No. 46638-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

COLE RIFE,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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II. STATEMENT OF THE CASE

Logan Crump was a 19 year old who played baseball for Centralia Community College. RP 62-63.[1] On March 16, 2014 Logan[2] went to 512

[1] The verbatim report of proceedings have two separate paginated set of proceedings. The trial proceedings, minus the voir dire, will be cited as RP. The voir dire portion will be cited as VRP.

[2] The State will refer to Logan Crump by his first name to avoid confusion because Logan's mother, Sheila Crump, also testified, no disrespect intended.

Maple Street to pick up a friend who had been drinking at a party. RP 62. Logan had not consumed any alcohol. RP 62.

Logan arrived at the house, and while outside, he talked with some people he had played baseball with. RP 64. The group heard screaming from down the street. RP 64. According to Logan, he was getting ready to leave when he heard the screaming. RP 65.

According to Connor Atchison, Connor Reopelle and Ryan Smolko, other people at the party, a number of people showed up at the party who were not invited and were told to leave. RP 132-33. Cody Sanchez had received a call or text message from his girlfriend, Erica Brower, who was at the house, and Mr. Sanchez and his friends, Cole Rife, Bo Rife, Tennessee Wordingham, Michael Taylor, Thomas Woo and Tyler Burk went to the house to retrieve Ms. Brower. RP 87-89, 226, 257-58, 280, 302, 315. Mr. Burk believed Mr. Sanchez was upset that Ms. Brower was at the party and went over to the house intending to get into a fight. RP 88.

Christie Huff, who lives across the street from the house, saw a truck pull up, a man get out of the truck, and come screaming down the street, apparently upset about someone's girlfriend being at the house. RP 150. Ms. Huff saw the man pounding on the door screaming for people to let them in and the people in the house refusing to let him inside. RP 151.

Cole Rife was identified as the person walking up the street screaming. RP 64. Mr. Smolko, the owner of the house, told Rife to leave. RP 173-74. Rife was yelling, trying to get Mr. Smolko and Mr. Reopelle to fight. RP 165-66, 174. The people in the house decided to close the door because the people outside were getting aggressive and would not leave. RP. 164.

When Rife walked up he said, "I'm Cole motherfucking Rife." RP 65, 135, 164, 272, 304. Rife asked "which one of you wants to roll?" RP 275. Mr. Reopelle and Rife had words, then, for whatever reason, as Logan went to leave, Rife came up to Logan and asked Logan if he wanted to fight. RP 66. Logan responded, no. RP 66. Rife appeared livid. RP 66.

Rife swung at Logan hitting him in the face. RP 67-68, 91-92. Logan placed Rife in a headlock and Rife pulled Logan's legs out from underneath him and both men fell to the ground. RP 68, 92. Rife got on top of Logan, straddling him, and punched him while Logan was trying to cover his face to block the punches RP 68, 92-93. Rife punched Logan 10 to 15 times in the face. RP 69. Logan also was kicked twice in the face and once in the chest. RP 68.

Mr. Burk grabbed Rife from behind and pulled Rife off of Logan but Rife shook Mr. Burk off. RP 93-94. Rife then kicked Logan in the

face, stomping down directly on Logan's face. RP 94. Mr. Burk and Rife also tried to get into the house by kicking the door, but were unsuccessful. RP 72, 96, 137, 164.

As a result of the beating, Logan suffered serious injuries to his face. RP 70-72, 125. Logan's jaw was broken on the lower left side and had to be wired shut for six weeks. RP 69-70-71, 125. Logan's teeth were chipped. RP 70. Logan had a laceration to his upper left eyebrow and received five stiches. RP 69-70, 125. Logan had a bruise on his chest. RP 125. Due to his mouth being wired shut for six weeks, Logan lost 40 pounds, was unable to play baseball and lost his scholarship. RP 63, 125.

On April 15, 2014 The State charged Rife with one count of Assault in the Second Degree. CP 1. A Second Amended Information was filed on July 3, 2014 charging Count I: Assault in the Second Degree and Count II: Attempted Burglary in the First Degree. CP 9-10. On July 17, 2014 the State filed a Third Amended Information charging Count I: Assault in the Second Degree, Count II: Attempted First Degree Burglary, and Count III: Tampering with a Witness. CP 12-14. On July 18, 2014 the State filed a Memorandum in Support of a Motion to Amend to Include One Count of Tampering with a Witness. Supp. CP State's

Memorandum.[3] Over Rife's trial counsel's objection, the trial court allowed the State to proceed to trial on the Third Amended Information. RP 4-18. Rife elected to have his case tried to a jury. See RP.

