NO. 44135-7-II
Cowlitz Co. Cause NO. 11-1-01134-5

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CRYSTAL LUTTRELL,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
JASON LAURINE/ WSBA #36871
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Other Authorities

Rules

I. STATEMENT OF THE CASE

On November 6, 2011, Crystal Luttrell repeatedly hit Summer Baldwin in the face with beer bottle. RP 45. Luttrell and Baldwin had previously been in an altercation when the women worked at the Bottom's Up Tavern, in Portland, Oregon. RP 30, 53.

During that prior altercation, Baldwin was accused of using a racial slur towards one of Luttrell's friends. On November 6, Luttrell and several of her friends approached Baldwin, who was alone, outside, smoking. RP 39, 41-44. One of Luttrell's friends again accused Baldwin of using a racial slur. Backed by her friends, Luttrell got into Baldwin's face. RP 67-68. Baldwin was unable to leave, because these women had cornered her. RP 44. Baldwin pushed Luttrell away from her personal space. RP 66-67.

Luttrell had a beer bottle in her hand. She hit Baldwin with the bottle in the right eye, multiple times. RP 45-46, 69-70.

Brock Mudge, the bouncer at the bar, had watched the confrontation between the women. He never saw Baldwin strike, kick, or punch Luttrell. RP 66-70. He did however watch Luttrell hit Baldwin twice in the face before he was able react. When he went to separate

Luttrell from Baldwin, Luttrell hit him with the bottle when he placed himself between the two women. RP 71.

Luttrell immediately left the bar.RP 71. Baldwin, who was bleeding from a cut on her right eye, was unable to leave. RP 71. She was dizzy and severely injured, RP 48, 72 and was taken to the hospital. Mudge, who had seen both drunk people and people who had been assaulted, stated the dizziness was more consistent with being assaulted.

At the hospital, Baldwin was interviewed by Longview Police officer, Mike Maini. She told him about the interaction that night. She also told him about the altercation that happened a month ago. RP 123-24.

Detective Webb interviewed both women. When asked what happened, Luttrell immediately said: "I was attacked." RP 115. Detective Webb said that she did not look as if she had been attacked and that she had no marks on her. RP 115. Baldwin, on the other hand, did have swelling and bruising on her right eye, a swollen jawline, and appeared to be in pain. RP 115-17. Even though she had significant injuries, Detective Webb did not say she looked as if she had been attacked.

The State charged Luttrell with Assault in the second degree and, alternatively, Assault in the third degree. CP 1-2.

After jury selection, and before evidence was admitted, a juror informed the bailiff that she had overheard Luttrell wondering about why

"they were talking about strippers." RP 7-9. The Bailiff informed the court and the court brought up the issue with both attorneys and the defendant. The court determined that it would rather avoid putting undue emphasis on the issue. RP 9.

Regardless, evidence of strippers did come out at trial. This was in support of Luttrell's claim of self-defense. The first confrontation happened at a strip club in Portland, Oregon, where both women were dancing.

In her defense, Luttrell told her version of the events. RP 129-47. Her version of the events was different than the events described by both Baldwin and Mudge. She claimed that she had been corned by Baldwin and had no other choice than to hit her with a bottle.

At trial, the State argued that Luttrell did have other options than hitting Baldwin with a bottle. Based on the evidence, the State argued that she was the one who confronted Baldwin, that it was Baldwin who was corned, and that, like her friends, Luttrell could have left the situation before she chose to hit Baldwin with a beer bottle. RP 156-67, RP 181-88.

The jury found Luttrell guilty of both the Assault in the second degree charge and the Assault in the third degree charge. The court vacated the conviction for Assault in the third degree. RP 188-90.

II. ISSUES

1. Did the trial court's instructions to the jury relieve the State of its burden of proof when it accurately described that burden and the law of self-defense, without making an impermissible comment on the evidence?

