, Swinford put the gun down and immediately called 911. 4RP 549.

Raney sustained gunshots to his chest, abdomen, pelvis right arm, and left hand. 2RP 353-58, 371-72. A firearm expert confirmed that Swinford's .45 caliber 1911 pistol fired the bullets recovered from Raney's body. 3RP 515-20.

Detectives found a .40 caliber pistol tucked between the right armrest and seat cushion of the chair Raney had been sitting in. 2RP 380, 384-85; 3RP 415-17, 425. The back sights, hammer, and grip of the gun were visible. 2RP 385, 386-87; Ex. 5; 3RP 423; Ex. 11. The gun was fully loaded with a round in the chamber, cocked, and ready to fire if the trigger were pulled. 3RP 425,

456-57, 462-63, 521-24, 590.

Microscopic examination of the gun revealed blood spatter on the rear sights, hammer, and firing pin. 3RP 468, 479. By the time of the exam, however, the gun had been test-fired and processed for fingerprints, which may have removed blood from other parts of the gun. 3RP 488-89, 494, 507; Ex. 11. The examining expert believed some of the areas where he found blood would have been covered by the chair cushion if, at the time of the shooting, the gun had been placed as depicted in the pictures. 3RP 498-500.

Forensic Pathologist Gina Fino testified that there was no way to determine the order of shots and which of Raney's wounds were inflicted first or last. 3RP 353. Fino admitted on cross-examination that she had "no idea" whether Raney was holding the gun prior to being shot. 2RP 359, 372.

Blood stain pattern and trajectory analyst Mitchell A. Nessan testified that Raney's exits wounds, when lined up with the seam in the seat material in the chair he was sitting in, showed that he may have been leaning to his right side at the time of the shooting. 3RP 482. Nessan confirmed that the .40 caliber pistol was tucked into the right side of the chair, in the direction Raney was leaning. 3RP 490-92, 500. Nessan opined that the way the pistol was tucked into the cushion, the areas that were exposed visually would be areas that could be exposed to some kind of

blood spatter event, and that blood was found around the rear sight, the hammer, and on the firing pin. 3RP 480, 494. Nessan confirmed that blood spatter was found on the rear right sight of the pistol, a portion of the gun that was clearly covered by the chair cushion. He opined that the blood spatter may have been deposited from play in the cushion while Raney was sitting in it, or that the seat was overturned at some point and then uprighted. 3RP 498-500. Nessan testified that he could not determine which one of Raney's wounds caused blood spatter to his hands or the gun. He admitted that it could have been the first or the last shot. 3RP 497.

3. Closing Argument

During closing arguments the prosecutor asked the jury to find Swinford guilty of second degree murder. 4RP 598, 602. To obtain this verdict the prosecutor argued:

> MR SHAE: Raney said "Why do you have to be a badass. Why do you have to be a badass. Are those fighting words? They talk all the time between the two of them. They argue. They go back and forth between each other like brother and sister, ... and this was a normal circumstance on a normal evening between the two people. All of a sudden, as he's reaching for the beer, Mr. Flick sees Mr. Swinford pick up the .45 which --
>
> MR. FORD: Your Horor, I'm going to object at this point. Mr. Flick never testified to that.
>
> THE COURT: This is argument.
>
> MR. SHAE: ... This is our argument. Whether he saw him do it, he sees him with the gun. He hears the trigger which could have been Mr. Swinford kicking a round out, making sure there was a -- racking a round

.... He shoots him seven times. It's a .45. Each time, that gun has a recoil. He's got to bring it down again. It recoils. He's got to bring it down again. It recoils. He's got to bring it down again. And it happens in a matter of seconds and Mr. Flick is watching, sees him do that.

And he turns and he looks at Paul and Paul has his hands up, he says, not out like this to stop but up, up. When his hands are up like this, there's no threat. There's no threat to Mr. Swinford. Mr. Swinford is killing him. He's murdering him. He's not shooting a round into the ceiling. He's not holding the gun saying, stop. He's not trying to get him to stop. He's murdering that young man. He's shooting him as many times as he has bullets and then he puts the gun down.

Mr. Swinford picks up the phone and calls 911, because Mr. Flick was going to do it too, but he's concerned, so he calls 911 ....

He just murdered his friend. He's shot him. This is case where a person shoots first and asks for you to excuse him later ....

MR. FORD: Your Honor, I'm going to object to that part. Can we have a sidebar?

THE COURT: All right. (Sidebar conference held outside the hearing of the jury).

THE COURT: Go ahead, Mr. Shae.

4RP 595-97.

MR. SHAE: Instruction Number 18 talks about a person is able to act on appearances if a person believes in good faith and reasonable grounds that he's in actual danger of personal injury. Remember, the testimony of the defendant is that he grabs the gun. He turns. He aims it to him, but he closed his eyes. This is a circumstance that — this would be if somebody had a toy pistol an aimed it at somebody else.

MR. FORD: Your Honor, I'm going to object again. That's a misstatement of the law.

MR. SHAE: It's certainly an accurate statement of the law.

MR. FORD: It's an inaccurate statement of the law.

THE COURT: Overruled.

4RP 599-600.

MR. SHAE: ... His hands were up. The only testimony was that his ands were up. .... His hand were up. And if his hands are up, there's no threat. If there's no threat then he can't shoot. Mr. Swinford committed this murder. ... at the end of this, I'm going to ask you to find him guilty of murder in the second degree. Thank you."

4RP 602. The closing arguments described above appear to be a conflation of details the trial court rejected when the State took exception to the issuance of self-defense instructions. The following colloquy occurred between the State and the Court:

MR SHAE: "... In this particular case, Mr. Swinford has testified, ..., that he doesn't know whether Mr. Raney pulls the gun up because he closes his eyes. He doesn't attempt to try to use any caution at all. In this case, he's like a spring gun. He sees something and he interprets it --

THE COURT: Well interpreting the testimony most favorably to Mr. Swinford is that Mr. Raney had his hand around the handle of the loaded gun in the seat next to him and Mr. Swinford feared that he was going to pull that out.

MR. SHAE: But he doesn't look to see if he's doing anything with that gun other than that. So -- he has to use ordinary care, Your Honor, before he actually uses deadly force. He doesn't do that at all. So in a sense he's a spring gun because anything can happen at that point. Mr. Raney can put his hands up. Then he as to use ordinary care before he shoots him. Mr. Raney can move away from the gun, let go of the gun. There's no threat at that time, so he doesn't use any

ordinary care, Your Honor. He shouldn't get the instruction.

THE COURT: All right. Well, I understand your argument, Mr. Shae, but I think under the facts presented ... what the jury will choose to believe is going to be the ultimate, you know, proof in the pudding, but there have been sufficient facts presented that would merit the giving of the self-defense instructions and so the Court is going to do that.

4RP 583-84.