At trial, Rife testified that he and his friends went to the party to pick up Mr. Sanchez's girlfriend and thought it would be okay if they joined the party at the house. RP 315. Rife explained that he, Ms. Wordingham and Mr. Sanchez went inside the house when they arrived and he introduced himself to the people by saying, "I'm Cole Rife, from Chehalis." RP 316. Rife said something went on between Mr. Sanchez and Ms. Brower and it got awkward but no one told them to leave. RP 316-17. According to Rife some of the kids at the party then started insulting him, calling him a "pussy" and telling him to leave. RP 319. Rife admitted he started saying the same thing back to Mr. Reopelle. RP 319. Then, according to Rife, Logan said something to him, so Rife turned his attention to Logan and Logan pushed Rife. RP 320.

Rife testified he pushed Logan back and then Logan punched Rife in the face. RP 321. Rife said he ran at Logan, who then grabbed Rife in a headlock. RP 322-23. Then, Rife explained, another kid jumped on Rife's back and began choking him. RP 323. Rife did state he was the only person who touched Logan, but denied breaking his jaw or kicking him.

[3] The State will be filing a Supplemental Clerk's papers to include the State's Memorandum in Support of Motion to Amend to Include Tampering with a Witness.

RP 350. Rife said he did not touch the door of the house except when he turned the doorknob when they entered the house initially. RP 332. Rife also said he called Logan because he felt bad about his injuries and offered to help Logan financially. RP 328-29.

Bo Rife, Rife's older brother, also testified. RP 223. Bo explained Logan hit Rife first after yelling and getting in Rife's face. RP 229. But Bo also stated he did not see anyone punch each other. RP 230. Bo testified that it was Mr. Burk that kicked Logan in the face and stomped him while he was on the ground. RP 232. Bo claimed he was the one who broke up the fight and helped Logan to the porch. RP 232-33. This testimony was contrary to what Bo had told Officer Weismiller when he arrived on the scene the night of the incident. RP 399-400. Bo told Officer Weismiller that Rife had attacked Logan because Logan had said something to Rife he did not like and Rife beat Logan up. RP 400.

Rife was found guilty of Count I: Assault in the Second Degree, Count II: Attempted Burglary in the First Degree, and not guilty of Count III: Tampering with a Witness. CP 65, 67, 68. Rife was sentenced to 19.5 months in prison. CP 73. Rife timely appeals his conviction. CP 81.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE THE APPEARNCE OF FAIRNESS DOCTRINE.

Rife asserts the trial court violated the appearance of fairness doctrine due to the trial judge's personal relationship with Rife's family. Brief of Appellant 12-16. Rife argues there are many ways the relationship the trial judge had with Rife's family may have manifested bias against him, and therefore this Court should order a new trial. The appearance of fairness doctrine was not violated and this Court should affirm Rife's convictions.

1. Standard Of Review.

The appearance of fairness doctrine, and whether a judge should be disqualified based upon if the judge's impartiality may reasonably be questioned, is an objective test. *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010). An appearance of fairness claim will not succeed without evidence of actual or potential bias because the claim would be without merit. *Id.*

2. Judge Brosey Did Not Violate The Appearance Of Fairness Doctrine.

A criminal defendant has a constitutional right to a fair trial by an impartial judge. U.S. Const. amends. VI, XIV; Const. art. I, § 22. The law requires more than just impartiality, the law requires a judge to also appear

impartial. *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (quotations and citations omitted). It is presumed that a judge acts without prejudice or bias. *Swenson*, 158 Wn. App. at 818. Judges are also required to disqualify themselves from a proceeding if the judge's impartiality may reasonably be questioned or they are biased against a party. CJC 2.11(A);[4] *Swenson*, 158 Wn. App. at 818.

"The appearance of fairness doctrine is 'directed at the evil of a biased or potentially interested judge or quasi-judicial decision maker.'" *Swenson*, 158 Wn. App. at 818, *citing State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172 (1992). Under the objective standard, "a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial and neutral hearing." *Gamble*, 168 Wn.2d at 187 (internal quotations and citations omitted). Allegedly improper or biased comments are considered in context. *See, e.g.*, *Gamble,* 168 Wn.2d at 188; *In re Dependency of O.J.*, 88 Wn. App. 690, 697, 947 P.2d 252 (1997).