2. Did the trial court abuse its discretion when, after a juror informed the court it overheard Luttrell ask why there was a discussion of stripping during voir dire, it admonished Luttrell to keep her conversations outside the presence of the jurors rather than holding a hearing that would place undue emphasis on a topic that eventually came out during evidence.?

3. Did the court abuse its discretion when it permitted Detective Webb and Brock Mudge to testify based on their training and experience about the observations they made of the injuries sustained by Baldwin and Luttrell?

4. Did the State commit misconduct when it made arguments based on reasonable inferences taken from the facts that came out at trial, was not permitted to make enquiries of Luttrell regarding the inconsistencies between her

testimony and that of Mr. Budge, and properly argued from correct self-defense instructions?

5. Did Luttrell receive ineffective assistance of counsel when her trial counsel objected to testimony that was not impermissible opinion testimony, objected to the State's enquiry of Luttrell and the inconsistencies between her testimony and Mr. Mudge, and did not ask the trial court to make an impermissible comment upon the evidence through an incorrect self-defense instruction no proffered by appellate counsel?

III. ANSWERS

1. No. The court's instructions to the jury properly related the law of self-defense and did not relieve the State of its burden of proof.

2. No. The trial court has wide discretion to determine what steps are to be taken to prevent juror taint.

3. No. Witnesses are allowed to testify to their observations and give opinions so long as not on an ultimate issue.

4. No. The State's arguments were based on the appropriate law and reasonable inferences of facts that came out at trial.

5. No. Defense counsel's representation was not deficient and did not prejudice Luttrell.

IV. ARGUMENT

1. The trial court properly advised the jury of law on self-defense.

Challenges to jury instructions are reviewed de novo and the court should evaluate the challenged instruction in context of the instructions as a whole. *State v. Knutz*, 161 Wn.App. 395, 403, 253 P.3d 437 (2011) (*quoting State v. Benn*, 120 Wn.2d 631, 654-55, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993)). Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *Knutz*, 161 Wn.App. at 403, 253 P.3d 437 (*quoting State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010)).

To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable

doubt. *State v. Walden*, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997). The degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. *Walden*, 131 Wn.2d at 474, 932 P.2d 1237.

When non-deadly force is at issue, RCW 9A.16.020(3) instructs that a person is entitled to act in self-defense when she reasonably apprehends that he is about to be injured. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Jury instructions on self-defense must more than adequately convey the law. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). They must make the relevant legal standard manifestly apparent to the average juror. Id. A jury instruction on self-defense that misstates the harm that the person must apprehend is erroneous. *Walden*, 131 Wn.2d at 477-78.

In the present case, the jury was instructed on self-defense in several instructions. While Luttrell focuses on Instruction 17, which accurately reflects the law in instances when a person acts with non-deadly force, she disregards the mandate that jury instructions be read as a whole. Here, the self-defense instructions are not limited to only Instruction 17, but also include Instructions 18, 19, and 20. Each of those instructions further describes the standard of self-defense and the burden

the State must overcome in order to prove beyond a reasonable doubt the absence of self-defense.

Instruction 17 informed the jury of the basic defense of self-defense. It stated that

> It is a defense to a charge of assault in the second degree, and assault in the third degree, as well as the lesser included offense of assault in the fourth degree that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

Instruction 18 defined the word "necessary" as found within the second paragraph of Instruction 17. It stated that

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2)

the amount of force used was reasonable to effect the lawful purpose intended.

Instruction 19 described how a defendant can act on appearances regardless of whether those appearances may be mistaken. It informed the jury that

> A person is entitled to act on appearances in defending himself if that person believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

The jury was then instructed of the additional prescriptions for self-defense and lawfulness. Instruction 20 informed them that

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

Luttrell's defense turned on the fact the victim had assaulted her in the past. She acknowledges that defense counsel argued this fact to the jury on several occasions during closing remarks. However, Luttrell argues it was error to not instruct the jury on the importance of that prior

assault. She claims that the language "the person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident" was inadequate, and that the court should have made a comment on the evidence.