MR. SHAE: I do take exception to the self-defense instruction, Your Honor, based on my argument that I mentioned. I do think that there is a need -- there is a duty of ordinary care before you can use excusable homicide. And my feeling, based upon the facts, is that this is similar to the case that I cited and I don't believe that ordinary care was necessarily used on that.

Also, I'd take exception to Instruction Number 18 which is a person is entitled to act on appearances in defending themself. I think that instruction is more for a situation where a person reacts with a person -- somebody with a toy gun or something like this rather than a situation as the facts have been laid out in this case. Mr. Raney never got the gun out of the chair and as a result, I don't think that this is the type of situation where that instruction should be given, as well as the other instruction for the other reasons.

THE COURT: All right. And we, of course, discussed this on the record earlier, but the Court finds, based on the evidence that has been presented ..., that Mr. Ford (Swinford) is entitled to have these instructions given regarding self-defense in order to argue that theory ....

4RP 590-91. In closing, the prosecutor argued the State had disproved at least one the three WPIC 16.02 criteria an thereby shown the homicide was not justifiable. He misstated the law of self-defense and argued facts not in evidence to obtain a

conviction on conflated theory's the trial court rejected. 4RP 583-84, 590-91, 595-97, 599-600, 602.

B. ARGUMENT

1. THE PROSECUTOR'S FLAGRANT, PREJUDICIAL MISCONDUCT DENIED SWINFORD A FAIR TRIAL.

Unlike other attorneys, prosecutors are not just lawyers but are also "quasi-judicial officers". State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 21 L.Ed.2d 787, 89 S.Ct. 886 (1969). As such, they are required to refrain from trying to gain convictions at all costs and must instead act in the interests of justice even if that causes them to "lose" a case. State v. Smith, 71 Wn.App. 14, 18, 856 P.2d 415 (1993).

When a prosecutor fails in this duty and commits misconduct, he may deprive the accused of his constitutional right to a fair trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Boehning, 127 Wn.App. 511, 518, 111 P.3d 899 (2005); see U.S. Const. Amend. 6 & 14; Wash. Const. art. 1, sections 3 & 22 (amend. 10). Even with no objection below, a prosecutor's misconduct will still compel reversal where that misconduct is so "flagrant and ill-intentioned" that it could not have been cured by an instruction telling the jury to disregard it. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

A prosecutor's argument must be confined to the law stated in the court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). When the prosecutor mischaracterizes the law, and there is a substantial likelihood that the misstatement affected the jury's verdict the accused is denied a fair trial. State v. Gotcher, 52 Wn.App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity that may mislead the jury. State v. Davenport, 100 Wn.2d 757 764, 675 P.2d 1213 (1984).

It is also misconduct for a prosecutor to mislead the jury in summarizing evidence during closing argument. State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Furhter, by arguing facts not in evidence, or misstating the actual facts, the prosecutor effectively becomes an unsworn witness against the accused -- one not subjected to all the limits confrontation rights require. Belgarde, 110 Wn.2d at 507-510. Washington courts have recognized that prosecutors have a duty not to make statements unsupported by the record and which may mislead the jury. State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991); State v. Grover, 55 Wn.App. 923, 936, 780 P.2d 901 (1989), rev. denied, 114 Wn.2d 1008 (1990).

a. Misstating Law/Crucial Evidence & Burden Shifting/Reducing

Here, (as emphasized in closing arguments above) the prosecutor misstated the law, misstated crucial evidence, and shifted the burden of proof; some of which defense counsel made

objections, others not.[3]

i. The prosecutor erroneously declared, in closing argument, that Raney said "Why do you have to be a badass. Why do you have to be a badass. Are those fighting words?" 4RP 595. This is not, however, what Raney said. Instead, Steven Flick testified that Raney said "stop being a fucking badass" and then shots were fired. 2RP 266, 281. Swinford recalled Raney saying "quit being a fucking badass" just before Raney grabbed for the .40 caliber pistol and shots were fired. 4RP 547, 549, 551, 557-59. The prosecutor improperly implied that Raney posed a question instead of a threat, which he buttressed with "are those fighting words?" The prosecutor's argument misstated evidence on the very crucial issue of whether or not Swinford faced an imminent threat of death or great personal injury. By changing the context of Raney's words from a threat to a question, the State diminished the threat Swinford faced.

This misstatement was misconduct and reduced the State's burden of proving the absence of self-defense. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)(State's burden is to prove the absence of self-defense beyond a reasonable doubt); see also State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993).

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[3] In the event this Court finds that the misconduct could have been cured by an objection, Mr. Swinford submits that counsel was ineffective for failing to object. See argument on ineffective assistance, infra.

A reasonable juror could have believed that Raney didn't threaten Swinford prior to reaching for the .40 caliber pistol, and thus relieved the State of the burden of establishing Swinford reacted to protect himself from death or great personal injury and imminent danger of such harm being accomplished. RCW 9A.16.050; WPIC 16.02(1 & 2). Why would Swinford shoot Raney if no fighting words were exchanged -- was the State's clear implication. This misconduct was clearly prejudicial and could have easily affected the jury's verdict.

ii. In the same paragraph the prosecutor erroneously declared that "All of a sudden, as he's reaching for the beer, Mr. Flick sees Mr. Swinford pick up the .45 which." Defense counsel objected "Mr. Flick never testified to that." 4RP 595. The State went on to argue that Flick "hears the trigger which could have been Mr. Swinford kicking a round out, making sure (Swinford) rack(ed) a round (into the chamber before) ... he shoots him seven times." 4RP 595-96. Flick testified that as he reached for his beer he "heard a gun cocking and shots being fired." 2RP 266, 281 & 284. Racking a round into the chamber of a pistol is not the same as cocking a gun. No evidence was presented that Flick heard a racking sound, therefore, it was improper for the prosecutor to imply that it could have been Swinford. This was highly prejudicial misconduct because the jury could have been misled to believe Swinford took the time to chamber a round before

reacting to Raney's threat, diminishing the immediate threat Swinford faced and inferring that Swinford formed the necessary intent to shoot Raney in the time it took to chamber the round. Moreover, only one gun was found cocked, and that was the gun next to Raney in the chair he was sitting in. 3RP 423-24, 456-57, 462-63.

iii. Again, in the same paragraph, the prosecutor erroneously declared that "(Flick) turns and ... looks at Paul and Paul has his hands up .... When his hands are up like this, there's no threat. There's no threat to Mr. Swinford. Mr. Swinford is killing him. He's murdering him. He's not shooting a round into the ceiling. He's not holding the gun saying, stop. He's not trying to get him to stop. He's murdering that young man." 4RP 597; 602. Two forms of misconduct exist here.