A defendant who has reason to believe a judge is biased and impartial must affirmatively act if they wish to pursue a claim for violation of the appearance of fairness doctrine. *Swenson*, 158 Wn. App. at 818. A

[4] The State is citing to the current citation under the CJC that was in effect in 2011 when the plea was taken. Much of the case law and LaChance's briefing cite to former CJC 3(D)(1).

defendant cannot simply wait until he or she has an adverse ruling to move for disqualification of a judge if that defendant has reason to believe the judge should be disqualified. *Id.*

The following exchange occurred prior to trial commencing:

> THE COURT: All right. There's one other thing that I should say about this case before we proceed any further. I believe, if I'm not mistaken, that I am acquainted with the defendant's family, specifically his mother and his aunt and his grandparents, and have been for many years. It might even be, if I went back far enough, that I may very well have conducted the ceremony when his mother and father were married, if I'm not mistaken. So if that is a problem from the State or the defense -- this is going to be a jury trial, the jury's going to be making its decision. But if that's a problem, which would lead you to believe that I should not hear this or that you'd prefer I didn't hear this, then I will recuse and allow one of the other judges to hear it. That's something else you can talk with your client about.
>
> MR. McCLAIN: I presume from the Court what you're telling us is you don't believe there's any conflict for yourself.
>
> THE COURT: I don't because it's a jury trial. On the other hand, there's -- it's a relationship I want everyone to be aware of. We're not -- some years back his grandparents and my wife and I were very good friends, very close friends. Vacationed to Hawaii together, did things together. We haven't done that for probably -- it's probably been 15 years now. But his aunt still cuts my hair, among other things.
>
> MR. McCLAIN: Does the Court know Mr. Rife then?
>
> THE COURT: Except by name, no.
>
> MR. McCLAIN: State has no issue, Judge.

> MR. GROBERG: I don't think we have an issue, but I'll talk to Mr. Rife.
>
> THE COURT: Go talk to him. Let me know when you're ready to go.

RP 18-19.

Judge Brosey was merely informing the parties of a past relationship he had with family members of Rife. He did not personally know Rife and had no personal relationship with Rife. Further, the relationship was aged, as it had been 15 years since Judge Brosey had been close with Rife's grandparents. RP 18. The fact that a person in Rife's family cut Judge Brosey's hair is inconsequential and does not create a personal bias or an appearance of fairness issue.

A judge is required to disqualify himself if his impartiality may be questioned if he has personal bias concerning a party. CJC 2.1(A)(1). Judge Brosey did not have personal bias concerning a party. Rife was the party, not his grandparent's. Judge Brosey did not know Rife. Rife is correct that the party's cannot waive an issue of personal bias pursuant to CJC 2.11(C). *In re Disciplinary Proceeding Against Jones*, 182 Wn.2d 17, 42, 338 P.3d 842 (2014). But Judge Brosey did not have personal bias against Rife, therefore, informing the parties that there was a past close relationship with family members of Rife and asking in an abundance of caution if either party wished to have the judge recuse was not improper

under these circumstances. The fact that neither party saw an issue is further evidence that there was no personal relationship or bias. RP 18-21.

Without taking some action in the trial court, Rife cannot now claim, now that he has been convicted by a jury and sentenced (to the low end of the standard range on the higher of the two offenses nonetheless), that there is an appearance of fairness issue. *Swenson*, 158 Wn. App. at 818. There was no violation of the appearance of fairness doctrine and this Court should affirm Rife's convictions.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ALLOWED THE STATE TO AMEND THE INFORMATION TO INCLUDE THE ADDITIONAL CHARGE OF TAMPERING WITH A WITNESS.

Rife argues he was prejudiced by the late amendment to the information adding the charge of Tampering with a Witness. Rife asserts the amendment should have been prohibited because there was governmental mismanagement and asks this Court to reverse and remand for a new trial. Any claim of governmental mismanagement pursuant to a CrR 8.3 claim was not preserved below and the trial court did not abuse its discretion in granting the State's request to amend the information as there was no prejudice to Rife.

1. Any Claim Of Governmental Mismanagement Was Not Preserved Below And Cannot Be Raised For the First Time On Appeal.

The State's motion to amend the information was based on previously disclosed evidence, evidence that was cross-admissible and evidence that Rife had knowledge of prior to the motion being filed. RP 4-17; Supp. CP State's Memorandum. Rife's trial counsel solely challenged the amendment on CrR 2.1(d) grounds. RP 9-14. Rife's trial counsel did not prepare or argue a CrR 8.3(b) motion to the trial court. *See* RP; CP. This is necessarily because Rife's trial counsel understood that the trial court's ruling was correct.