A trial judge is prohibited by Article IV, Section 16 of the Washington Constitution from conveying to the jury his or her personal attitudes toward the merits of the case. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (*quoting State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)) (*citing* Wash. Const. art. IV, § 16). To constitute an improper comment on the evidence, the court need not have expressly conveyed to the jury its personal feelings on an element of the offense; it is sufficient if these feelings are merely implied. *Levy*, 156 Wn.2d at 721.

A jury instruction that states the law correctly and concisely and is pertinent to the issues of the case does not constitute a comment on the evidence. *State v. Johnson*, 29 Wash.App. 807, 811, 631 P.2d 413 (1981). But an instruction that directs the jury to specific evidence would.

Had the trial court drawn specific attention to a prior confrontation between the victim and Luttrell, it would have made an implied comment on the importance of that evidence, if not an overt comment on its

importance. This would have been error. Here, the court's instructions to the jury were sufficient, they allowed counsel to argue their theory of the case, and they were without comment on the evidence. Therefore, Luttrell's request for reversal on these grounds should be denied.

2. The trial court did not abuse its discretion when it chose to not bring undue attention to issues that would eventually come out at trial.

Luttrell argues that she was not afforded a fair trial because a juror overheard a discussion she had. The juror informed the bailiff that she overheard the Luttrell speaking in the hallway, questioning why anyone would bring up the issue of strippers. Now, Luttrell claims this conversation was about information regarding an alleged assault during her time as a stripper. The record does not reflect that assertion. RP7-8.

After considering the information provided to it by the bailiff, the trial court ensured that no further and undue emphasis was placed on the issue of stripping and used its discretion in dealing with the situation. Indeed, the trial court relied upon its continued admonishments to the jurors and other participants throughout the trial to provide assurances that no person was allowed to speak with or consult outside resources regarding this case. RP 84.

Trial judges are afforded considerable discretion in determining what steps, if any, are required to make certain that a jury has not been tainted. Any review of a trial court's refusal to hold a hearing should be reviewed for abuse of discretion. *United States v. Schoppert*, 362 F.3d 451, 459 (8th Cir.2004).Trial judges are in a unique position to ascertain an appropriate remedy, having the privilege of continuous observation of the jury in court. *United States v. Peterson*, 385 F.3d 127, 134 (2nd Cir.2004). In Washington, while this issue appears to be one of first impression, courts do apply the abuse of discretion standard when reviewing the removal of a juror from deliberations based on issues of taint. *See State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2005) (reviewing for abuse of discretion of trial court's decision to dismiss juror who refused to convict); *State v. Jorden*, 103 Wash.App. 221, 226, 11 P.3d 866 (2000) (reviewing a trial court's decision, before deliberations, to dismiss a juror for inattentiveness).

Here, the trial court chose not to place any undue emphasis on the issue and allow the facts to come out during trial rather than taint those facts prior to their admission into evidence. In Federal cases, a defendant is not entitled to a hearing regarding potential jury taint. Before an evidentiary hearing is determined appropriate, a defendant must make a showing that his allegation is credible and that the prejudice alleged is

serious enough to warrant whatever action is requested. *Schoppert*, 362 F.3d 451 at 459.

In the case of extrinsic contact, a presumption of prejudice does not apply unless the extrinsic contact relates to factual evidence not developed at trial. *United States. v. Hall*, 85 F.3d 367, 371(8th Cir.1996) (*citing United States v Cheyenne*, 855 F.2d 566, 567 (8th Cir.1988). Assuming the juror did hear a conversation about a fight that occurred during Luttrell's years as a stripper, that juror also heard that same evidence during the trial. In fact, there was in-depth inquiry into that prior fight during direct and cross examination of the victim, Summer Baldwin, and of Luttrell. Nothing regarding the interaction and relationship between Luttrell and the victim was withheld from the jury. Moreover, any evidence connected with stripping was circumstantially connected to Luttrell's claim of self-defense. She used the prior confrontation between herself and the victim as evidence to support the reasonableness of her fear that she was about to be assaulted.