First, the State asserted Raney's hands were up prior to being shot by Swinford. However, neither Flick nor Swinford testified to this fact. Flick did see Raney's hands up as he fell back into the chair. 2RP 266-67. But, Flick also testified that as he reached to grab his beer and heard a gun cocking and shots being fired, all within seconds — he didn't see Raney's hands while he reached for the beer because his back was turned. 2RP 284, lines 11-24. The prosecutor's argument misstated the evidence on, yet another, crucial issue by implying that Flick eye-witnessed the whole incident. This was particularly egregious

misconduct because the jury may have been misled to believe Swinford never observed Raney's hand reach for the gun tucked in the chair cushion -- because the State improperly implied that when Flick testified Raney's hands were up and empty, it was for the entire time. 2RP 268. Flick testified that his back was turned, therefore, he could not have seen the position of Raney's hands or whether he reached for the gun in the cushion; therefore, it was misconduct to imply otherwise.

On this first issue, the prosecutor's misconduct also bore directly on Mr. Swinford's right to act on appearances in defending himself. The State's misconduct misled the jury to believe that Swinford shot Raney in cold blood while his hands were up. This relieved the State of the burden of proving Swinford acted on the appearance of Raney's threat.

Second, repeatedly claiming "there's no threat ... he killed him ... he murdered him ... he's not shooting a round into the ceiling ... saying stop ... (or) trying to get him to stop ... he's murdering that young man" -- all because Raney's hands were up at one point during the shooting shifted the burden of proof to Swinford to establish he acted on the appearance of a threat. Moreover, its a misstatement of law because Swinford is not obligated, when defending himself from death or great personal injury, to fire a warning shot, say stop or otherwise try and stop Raney from reaching for a loaded handgun before he uses deadly

force to defend himself. RCW 9A.16.050; WPIC 16.02.[4]

Again, this was prejudicial because the jury may have believed the law required Swinford to somehow stop or warn Raney before defending himself. In fact, the last statement the jury received from the prosecutor was "His (Raney's) hands were up. And if his hands are up, there's no threat. If there's no threat then he (Swinford) can't shoot. Mr. Swinford committed this murder." 4RP 602. This misconduct very well could have affected the jury's verdict.

iv. The prosecutor erroneously declared that "... he (Swinford) puts down the gun .... picks up the phone and calls 911, because Mr. Flick was going to do it too ...." 4RP 597. Neither Flick nor Swinford testified to this. The prosecutor appears to intentionally imply the only reason Swinford called 911 was because Flick was going to do it first. Instead, the testimony indicates that Swinford dialed 911 on his own accord, and not by any pressure that he needed to because someone else was going to do it first. 2RP 268; 4RP 549. This was prejudicial misconduct because the jury may have been misled to believe Swinford was guilty murder. The fact that Swinford called 911 on his own directly after the shooting goes to the heart of his self-defense

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[4] The prosecutor's argument appears to admit or concede that Raney was indeed reaching for or holding the gun, otherwise what need would there be for Swinford to fire a warning shot or direct Raney to stop.

claim. Who would intentionally murder their best friend and then immediately call 911? The prosecutor's improper argument was highly prejudicial, designed to diminish Swinford's defense, and mislead the jury.

v. The prosecutor intentionally misstated the law when, during closing argument, he stated:

> "a person is able to act on appearances if a person believes in good faith and on reasonable grounds that he's in actual danger of personal injury. Remember, the testimony of the defendant is that he grabs the gun. He turns. He aims it to him, but he closed his eyes. This is a circumstance that -- this would be if somebody had a toy pistol and aimed it at somebody else."

4RP 599-600. Defense counsel objected and asserted it was a misstatement of the law. The prosecutor responded and asserted it was an accurate statement of the law. The trial court overruled the objection. Id. This argument appears to be a conflation of the State's "spring gun" and "ordinary care" theory the trial court rejected. 4RP 584-84, 590-91. When giving the act on appearances instruction No. 18, the prosecutor reiterated his argument that "Swinford doesn't look to see if he's (Raney) doing anything with that gun other than that (grabbing for it). So in a sense he's a spring gun because anything can happen at that point. Mr. Raney can put his hands up ... he move away from the gun, ... he can let go of the gun." 4RP 583-84. "I (prosecutor) think that instruction is more for a situation where a person

reacts with a person -- somebody with a toy gun or something ... rather than as a situation as the facts have been laid out in this case." 4RP 590-91.

Here, it is clear the prosecutor was intentionally trying to mislead the jury as to what this instruction meant. The law allows Swinford to "act on appearances." Part of Swinford's defense was that even if he did not see Raney actually pull the gun up, he could still act on appearances. From an objective and subjective evaluation of the evidence, Swinford knew the gun was real, that it was loaded, and that Raney knew how to use it. It was not a toy gun. As a consequence, the prosecutor's statement was misleading and extremely prejudicial because the jury could have believed that Swinford was somehow wrong for closing his eye's and shooting. The jury may have believed Swinford was not in danger of death or great personal injury because he failed to open his eyes and confirm, before shooting, that Raney put his hands up, moved away from the gun, or let go of it. The jury may have equated Swinford's closed eye's to a situation similar to someone grabbing for a toy gun -- because when he failed to open his eye's, he didn't actually know if he was in danger. In other words, closing his eyes and not confirming that Raney actually grabbed the gun was tantamount to Raney grabbing a toy gun because, with his eye's closed, Swinford didn't know if a real danger existed. This was a clear misstatement of the law

because from a subjective standpoint, knowing all that Swinford knew, the danger was real whether his eye's were open or closed. There is substantial likelihood this misconduct affected the jury's verdict.

vi. The prosecutor argued that "this is a case where a person (Mr. Swinford) shoots first and asks for you to excuse him later ...." 4RP 597. Defense counsel objected and requested a sidebar. The sidebar was held off the record and the court instructed the State to continue. The State continued, but left the subject alone. The trial court never offered a curative instruction. Id. This argument was an improper prejudicial comment, distorted the law, and shifted the burden of proof to Swinford. The law clearly requires the State to prove the absence of self-defense beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984). The comment itself was independently prejudicial. Swinford claimed he shot Raney in self-defense, therefore, he didn't need to establish an excuse. The prosecutor's "shoots first" comment was intended to persuade the jury that Swinford's actions were not justified, an implication that he had no purpose -- like self-defense. But, the law requires the jury to determine if Swinford acted in self-defense, not to excuse him for a purposeless shooting. As such, this comment was improper and clearly misstated the law. Finally, the State has the burden of proving the absence of self-defense beyond a reasonable doubt.

By arguing that Swinford needed to be excused, the State shifted the burden to him to establish there was a purpose for shooting Raney. There is a substantial likelihood this improper comment affected the jury's verdict because they may have believed that "shooting first," with no real purpose or possible danger, required Swinford to produce an excuse; when the law places no obligation on him to provide an excuse. Instead, the actual burden of proof is on the State to prove he did not act in self-defense. It is clear the prosecutor improperly shifted the burden of proof to the defense.

b. Reversal Is Required

The prosecutor's misconduct was prejudicial and compels reversal. This was a very close case in which Swinford took the stand and explained his actions from his perspective at the time. The jury was entitled to believe his account of the fear he felt and to find that, under the circumstances, his fear was reasonable.