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, *citing* RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.* (*citations omitted).* A claim of a

manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

A claim of governmental mismanagement, which Rife now claims for the first time on appeal, is not a claim of constitutional magnitude. Rife attempts to argue that the trial court erred in accepting the amended information because the information was amended solely because the government mismanaged its case and therefore the late amendment was improper and prejudiced Rife. Brief of Appellant 16-25. Rife cannot raise a claim of governmental mismanagement for the first time on appeal and this Court should not entertain his invitation to do so.

2. The Trial Court Did Not Abuse Its Discretion When It Allowed The State To Amend The Information To Include One Count Of Tampering With A Witness.

Pursuant to CrR 2.1(d) the court may permit the prosecutor to amend the information at any time before the verdict "if substantial rights of the defendant are not prejudiced." A trial court's decision to allow the State to amend the information is reviewed under an abuse of discretion standard. *State v. Hockaday*, 114 Wn. App. 918, 924, 184 P.3d 1273 (2008). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Rife seeks reversal and remand for a new trial, claiming he was prejudiced by the late amendment. Rife argues he was prejudiced because he allegedly had to spend a considerable amount of time defending against the Tampering with a Witness charge to avoid the additional sentencing range. Brief of Appellant 21. Rife also alleges he was not able to conduct an independent investigation of this "newly discovered evidence." *Id.* at 22. Rife further argues that the trial court's decision to not sever the witness tampering charge was manifestly unreasonable because the State would suffer no harm from the severance. *Id.* at 24.

"When reversal is sought because of late amendment, the burden is on the accused to demonstrate specific prejudice from the information amendment." *State v. Alvarado*, 73 Wn. App. 874, 877, 871 P.2d 663 (1994). The Washington Courts have rejected defendant's arguments claiming amendments of an information prejudiced them without the defendant providing specific evidence to support the claim of prejudice. *State v. Murbach*, 68 Wn. App. 509, 511, 843 P.2d 551 (1993) (internal quotations and citations omitted).

The only arguments Rife's trial counsel made to the trial court was, (1) he was unaware of the tampering allegation, (2) Rife was unable to evaluate the entire case and determine if he wants to take a plea deal or go to trial with a late amendment, (3) the additional charge changed the

amount of points Rife was looking at, (4) it was different charges and different ranges. RP 9-14.

In regards to the first argument, the trial court pointed out that Rife's counsel knew the State alleged Rife had called Logan and at the very least apologized to Logan regarding the incident, because that was outlined in the probable cause statement. RP 9-10. Further, in preparation for trial, one would expect trial counsel would have spoken to the victim prior to trial and would have found out he was alleging Rife asked him not to speak to the police and offered to pay for his medical bills in addition to apologizing.

The second argument Rife's trial counsel made also fails because there is no constitutional right to a plea bargain and the right or lack thereof does not factor into whether his client would be prejudiced by the late amendment. *State v. Rohrich*, 149 Wn.2d 647, 655-56, 71 P.3d 368 (2003). The additional charges and concerns about sentencing ranges also does not factor into a fairness of the anticipated trial and prejudice analysis. *Rohrich*, 149 Wn.2d at 646, *State v. Rohrich*, 110 Wn. App. 832, 839, 43 P.3d 32 (2002).

The trial court, in evaluating the arguments made by Rife's trial counsel in opposition to the amendment, did not abuse its discretion when it granted the State's request to amend the information to include the

Tampering with a Witness count. The decision was not manifestly unreasonable. Rife's trial counsel could not articulate any prejudice. There was no reason to sever the count, and once the trial court granted the State's motion, Rife's trial counsel did not renew his motion to sever. RP 17-22. Further, Rife was acquitted of the Tampering with a Witness Charge. CP 68. This Court should find the trial court did not abuse its discretion when it allowed the late amendment of the information and affirm Rife's convictions.

C. RIFE'S RIGHT TO BE PRESENT WAS NOT VIOLATED DURING THE JURY SELECTION PROCESS.

Rife argues to this Court that his right to be present was violated because the record is void of any mention of his presence during the peremptory challenges. Brief of Appellant 25-27. While the transcript is silent as to what occurred during the peremptory challenges, the Clerk's minutes coupled with the transcript make it clear that Rife was present.