In *Hall*, where, at the time of sentencing the district court was informed by a single affidavit that a juror made her decision based on extrinsic evidence overheard and not admitted during the course of trial, the district court summarily ordered a new trial without first holding a hearing. The Court of appeals remanded the case to the district court for a

hearing because it felt the remedy was ordered based on insufficient evidence. 85 F.3d at 369. In order to impeach a jury's verdict, a defendant must produce evidence not barred and sufficient to prove grounds recognized as adequate to overturn the verdict. Id. at 370. The court held that a presumption of prejudice does not apply if extrinsic contact relates to evidence developed at trial. Id. at 371.

In *Schoppert*, where the defendant argued that he was denied his sixth amendment right to a fair trial when the jury possibly overheard bench conferences between the trial court and the attorneys, the Court held the defendant asked them to rule on a speculative theory. While a district court may hold a hearing to determine whether any private communications may have tainted a jury and prejudiced a defendant, trial judges are afforded considerable discretion in determining what steps, if any, are required to make certain that a jury is not tainted. 362 F.3d at 459.

In this case, because the trial had not commenced, the trial court determined that a better course to take was to persist with the continued admonishments that they are not to discuss the case with anyone. In addition, the jury is assumed to follow the jury instructions. Those instructions contained specific admonishments, sufficient to ensure they were not influenced by outside sources. Indeed, Instruction 1, WPIC 1.04, as read to the jury, instructed them:

> It is your duty to decide the facts of this case based upon the evidence presented to you during this trial. It is also your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.
>
> ....
>
> The evidence that you are to consider during your deliberations consists of the testimony that you have heard from the witnesses, stipulations and the exhibits that I have admitted during the trial. If evidence was not admitted or stricken from the record, then you are not to consider it in reaching your verdict. JURY INSTRUCTION 1

In addition to the continued admonishments, the jury was instructed on what evidence was to be considered in their deliberations. In this case, the topic of the issue brought before the court was discussed thoroughly in direct and cross examinations. Indeed, it was not evidence or an issue that was withheld from the jury's prevue. Consequently, the trial court did not abuse its discretion because there was no presumption of prejudice in this area of enquiry.

3. The court did not abuse its discretion when it admitted both Brock Mudge's and Detective Webb's observations of the injuries sustained by Baldwin and Luttrell.

In general, Appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125

(2007). RAP 2.5(a). But a party can raise an error for the first time on appeal if it is a manifest error affecting a constitutional right. *Kirkman*, 159 Wn.2d at 926, 155 P.3d 125; RAP 2(a)(3). Luttrell must show the constitutional error actually affected her rights at trial, thereby demonstrating the actual prejudice that makes an error "manifest" and allows review. *Kirkman*, 159 Wn.2d at 926-27. The manifest constitutional error exception to waiver of review is narrowly drawn and typically requires an explicit or nearly explicit statement on an ultimate issue. *Kirkman*, 159 Wn.2d at 936, 155 P.3d 125.

If a court determines the claims raises a manifest, constitutional error, it may still be subject to the harmless error analysis. *Id.* at 927, 155 P.3d 125.

Opinion testimony regarding a defendant's guilt is reversible error if the testimony violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *Kirkman*, 159 Wn.2d at 926-27. Generally, no witness may offer testimony in the form of opinion regarding the guilt or veracity of the defendant. That sort of testimony invades the exclusive province of the jury and is unfairly prejudicial to the defendant. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Neither a lay nor an expert witness may testify to his opinion as to the guilt of a defendant, whether by direct

statement or inference. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a manifest, constitutional error. *Kirkman*, 159 Wn.2d at 936. However, an explicit or nearly explicit opinion on the defendant's guilt or victim's credibility can constitute manifest error. Id.