Although the State attempted to argue otherwise, Swinford's testimony was consistent with the physical evidence and the testimony of other witnesses. For example, the forensic pathologist testified that while there was blood spatter on Raney's right hand, she could not say when it was placed there. 2RP 372. The police found the gun in its resting place in the chair after it had been jostled and knocked over. 2RP 291, 320, 323-25, 390, 393; 3RP 410. While the State attempted to argue that the blood

spatter found on the gun was consistent with the gun remaining securely tucked into the chair, the testimony was, at best, ambiguous. 3RP 468 479, 488-89, 494, 498-500; Ex. 5 & 11. Consistent with Flick's testimony, Swinford did not testify he saw the gun raised, only that he saw Raney put his hand on it. 2RP 268; 4RP 547, 549, 551, 557-58. Significantly, Swinford knew the gun was fully loaded and ready to fire. 3RP 522-24; 4RP 543-44.

The prosecutor, encouraging the jury to find the absence of self-defense based on, apparently, his own subject belief about what the law of self-defense should be, misstated crucial evidence, misstated the law, and shifted the burden of proof to the defense. The misstatements of law and burden shiftings were particularly prejudicial because they related directly to the self-defense instructions. Jury instructions on self-defense must more than adequately convey the law. Walden 131 Wn.2d at 473. Self-defense instructions also "must make the relevant legal standard manifestly apparent to the average juror." State v. LaFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Here, the prosecutor's misconduct distorted the evidence and self-defense instructions — failing to make the law clear to the jury. In this instance, there is a substantial likelihood the State's misconduct misled and confused the jury about the law of self-defense, which affected the verdict. The misconduct was prejudicial and denied Swinford a fair trial.

Finally, the fact that the jury in Swinford's first trial deadlocked 8 not guilty, 4 undecided, supports the fact that the State's argument at his second trial was prejudicial. CP 155. This Court should reverse the jury's verdict and remand for a new trial.

c. Cumulative Effect of Misconduct Requires Reversal

Even if the acts of misconduct were are not sufficient to support reversal separately, the sheer weight of misconduct here does, because it had the cumulative effect of depriving Swinford of a fair trial. State v. Torres, 16 Wn.App. 254, 263, 554 P.2d 1069 (1976)(reversal is proper based on cumulative effect of misconduct); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 688 (1984). These errors all went to the heart of the case -- self-defense. The prosecutor mislead the jury about its role by shifting the burden of proof, misstated crucial evidence, and misstated the law. And throughout it all, the prosecutor returned to his improper theory that Swinford owed a "duty of care" to Raney, which he breached by shooting him. 4RP 599. All of these errors, including the "duty of care" issue raised by Appellate Counsel Jennifer Winkler, clearly compounded one another, and the result was trial that was far less than fair. This Court should reverse.

d. Ineffective Assistance of Counsel

The accused have a State and Federal constitutional right to effective assistance of counsel. U.S. Const. Amend. 6, 14;

Wash. Const. art. 1, sections 3 & 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defense. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes knowing the relevant law and lodging objections. State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662 (1989)(failure to object may amount to ineffectiveness if failure goes to the heart of the state's case).

Here, in the unlikely event this Court finds that the prosecutor's flagrant misconduct could have been cured by instructions, this Court should then reverse, based on ineffective assistance of counsel. As noted above, all of the prosecutor's improper statements in this case distorted the law of self-defense, where both instructions and argument are to be made manifestly clear to the average juror. Yet, on some instances, counsel did nothing as the prosecutor repeatedly mislead the jury about its role by shifting the burden of proof, misstating crucial evidence, and misstating the law. There could be no tactical reason to

fail to protect a client's interests by failing to object to this flagrant, prejudicial misconduct. And, as noted above, the misconduct went to the heart of the State's case, making it impossible for Swinford to receive a fair trial. If this Court concludes that the misconduct might potentially have been curable with objections, counsel's failure to object amounted to deficient performance which prejudiced Swinford. Madison, 53 Wn.App. at 763. This Court should reverse.

2. THE TRIAL COURT'S FAILURE TO DEFINE THE TECHNICAL TERM "GREAT PERSONAL INJURY" AS PART OF SWINFORD'S SELF-DEFENSE INSTRUCTIONS WAS ERROR AND DEPRIVED HIM OF A CONSTITUTIONALLY FAIR TRIAL.

At the conclusion of the evidence, the trial court gave self-defense instructions to the jury. CP 223 (Instruction Nos. 17-18); WPIC 16.02 & 16.07. When giving these instructions, the record indicates they were supposed to be the same as those provided at Swinford's first trial. 3RP 531-32; 4RP 583 & 591; CP 150 (Instruction Nos. 16, 16.1, 17 & 18). These instructions included WPIC 16.02, 16.07 and the definition of "great personal injury," WPIC 2.04.01. Defense counsel Jeremy Ford took no exceptions to the court's instructions and the record is silent as to why the definition of "great personal injury" was given at Swinford's first trial, but not his second trial. 4RP 590-91.

Swinford contends the failure to define great personal injury in his case, as applied to the facts and circumstances, deprived

him of a fair trial, relieved the state of the burden of proof related to the absence of self-defense and the subjective element "all the facts and circumstances known to Swinford at the time" of the shooting, and that counsel's failure to recognize the definition of great personal injury was missing and except to it deprived Swinford effective assistance of counsel. U.S. Const. Amends. 6 & 14; Wash. Const., art. 1, Sections 3 & 22 (Amend. 10); See State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007) (describing manifest error as one that is truly constitutional and had a practical and identifiable consequence at trial).

Courts closely scrutinize jury instructions relating to a claim of self-defense. Such instructions must more than adequately convey the law. State v. LaFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Read as a whole, the jury instructions must make the legal standard for self-defense manifestly apparent to the average juror. Id. The State must prove every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense the State must prove beyond a reasonable doubt. Acosta, supra, 101 Wn.2d at 615-16. It is constitutional error to relieve the State of its burden of proving the absence of self-defense. Walden, supra, 131 Wn.2d at 473.

Jury instructions are sufficient if they are supported by

substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. State v. Irons, 101 Wn.App. 544, 549, 4 P.3d 174 (2000). But our Supreme Court subjects self-defense instructions to a more rigorous scrutiny. Jury instructions on self-defense must more than adequately convey the law. Read as a whole they must make the relevant legal standard "manifestly apparent to the average juror." State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)(quoting State v. Painter, 27 Wn.App. 708, 713, 620 P.2d 1001 (1980)).

The technical term rule attempts to ensure that criminal defendants are not convicted by a jury that misunderstands the applicable law. Thus, the rule complements the constitutional requirement articulated in State v. Davis, 27 Wn.App. 498, 618 P.2d 1034 (1980), and later recognized in State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), that the jury be informed of all the elements of the crime charged.