A law enforcement officer's opinion testimony may be especially prejudicial because the officer's testimony often carries a special aura of reliability. *Kirkman*, 159 Wn.2d at 928, 155 P.3d 125.

a. The testimony of Brock Mudge was based on his training and experience and did not encompass an ultimate issue.

A trial court's ruling on the admissibility of opinion evidence is reviewed for abuse of discretion. *Demery*, 144 Wn.2d at 758.

Brock Mudge was the bouncer present at the time Luttrell assaulted the victim. He testified that he watched the Luttrell swing a beer bottle at the victim a number of times, that he broke up the altercation, and that he then cared for the victim following the altercation. RP 63-86. He also testified that the victim never swung a fist at Luttrell, never swung a bottle at Luttrell, and never punched or kicked Luttrell. His testimony

never approached the ultimate issue—whether Luttrell was guilty of assaulting the victim—it remained focused on his observations.

During cross examination, defense counsel opined in a question that alcohol intoxication could cause people to be dizzy or sway. RP 77. Mr. Mudge agreed. On re-direct, the State inquired about that line of questioning. RP-82. The State laid a foundation to show that Mudge understood the difference between alcohol-induced dizziness and dizziness caused by being hit with a bottle, and he based it on his training and experience. The testimony was based on his observations of the victim prior to the incident, her actions after the incident, and the observed changes in her behavior. RP 83.

Evidence Rule (ER) 701 allows testimony as to "opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Similarly, ER 704 provides that "testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Case law establishes that the limits of ER 701 and ER 704 are exceeded when a witness testifies in the form of an opinion regarding guilt of the defendant, because such an opinion invades the exclusive province of the jury. *Demery*, 144 Wash.2d at 759, 30 P.3d 1278

(*quoting City of Seattle v. Heatley*, 70 Wash.App. 573, 577, 854 P.2d 658 (1993). However, testimony that is based on inferences from the evidence is not improper opinion testimony. *Heatley*, 70 Wash.App. at 578, 854 P.2d 658. The fact that an opinion supports a finding of guilt does not make the opinion improper. *State v. Collins*, 152 Wash.App. 429, 436, 216 P.3d 463 (2009).

Here the testimony may have been in the form of opinion, but it was not an opinion that encompassed the ultimate issue of whether Luttrell was guilty of the assault. It related firsthand observations of the assault as it occurred and observations of the victim's behavior following. As a lay witness Mr. Mudge was allowed to make inferences based on his training and experience. ER 701. Moreover, as a witness to the actual crime he was allowed to relate those observations to the jury. ER 602.

Luttrell has failed to show 1) that the testimony was inappropriate, 2) that it was impermissible opinion testimony that encompassed an ultimate issue, and 3) that she suffered actual prejudice from the testimony. Therefore, Luttrell failed to show manifest error.

b. The testimony of Detective Webb was not an expression of opinion.

Detective Webb testified about the investigation he performed. He testified to the observations he made of both Luttrell and of the victim in

this case. RP 115-16. Luttrell claims that Detective Webb testified as to who was attacked. This claim is meritless.

It is true, that a law enforcement officer's opinion testimony may be especially prejudicial because the officer's testimony often carries a special aura of reliability. *Kirkman*, 159 Wn.2d at 928, 155 P.3d 125. But here, Detective Webb testified only about his observations of the two individuals involved in the altercation. He testified that he interviewed Luttrell and, when she was asked what happened, Luttrell immediately stated that she had been attacked. RP 114-15. When asked if Luttrell appeared as if she had been attacked, Detective Webb stated she did not. He said she did not have any cuts, bruises, scratches, swelling around her face, defensive marks on her arms or hands, and that she had no obvious signs of an attack. When asked about the victim in this case, he said that she had a lot of bruising on the right side of her face.

Again, Detective Webb did not give an opinion on any evidence. testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony. *State v. Sanders*, 66 Wash.App. 380, 832 P.2d 1326 (1992); Heatley, 70 Wn.App. at 660-61; *see also State v. Jones*, 59 Wash.App. 744, 801 P.2d 263 (1990), *review denied*, 116 Wash.2d 1021, 811 P.2d 219 (1991) (in

manslaughter case, an expert's opinion based on physical evidence that injuries not accidental did not constitute inadmissible opinion on guilt). The trial court must be afforded broad discretion to determine the admissibility of ultimate issue testimony. *Jones*, 59 Wash.App. at 751, 801 P.2d 263. Indeed, appellate courts will not take an expansive view of claims that inferential testimony constitutes an opinion on guilt. *See State v. Wilber*, 55 Wash.App. 294, 298, 777 P.2d 36 (1989) (analyzing officers' testimony that "inferentially" constituted opinion on guilt as expert testimony under ER 702).

Here, Detective Webb provided his observations of any injuries he saw on the two women. He neither spoke of Luttrell's guilt or her veracity. *Demery*, 144 Wn.2d at 759. And he did not speak to his opinion as to her guilt by inference. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). These observations were also supported by other testimony by other witnesses. Mr. Mudge described the blood that came from the victim's face, and the victim, Summer Baldwin, also described the bruising and the cuts to her face. Detective Webb's testimony did not inject his opinion in to the evidence, but merely described his observations. Consequently, Luttrell has failed to show how his testimony was impermissible opinion.

4. Luttrell has not established prejudice and has not shown prosecutorial misconduct.

To prevail on a claim of prosecutorial, Luttrell must establish that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Luttrell establishes prejudice by proving there is a substantial likelihood that the instances of alleged misconduct affected the jury's verdict. *Magers*, 164 Wn.2d at 191, 189 P.3d 126.

Where a defendant objected to an alleged instance of misconduct, the court should evaluate the trial court's ruling for abuse of discretion. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006).

The failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) *cert denied*, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995).

a. Luttrell was not permitted to testify on the credibility of another witness.

Luttrell claims the State committed misconduct when it began an enquiry into the differences between her testimony and that of Mr. Mudge. This was not an improper enquiry, nor was it misconduct.

It is prosecutorial misconduct to ask a witness whether another witness is lying. *State v. Wright*, 76 Wash.App. 811, 821, 888 P.2d 1214 (1995). However, a prosecutor does not commit misconduct by asking a witness whether another witness was mistaken. Such questions do not have the potential to prejudice the defendant or show her in a bad light. *Wright*, 76 Wn.App. at 822. Regardless of these restrictions, the State is permitted to vigorously cross-examine a defendant in the same manner as any other witness who has voluntarily asserted there right to testify. *State v. Ethridge*, 74 Wn.2d 102, 113, 443 P.2d 536 (1968); State v. Graham, 59 wn.app. 418, 427, 798 P.2d 314 (1990).

In *State v. Ramos*, 164 Wn.App. 327, 334-35, 263 P.3d 1268 (2011), the court held that asking the defendant whether another witness had a reason to testify untruthfully was improper, but not so flagrant and ill-intentioned that an instruction to the jury could not have cured any prejudice. There the prosecution asked the defendant whether a particular

witness had any reason to make up anything untrue about him. After objection, the prosecutor asked the defendant if he could think of any reason why that witness might be making up something untrue about him. 164 Wn.App. at 334. While not objected to, the court did find that prosecutor committed misconduct because it was asking a witness if another witness lied. Id. at 335.

In the current case, the State did not ask Luttrell whether another witness lied, or whether another witness had reason to lie. The State did attempt to discuss the inconsistencies between Luttrell's testimony and Mudge's testimony, because the testimony from both witnesses was inconsistent. The State can inquire about those inconsistencies in testimony; especially if the State does not enquire of the defendant about whether or not a particular witness was lying. However, due to sustained objections, the State was not permitted to even enquire about the inconsistencies between Luttrell's and Mudge's testimony.