WPIC 16.02, note on use, states: "Use WPIC 2.04.01, Great Personal Injury -- Definition, ... with this instruction." The note on use for WPIC 2.04 states: "Do not use this instruction to define ... "great personal injury."" These other terms have distinct definitions. ... with regard to great personal injury see the caveat below.

> Caveat: See the comment to WPIC 2.04.01 ... for a discussion of the distinctions that must be drawn between

"great bodily harm" and "great personal injury."

> WPIC 2.04.01 - Note on use. Use this instruction with WPIC 16.02 .... Comment: Caution. In light of the discussion of above, courts should carefully distinguish between the terms "great personal injury" and "great bodily injury." More generally, caution is advised throughout this area of the law due to the existence of distinct(ions).... See notes on use and comments for WPIC ... 2.04.
>
> WPIC 17.02 — Comment: The comment on great personal injury in WPIC 16.02 notes that "practitioners should carefully note that "great personal injury" is distinct from "great bodily harm," and refers the reader to the discussion of these terms in the comment to WPIC 2.04.01.

First, the term "great personal injury" is a technical term. A term is technical if its legal definition differs from the common understanding of the word. State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). The WPIC comments on 2.04.01 and 16.02, as described above, support the fact that 'great personal injury' is a technical term. It includes the subjective element "in light of all the facts and circumstances known at the time." WPIC 2.04.01. No person could possibly understand the term unless it was provided to them, therefore, it is a technical legal term.

Second, as described above, the WPIC 2.04.01 & 16.02 notes on use affirmatively state "use" the definition "with." The language implies the definition should always be used with WPIC 16.02. Under normal circumstances, whether a term is technical is left to the trial court's discretion. State v. Amezola, 49 Wn.App. 78, 88, 741 P.2d 1024 (1987)(citation omitted). Here,

however, the Committee on use of self-defense instructions, states in the comments to "use" the definition; as such, the trial court should always use it to complete self-defense instructions and ensure the legal standard for self-defense is manifestly apparent to the average juror. Allery, supra, 101 Wn.2d at 595. Read as a whole, the absence of the 'great personal injury' definition, WPIC 2.04.01, would render the self-defense instructions incomplete and fail to make the legal standard manifestly apparent.

In the event this Court determines the legal standard regarding self-defense would not be affected by the absence of the WPIC 2.04.01 definition, Swinford asserts the trial court's failure to include it relieved the State of the burden of proving the absence of all the self-defense elements. Because this was a close case, whether Swinford faced "death or great personal injury" was a crucial element the State was required to disprove. Acosta, supra, 101 Wn.2d at 615-16; Walden, supra, 131 Wn.2d at 473; WPIC 16.02(1); RCW 9A.15.050(1).

Here, as shown above, the prosecutor argued that Swinford shot Raney without a purpose, with his hands up, and that no threat existed. He argued that "Raney's hands were up. And if his hands are up, there's no threat. It there's no threat then he can't shoot. Mr. Swinford committed this murder." He insinuated further, that instruction 18 allowed Swinford to act on appearances if he was in actual danger of personal injury, but explained there

was no danger because the situation involved a circumstance similar to the use of a toy gun, because Swinford closed his eyes. Moreover, he argued that Swinford is a person who "shoots first and asks for you to excuse him later..." insinuating it was a purposeless shooting. 4RP 595-97, 599-600, 602. These arguments went directly to the issue of whether Swinford acted to prevent the imminent threat of death or great personal injury.

Two of the elements the State was required to disprove were WPIC 16.02(1&2), that Swinford "reasonably believed that the person slain intended to inflict death or great personal injury," and that he "reasonably believed that there was imminent danger of such harm being accomplished." CP 223 (Instruction No. 17). Without the definition of great personal injury,[5] the State was able to argue Swinford was not in danger, as it did, and the jury would have no way of applying the "subjective" elements to the definition to determine, "in light of all the facts and circumstances known at the time," if Swinford was in fear of "death or great personal injury." For example, the State argued "if Raney's hands are up, there's no threat ... and if there's no threat Swinford can't shoot." 4RP 602. If the jury believed

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[5] "Great Personal Injury" means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the slayer or another person." WPIC 2.04.01.

Swinford could not shoot, it was because they were deprived of the "subjective definitional element" (WPIC 2.04.01) telling them he could if "in light of all the facts and circumstances known at the time" Raney could "produce sever pain and suffering" upon Swinford.

With the definition, the legal standard for self-defense becomes manifestly apparent and demonstrates the State's argument may have misled the jury concerning the applicable law, because even if Raney's hands were up after he reached for the gun, Swinford could shoot him if he began shooting as Raney reached for the gun; and the fact that Raney's hands were up at some point during the shooting has no bearing on Swinford's perspective prior to, during, and after the shooting.

There was substantial evidence that Raney had a fully loaded .40 caliber handgun at his side, that he made a threatening statement toward Swinford, and grabbed for the gun. From Swinford's subjective perspective, in light of all the facts and circumstances known to him at the time, Raney was certainly capable of producing death and severe pain and suffering upon Swinford with the .40 caliber pistol. WPIC 2.04.01.

Removing this subjective definitional element from the jury relived the State of the burden of disproving that Swinford "reasonably believed that the Raney intended to inflict death or great personal injury" and "... that there was imminent danger

of such harm being accomplished." WPIC 16.02(1&2). State v. Bennett, 87 Wn.App. 73, 940 P.2d 299 (1997); State v. Jackson, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999). WPIC 16.02(1&2) and WPIC 2.04.01 should be used in tandem and the failure to include the subjective definitional element failed to make the legal standard for self-defense manifestly apparent to the average juror and relieved the State of its constitutionally mandated burden of proof. State v. L.B., 132 Wn.Ap. 948, ___ P.3d ___ (2006). This Court should reverse Swinford's conviction and remand for a new trial.

a. Ineffective Assistance of Counsel

The legal standard for ineffective assistance of counsel was previously set forth in section 1(d), pages 23-25, of this brief. In the event this Court finds defense counsel's failure to request the definitional instruction, or object to the fact that it was missing, precludes review, Swinford claims counsel's performance was ineffective and deprived him of a fair trial. There is no tactical reason for not knowing the law and applying it in the correct context to ensure the legal standard for self-defense was made manifestly apparent to the jury. State v. Kyllo, 166 Wn.2d 856, ___ P.3d ___ (2009); Lafaber, 128 Wn.2d at 900; Allery, 101 Wn.2d at 595. The failure to include the WPIC 2.04.01 definition was a manifest error because it truly had a practical and identifiable consequence at Swinford's trial.