Consequently, Luttrell has not shown how the State's enquiry requested testimony on another witness's veracity. Moreover, if considered misconduct, the timely objection by defense counsel was enough to cure any problem that may have arisen from the State's line of enquiry. *State v. Neidigh*, 78 Wn.App. 71, 77, 895 P.2d 423 (1995). Though the State did not ask liar type questions, those type of questions

are found to be harmless if they are not so egregious as to be incapable of cure by an objection and an appropriate instruction to the jury. *Neidigh*, 78 Wn.App. at 77.

b. The State is allowed to make an argument based on reasonable inferences.

Because Luttrell argues that the State made improper arguments during closing, she bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. *Russell*, 125 Wn.2d at 85, 882 P.2d 747; *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986). Alleged improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Graham*, 59 Wn.App. 418, 428, 798 P.2d 314 (1990).

Luttrell claims that the State made an improper argument when it described how the event could be viewed; how Luttrell continued to attack the victim, even after being pulled apart from her, and how she was using the bottle to attack the victim. A prosecutor enjoys wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on the evidence. *State v. Lewis*, Wn.App. 230, 240, 233 P.3d 891 (2001).

Taken by itself, as Luttrell would expect the court to do, the comment "so, she's now moved from a swinging, punching motion to a stabbing motion," might suggest that the State is implying the defendant stabbed the victim. But the statement shall not be reviewed alone; it must be reviewed in context with the entire argument. When done so, the comment is understood to describe the use of the bottle and how it was intentional.

Luttrell was charged with Assault in the second degree and, alternatively, assault in the third degree. The State had to prove intent for Assault in the second degree, but also criminal negligence for assault in the third degree. With each crime, the State was also required to show that Luttrell committed the assault with a weapon. The State's argument described the intentional acts of swinging, punching, and stabbing with the bottle, describing how the beer bottle was used as a weapon in this case. RP 158-161.

These statements were reasonable inferences taken from the testimony that was admitted into evidence. The State based its arguments not only on the multiple times Luttrell struck the victim with the bottle until it broke, cutting her face, but also Mudge's description of the cuts he received on his arm from Luttrell as she swung the broken beer bottle. The way he received those cuts would indicate that he was not sliced, but

stabbed. In this regard, the State argued that a person who knows they have a beer bottle in their hand and they hit someone with that bottle, were intentionally assaulting another person with a weapon.

Based on that evidence and the issues within the case, the State's argument was permissible and not ill-intentioned. Consequently, Luttrell failed to show how the argument was misconduct.

c. The State is permitted to argue its theory of the case based on all instructions associated with the defense of self-defense.

Luttrell also claims the State committed misconduct when it referred the jury to two specific instructions on self-defense, and then made a reasonable argument from those instructions. Luttrell claims the arguments based on the jury instructions mischaracterized self-defense.

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). There is a substantial likelihood that the misstatement affected the jury verdict and the defendant was denied a fair trial when the prosecutor mischaracterizes the law. *State v. Gotcher*, 52 Wn.App. 350, 355, 759 P.2d 1216 (1988).

The State's argument was based on two instructions. Instruction 17 stated that a person is allowed to use force when it is lawful and "when it is not more than is necessary." This instruction should be read in

conjunction with Instruction 18. Instruction 18 defines "necessary." It means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

While a person who is being attacked has no duty to retreat, the right is qualified. The State was merely pointing out the fact that there were reasonable alternatives available to Luttrell in that instance other than the use of force. RP 163-66. This is a reasonable argument, and, while not an argument in accordance to Luttrell's theory of the case, is a reasonable interpretation of the facts that came out at trial.

Evidence was introduced that Luttrell and several other women cornered Baldwin. Evidence was also presented to the jury that the women, who accompanied Luttrell when she approached Baldwin, left when a verbal confrontation developed. The State is permitted to suggest that leaving the situation was a reasonable alternative to assaulting Baldwin with a beer bottle. In context, the State pointed to those reasonable alternatives available to Luttrell.