Kronich, 160 Wn.2d at 899. This was a close case and self-defense was Swinford's entire case. The failure to make the legal standard for self-defense manifestly apparent was prejudicial. Had the subjective definitional element been given, there is a reasonable probability that but for counsel's deficient performance the outcome of the proceeding would have been different. The jury would have considered the case from Swinford's perspective knowing all that he knew at the time and likely found the shooting to be in self-defense. This Court should reverse Swinford's conviction and remand for a new trial.

3. MR. SWINFORD'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE FAILED TO PROVE THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT. U.S. Const. Amend. 14; Wash. Const. article 1, sections 3 & 22 (Amend. 10).

As part of the due process rights guaranteed under both the State and Federal Constitution's, the State must prove every element of the crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, supra, 397 U.S. at 364. As the United States Supreme Court explained in Winship: "The use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of criminal law." Id.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the requirements of due process. State v. Moore,

7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973)(quoting State v. Collins 2 Wn.App. 757, 759, 470 P.2d 227 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light 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. Salinas 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)(citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201 (citing State v. Theroff, 25 Wn.App. 590, 593, 609 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

When a criminal defendant raises the issue of self-defense, the absence of self-defense becomes an essential element of the offense that the State must prove beyond a reasonable doubt. Acosta, supra, 101 Wn.2d at 615-16; State v. Box, 109 Wn.2d 320, 327, 745 P.2d 23 (1987); State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983). While circumstantial evidence is no less

reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, supra, 100 Wn.2d at 491.

Swinford contends the State failed to carry its burden of proving he did not act in self-defense. Under RCW 9A.16.050, homicide is "justifiable" when committed:

> (1) In the lawful defense of the slayer ... when there is a reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer ..., and there is imminent danger of such design being accomplished.

Consistent with the statute, WPIC 16.02 requires that the slayer: (1) "reasonably believed that the person slain intended to inflict death or great personal injury;" (2) "reasonably believed that there was imminent danger of such harm being accomplished;" and (3) "employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared" at the time of and prior to the incident. See CP 223 (Instruction No. 17).

Here, when viewed in the light most favorable to the State the unprejudiced evidence establishes that Swinford acted with reasonable belief he was in imminent danger of death or great personal injury. Flick's undisputed testimony was that Swinford

and Raney were bickering back and forth about how music should be played on the ipod. At some point during the bickering contest, which was common for the two of them, but just prior to the shooting, Raney advised Swinford to "stop being a fucking badass." Flick testified that he didn't see Raney grab or reach for the .40 caliber pistol because, while Swinford and Raney were bickering, he turned to grab his beer. While he was turned he heard a gun cock, and then shots being fired. As he turned back from grabbing his beer, and as the shots were being fired, he observed Raney falling back into the chair with his hands up, but not up in a defensive position.

The uncontested testimony of Swinford's objective and subjective perspective, was that after returning from target shooting earlier in the day, Swinford and Raney disassembled their pistols with the intention of cleaning them. Swinford had a .45 caliber 1911 pistol. Raney had a .40 caliber FNP. Instead of cleaning the pistol's, they reassembled them, loaded them, and set them in their respective, readily accessible, resting places. Swinford knew Raney had the pistol in the chair, that it was loaded and easily accessible to him. He also knew that Raney knew how to use the pistol.

Swinford and Raney then watched a movie and played a drinking game where significant amounts of alcohol were consumed. After the movie, they decided to listen to some music, but began

bickering over how the music should be played on the ipod. Raney was sitting in the chair with his .40 caliber FNP tucked into the cushion. Swinford was at the entertainment center near the end of the coffee table where his .45 caliber 1911 pistol was resting. The two of them were 6-8ft apart in the same room.

As the bickering continued, Raney became upset and threatened Swinford. According to Swinford, Raney advised him to "quit being a fucking badass" as he grabbed the grip of the .40 caliber pistol. At this moment in time, knowing all that he knew and with the reasonable belief that he was in imminent danger of death or great personal injury, Swinford reacted, grabbed his .45 caliber pistol, closed his eye's and fired the handgun until it was empty. He testified that he definitely seen Raney grab the gun, but was uncertain whether he had the opportunity to point it because his eye's were closed as he fired at Raney. He testified that he reacted to Raney's threat and fired the .45 in self-defense because he feared for his life.

Swinford admitted that he shot Raney and that Raney died as a result of the shooting. The disputed issue is whether he "intentionally" killed Raney or perceived a threat from Raney and acted to lawfully defend himself.

The State argued Raney was no threat because his hands were up, therefore, Swinford could not legally shoot him. 4RP 602. And because no threat apparently existed, the State alleged

Swinford "acted with the intent to cause the death of Mr. Raney (because he) shot him seven times and he died." 4RP 598.

The State's argument is inconsistent with the evidence and conflicts with itself. Absolutely no evidence was presented by the State that Raney's hands were up prior to the moment Swinford perceived an imminent threat. Recall, Flick testified that when he turned to grab his beer, he heard a gun cock and then shots. As he turned back, he observed Raney falling back in the chair with his hands up, but not up in defensive posture. As he reached for his beer and heard a gun cocking and shots being fired, all within seconds, he didn't see Raney's hands while he reached for the beer because his back was turned. 2RP 266-67, 281, 284.

Likewise, the State's expert's could not say where Raney's hands were prior to the shooting, 2RP 377, or whether or not he actually grabbed for the gun. 2RP 372. They admitted their conclusions were, at best, just speculation. Moreover, they could not conclude the order of shots in relation to the wounds Raney received, admitting that it would be pure speculation, as well. 2RP 353. See Moore, supra (mere possibility, speculation and conjecture, is not substantial evidence, and does not meet the requirements of due process - i.e., In re Winship); and Baeza, supra (evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt).

Consistent with this inconclusive evidence and Swinford's

testimony that Raney grabbed the gun, the State concedes that Raney did, in fact, grab the gun. The State argued that Swinford did "not shoot a round into the ceiling. He's not holding the gun saying, stop. He's not trying to get him to stop. He's murdering that young man." 4RP 596. Stop what? The only fact that could be drawn from this reference is that Raney reached for or grabbed the gun and Swinford owed him some kind of duty to order him to stop and/or to fire a warning shot.[6] In making this argument the State conceded the fact that Raney posed an imminent threat to Swinford; otherwise, why would it be necessary for Swinford to order Raney to stop or fire a warning shot.