With self-defense, once it has been claimed, it is upon the State to prove that it does not exist beyond a reasonable doubt. It is unreasonable to think that the State should not be allowed to comment upon and argue

from the law and how it applies to the facts as they were developed at trial. This is what the State did. The arguments made were not ill-intentioned, designed to inflame the passions and prejudice of the jury, nor were they misstatements of the law. *State v. Brett*, 126 Wn.2d 136, 179, 892 P.2d 29(1995).

5. Defense counsel's performance was not deficient and did not prejudice her.

In order to establish ineffective assistance of counsel, Luttrell must establish that her attorney's performance was deficient and the deficiency prejudiced her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). If either element of the test is not satisfied, the inquiry ends. *Hendrickson*, 129 Wn.2d at 78, 917 P.2d 563.

Deficient performance is performance falling below an objective standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). There is a presumption that counsel's performance was reasonable. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). When counsel's conduct can be characterized as legitimate trial strategy or

tactics, performance is not deficient. *Hendrickson*, 129 Wn.2d at 77-78, 917 P.2d 563; *McFarland*, 127 Wn.2d at 336, 899 P.2d 1251.

In order to show prejudice, Luttrell must prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). She only accomplishes that if she can show that her counsel's errors were so serious they deprived her of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made only when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

a. Defense counsel objected to and prevented any testimony that could be considered opinion testimony from entry into evidence.

Luttrell first argues that defense counsel's performance was deficient because he failed to object to inadmissible opinion testimony. In order to prevail on this issue, Luttrell must first show that the testimony was inadmissible. She failed to do so. *See above*.

She must then show that his failure to object to admissible testimony was deficient and that it prejudiced her. If testimony is admissible, it is not objectionable.

While trial counsel objected to Budge's testimony, the trial court used its discretion and allowed the testimony into evidence. That is an issue of abuse of discretion, not one of ineffective assistance of counsel. Regardless of that standard, Budge's testimony was not inadmissible opinion testimony.

Moreover, neither was Detective Webb's. Detective Webb testified about his observations, not Luttrell's guilt or veracity. Consequently, that testimony was admissible and would have still been admitted had defense counsel objected.

b. Defense counsel understood that the trial court could not comment upon the evidence and that any self-defense instruction that included mention of prior acts would have been a comment on the evidence.

This is a meritless claim. The court read to the jury the appropriate set of instructions for self-defense. Appellate counsel claims the instructions were inappropriate because they did not comment on the actual evidence that substantiated Luttrell's fear. Any comment by a trial court on the evidence is impermissible. Not only is trial counsel's reluctance and failure to request such an improper instruction considered reasonable, it was an example of his understanding of the standards of trial advocacy.

c. Defense counsel conducted a proper defense of Luttrell and held the prosecutor to his job.

Again, defense counsel is presumed to be reasonable. A presumption which assumes that defense counsel has an understanding of how closing remarks play out. Attorneys are permitted to make reasonable inferences based on the facts that came out during trial. Luttrell seems to confuse the development of argument and the development of fact. Consequently, she has not pointed to any facts that were argued that were never admitted into trial. Moreover, she cannot show how her defense counsel was deficient and how his deficient performance prejudiced her at trial. Because of this, the enquiry should end.

V. CONCLUSION

Based on the above, the State respectfully requests the Court affirm Luttrell's conviction for Assault in the second degree.

Respectfully submitted this 1 day of August, 2013.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By: _____
JASON LAURINE WSBA#36871
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Jodi R. Backlund
Attorney at Law
P.O. box 6490
Olympia, WA 98507
backlundmistry@gmail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on August 15, 2013.

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

August 01, 2013 - 3:01 PM

Transmittal Letter

Document Uploaded: 441357-Respondent's Brief.pdf

Case Name: State of Washington v. Crystal Luttrell

Court of Appeals Case Number: 44135-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: **sasserm@co.cowlitz.wa.us**

A copy of this document has been emailed to the following addresses:
backlundmistry@gmail.com