It is undisputed that Raney had a fully loaded .40 caliber pistol at his side, and no one knows but Swinford if he grabbed it, not even the jury. The expert testimony surrounding blood spatter on the gun and whether Raney actually grabbed for it or not was pure conjecture. Once Raney threatened Swinford and reached for the gun, Swinford had the right to defend himself

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[6] Swinford's appellate counsel argued the "duty of care" issue was misconduct that misstated the law of self-defense and reduced the state's burden of proving the absence of self-defense. See Brief of Appellant, filed by Jennifer M. Winkler. In this brief, Swinford argues it was misconduct for the State to distort crucial facts related to the threat posed by Raney, which misstated the law, relieved the State of its burden of proof, and was prejudicial because the jury may have been misled to believe the law required Swinford, "while Raney grabbed for his gun," to fire a warning shot or order him to stop. See this SAG, B. ARGUMENT, Section (1)(a)(iii), pgs. 15-16.

with lethal force. Had Swinford hesitated for even a moment, there is a potential the inebriated Raney may have killed Swinford or caused him great personal injury. Surely the .40 caliber pistol at his side was fully capable of producing death in an instant. Nevertheless, the strongest point against intentional murder, but for self-defense, is the lack of probability that Swinford would murder his friend without a cause, put the gun down, and immediately dial 911. Viewing this evidence in the light most favorable to the State, the record supports the undeniable conclusion that Swinford acted with the reasonable belief of imminent harm from Raney. As such, no jury could have reasonably concluded that Swinford was guilty of second degree intentional murder. The State failed to prove the absence of self-defense beyond a reasonable doubt; accordingly, this Court should reverse and dismiss Swinford's conviction with prejudice.

4. MR. SWINFORD'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS VIOLATED BY THE COURT'S INSTRUCTIONS, WHICH AFFIRMATIVELY MISLED THE JURY ABOUT ITS POWER TO ACQUIT. U.S. Const. Amends. 6, 7, & 14; Wash. Const. article 1, sections 3 & 22 (Amend. 10).

As part of the "to convict" instructions used to convict Swinford, the trial court instructed the jury as follows: "If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty." CP 223; Instruction Nos. 8, 11 & 15; WPIC 27.02, 28.02 & 28.06. Swinford contends there is not

constitutional "duty to convict" and that the instructions accordingly misstate the law. The instructions violated Swinford's right to a properly instructed jury.[7]

a. Standard of Review. Constitutional violations are reviewed de novo. Bellevue School Dist. v. E.S., 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed de novo. State v. Bennett, 116 Wn.2d 303, 307, 165 P.3d 1241 (2002). Instructions must make the relevant legal standard manifestly apparent to the average juror. Kyllo, supra, 166 Wn.2d at 864.

b. The United States Constitution. The right to a jury trial in a criminal case was one of the few guarantees of individual rights enumerated in the U.S. Const. of 1789. It was the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. 3, section 2, paragraph 3; U.S. Const. Amends. 6 & 7. Thomas Jefferson wrote of the importance of this right in a letter to Thomas Paine in 1789: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can he held to the principles of its constitution." The Papers of Thomas Jefferson, Vol. 15, pg. 269 (Princeton Univ. Press, 1958).

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[7] Division One of the Court of Appeals rejected the argument raised here in its decision in State v. Meggyesy, 90 Wn.Ap. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). Swinford respectfully contends Meggyesy was incorrectly decided.

In criminal trial, the right to trial is fundamental to the American scheme of justice. It is thus further guaranteed by the due process clauses of the 5th and 14th Amendments. Duncan v. Louisiana, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); Pasco v. Mace, 98 Wn.2d 87, 94, 653 P.2d 618 (1982). Trial by jury was not only a valued right of persons accused of a crime, but was also an allocation of political power to the citizenry. Duncan v. Louisiana, 391 U.S. at 156.[8]

c. Washington State Constitution. The Washington Constitution provides greater protection to its citizens in some areas than does the U.S. Constitution. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Under the Gunwall analysis, it is clear that the right to jury trial is such in this area. Pasco v. Mace, supra; Sofie v. Fiberboard Corp., 112 Wn.2d at 656.

i. The textual language of the State Constitution. The drafters of our State Constitution not only granted the right to a jury trial, Cons. art. 1, section 22,[9] they expressly declared

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[8] In Sofie v. Fiberboard Corp., the majority saw this allocation of political power to the citizens as a limit on the power of the legislature. 112 Wn.2d 636, 650-53, 771 P.2d 711 (1989). Two of the dissenting members of the court acknowledged the allocation of power, but interpreted it rather as a limit on the power of the judiciary. Sofie, 112 Wn.2d 676 (Callow, C.J., joined by Dolliver, J., dissenting).

[9] The difference in language suggests the drafter meant something different from the federal bill of rights. See Hon. Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U.Puget Sound L.Rev. 491, 515 (1984)(Utter).

it "shall remain inviolate."

> The term "inviolate" connotes deserving of the highest protection.... Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees.

Sofie, 112 Wn.2d at 656. Article 1, section 21 "preserves the right (to jury trial) as it existed in the territory at the time of its adoption. Pasco v. Mace, 98 Wn.2d at 96; State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910). The right to trial by jury "should be continued unimpaired and inviolate." Strasburg, 60 Wash. at 115.

While the court in Meggyesy may have been correct when it found there is no specific constitutional language that addresses this precise issue, the language that is there indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

ii. State Constitutional and Common Law History. State Constitutional history favors an independent application of Article 1, sections 21 & 22. In 1889 (when the Const. was adopted), the 6th Amend. did not apply to the States. Instead, Washington based its Declaration of Rights on the Bill of Rights of other states, which relied on the common law and not the federal constitution. State v. Silva, 107 Wn.App. 605, 619, 27 P.3d 663 (2001)(citing Utter, 7 U.Puget Sound L.Rev. at 497. This difference supports

an independent reading of the Washington Constitution.

State common law history also favors an independent application. Article 1, section 21 "preserves the right as it existed at common law in the territory at the time of its adoption." Sofie, 112 Wn.2d at 645; Pasco v. Mace, 98 Wn.2d at 96; See also State v. Hubble, 126 Wn.2d 283, 299, 892 P.2d 85 (1995). Under the common law, juries were instructed in such a way as to allow them to acquit even where the prosecution proved guilt beyond a reasonable doubt. Leonard v. Territory, 2 Wash.Terr. 382, 7 Pac. 872 (Wash.Terr 1885). In Leonard the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. The court instructed the jurors that they "should" convict and "May find (the defendant) guilty" if the prosecution proved its case, but that they "must" acquit in the absence of such proof. Leonard, at 398-99. Thus, the common law practice 'required' the jury to acquit upon a failure of proof, and 'allowed' the jury to acquit even if the proof was sufficient.[10] Id.

The Court of Appeals in Meggyesy attempted to distinguish Leonard on the basis that the Leonard court "simply quoted the

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[10] Furthermore, the territorial court reversed all criminal convictions that resulted from erroneous jury instructions (unless they favored the defense). See e.g., Miller v. Territory, 3 Wash.Terr. 554, 19 P. 50 (Wash.Terr 1888); White v. Territory, 3 Wash.Terr. 397, 19 P. 37 (Wash.Terr. 1888); Leonard, supra.

relevant instruction...." Meggyesy, 90 Wn.App. at 703. But the Meggyesy court missed the point -- at the time the Constitution was adopted, courts instructed juries using the permissive "may" as opposed to the current practice of requiring the jury to make a finding of guilt as a "duty.' The current practice does not comport with the scope of the right to jury trial existing at that time, and should not be re-examined.

iii. Pre-existing State Law. In criminal cases, an accused person's guilt has always been the sole province of the jury. State v. Kitchen, 46 Wn.App. 232, 238, 730 P.2d 103 (1986); See also State v. Holmes, 68 Wash. 7, 122 P. 345 (1912); State v. Christianson, 161 Wash. 530, 297 P. 151 (1931). This rule applies even where the jury ignores applicable law. See e.g., Hartigan v. Washington Territory, 1 Wash.Terr. 447, 449 (1874)(the jury may find a general verdict compounded of law and fact, and if it is for the defendant, and is plainly contrary to the law, either from a mistake or a willful disregard of the law, there is no remedy). This is likewise true in the federal system. See e.g., U.S. v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969).

iv. Difference in Federal and State Constitutions' Structures. State constitutions were originally intended to be the primary devices to protect individual rights, with the U.S. Constitution a secondary layer of protection. Utter, 7 U.Puget Sound L.Rev. at 497; Utter & Pitler, "Presenting a State Constitutional

Argument: Comment on Theory and Technique," 20 Ind.L.Rev. 637 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. An independent interpretation is necessary to accomplish this end. Gunwall indicates that this factor will always support an independent interpretation of the State Constitution because the difference in structure is constant. Id., 106 Wn.2d at 62, 66; see also State v. Ortiz, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

v. Matters of Particular State Interest or Local Concern. The manner of conducting criminal trials in State court is of particular local concern, and also does not require adherence to a national standard. See, e.g., State v. Smith, 150 Wn.2d 135, 152, 75 P.3d 934 (2003); State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). Gunwall factors number six thus also requires an independent application of the State Constitutional provision in this case.

vi. An Independent Analysis is Warranted. All six Gunwall factors favor an independent application of Article 1, sections 21 & 22 of the Washington State Constitution in this case. The State constitution provides greater protection than the federal constitution, and prohibits a trial court from affirmatively misleading a jury about its power to acquit.

d. Jury's Power to Acquit. A court may never direct a verdict of guilty in a criminal case. U.S. v. Garaway, 425 F.2d

185 (9th Cir. 1970)(directed verdict of guilty improper even where no issues of fact are in dispute); Holmes, 68 Wash. at 12-13. If a court improperly withdraws a particular issue from the jury's consideration, it may deny the defendant the tight to jury trial. U.S. v. Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)(improper to withdraw issue of "materiality" of false statement from jury's consideration); see Neder v. U.S., 527 U.S. 1, 8, 15-16, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)(omission of element in jury instruction subject to harmless error analysis).

Also well-established is "the principle of noncoercion of jurors," established in Bushell's Case, Vaughan 135, 124 Eng.Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jury for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issue a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts. See generally Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U.Chi.L.Rev. 867, 912-13 (1994).

If there is no ability to review a jury verdict of acquittal, no authority to direct a guilty verdict, and no authority to coerce a jury in its decision, there can be no "duty to return a verdict

of guilty." Indeed, there is no authority in law that suggests such a duty:

> We recognize, ... the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence.... If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justify the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

U.S. v. Moylan, 417 F.2d at 1006.

Furthermore, if such a "duty" to convict existed, the law lacks any method of enforcing it. If a jury acquits, the case is over, the charge is dismissed, and there is no further review. In contrast, if a jury convicts when the evidence is insufficient, the court has a legally enforceable duty to reverse the conviction or enter a judgment of acquittal notwithstanding the verdict. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Green, 94 Wn.2d at 616.

Thus, a legal "threshold" exists before a jury may convict. A guilty verdict in a case that does not meet the evidentiary threshold is contrary to law and must be reversed. The "duty" to return a verdict of not guilty, therefore, is genuine and enforceable by law. A jury must return a verdict of not guilty if there is a reasonable doubt; however, it "may" return a verdict of guilty if, and only if, it finds every element proven beyond a reasonable doubt.

e. The court's instructions in this case affirmatively misled the jury about its power to acquit even if the prosecution proved its case beyond a reasonable doubt. The instructions given in Swinford's case did not contain a correct statement of the law. The court's use of the word "duty" in the "to convict" instruction conveyed to the jury that it 'could not' acquit if the elements had been established. This misstatement of the law provided a level of coercion for the jury to return a guilty verdict, deceived the jurors about their powers to acquit in the face of sufficient evidence, Leonard, supra, and failed to make the correct legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864. By instruction the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took away from the jury its constitutional authority to apply the law to the facts to reach its general verdict.

The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of the law, and was particularly prejudicial in Swinford's case -- where the jury may have felt coerced to convict even if they felt he was in imminent danger and reacted to protect himself. The jury could have believed the State proved its case and thus the law imposed a "duty" to convict him, even if they believed the particular facts didn't warrant a conviction for second degree murder. The instruction creating a "duty" to return a verdict of guilty took away from

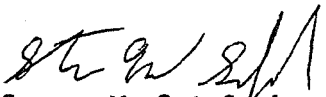
the jury its constitutional authority and prerogative to acquit Swinford. This affirmatively misled the jury of its power and failed to make the law manifestly apparent. The error violated Swinford's State and Federal constitutional right to a jury trial. Accordingly, his conviction must be reversed and the case remanded for a new trial. Hartigan and Leonard, supra.[11]

C. CONCLUSION

For the reasons stated, Swinford's conviction for second degree murder should be dismissed with prejudice because the State failed to prove the absence of self-defense, and that Swinford formed the necessary "intent" to kill Raney, while reacting to the imminent danger posed by his threat, beyond a reasonable doubt. Alternatively, the prosecutor's flagrant, prejudicial misconduct in closing argument misstated crucial evidence, misstated the law, and shifted the burden of proof, denying Swinford a fair trial. As a consequence, Swinford's conviction should be reversed and the case remanded for a new trial.

DATED this 4th day of November, 2012.

Respectfully Submitted,



Steven M. Swinford
Appellant, Pro Se

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[11] Unlike the appellant in Meggyesy, Swinford does not ask the court to approve an instruction that affirmatively notifies the jury of its power to acquit. Instead, he argues that the jurors should not be affirmatively misled. This question was not addressed in Meggyesy, thus the holding there should not govern here. The Brown court erroneously found that there was "no meaningful difference" between the two arguments. 130 Wn.App. 767, 771, 124 P.3d 663 (2005).

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State v. Steven Swinford

No. 30764-6-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 7th day of November, 2012, I caused a true and correct copy of the **Statement of Additional Grounds for Review** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Douglas Shae
Chelan County Prosecuting Attorney
Prosecuting.attorney@co.chelan.wa.us

Signed in Seattle, Washington this 7th day of November, 2012.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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