1. Standard Of Review.

Whether a defendant's constitutional right to be present has been violated is reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

2. Rife Was Present In The Courtroom During The Peremptory Challenges.

A defendant in a criminal action has a fundamental right to be present at all critical stages of his or her trial. *Irby,* 170 Wn.2d at 880, citing *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed.2d 267 (1983). This right is not only rooted in the confrontation clause of the Sixth Amendment but also in the Due Process Clause of the Fourteenth Amendment. *Id.* at 880-81, citing *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed.2d 486 (1985) (internal quotations omitted). Therefore, "a defendant has a right to be present at a proceeding whenever his presence has a relation, reasonable substantial, to the fullness of his opportunity to defend against the charge." *Id.* at 881 (internal quotation and citation omitted). The right to be present extends to the voir dire and jury selection process. *Id.* at 883-84.

Rife was present during the voir dire process and was introduced by the trial court to prospective jurors at 10:35 a.m. VRP 2; CP 82. Both sides conducted voir dire and, at 11:31 a.m., Rife's trial counsel, Mr. Groberg, concluded his portion of voir dire. VRP 49; CP 82. Peremptory challenges were then done by a strike sheet, where each side lined out with a marker their peremptory challenges. CP 82-83, 96-99. The process for striking peremptory challenges took approximately 13 minutes. CP 82-83. The trial court then announced which jurors were seated. VRP 50; CP 83.

While the State acknowledges the transcript does not state explicitly that Rife was sitting there in the courtroom the entire time while the peremptory challenges were taking place at the sidebar conference, the Clerk's minutes do not reflect that any break took place or that any activity happened outside of the courtroom.[5] VRP 49-53; RP 39; CP 81-83. Rife was present during the entire voir dire and jury selection process and therefore his right to be present was not violated and this Court should affirm his conviction.

D. THE TRIAL COURT DID NOT VIOLATE RIFE'S PUBLIC TRIAL RIGHT WHEN IT HEARD PEREMPTORY CHALLENGES IN A SIDEBAR CONVERENCE.

Rife argues to this Court that his right to a public trial was violated when the trial court heard peremptory challenges at a sidebar conference. Brief of Appellant 27-30. Sidebar conferences for peremptory challenges do not violate the public trial right and therefore Rife's public trial right was not violated.

1. Standard Of Review.

Purely legal claims are reviewed under a de novo standard of review. *State v. Love*, Supreme Court Case No. 896619-4, Slip Op. July 16, 2015, page 5.

[5] The State filed two motions in an attempt to supplement the record below with an affidavit to fill in the gap in the transcript with what was occurring in the courtroom during the peremptory challenges but the Commissioner denied the State's motions.

2. Rife's Public Trial Right Was Not Violated By The Sidebar Conference Held For The Peremptory Challenge Of Jurors.

Criminal defendants have the right to a speedy public trial. Const. Art. I, § 22. The Washington State Constitution also guarantees that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Const. Art. I, § 10. These two constitutional provisions serve to assure the fairness in our judicial system. *Love*, Slip at 6, *citing State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). It is well settled in our case law that the public trial right extends to jury selection. *Id.* at 7.

Rife's argument is nearly identical to the argument the Supreme Court rejected in *Love.* Rife argues because the trial court did not inform the public of which jurors had been challenged and no transcript exists regarding if there were arguments about the peremptory challenges this constitutes a courtroom closure. Love argued his right to a public trial was violated when the trial court conducted peremptory and for cause challenges at the bench. *Love* at 5. The Supreme Court found no violation of Love's public trial right, pointing out that while peremptory challenges were done on a struck juror list, as done in Rife's case, it was done in open court for all observers to see. *Id.* at 8-9. The Supreme Court pointed out that the entire voir dire process, the trial judge and the parties asking

questions of the jurors was done in open court, as was done in Rife's case. *Love,* at 9; VRP 2-50; CP 82-83. The Supreme Court also noted that the struck juror list, showing the peremptory challenges is publically available. *Love,* at 9. Similarly, the struck jury list from Rife's case is also publically available. CP 96-99. The Supreme Court held there was no violation of Love's public trial right. *Love*, at 9. Likewise, Rife's claim that his right to a public trial was violated also fails and this Court should affirm his convictions.

E. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S FINDING THAT RIFE COMMITTED ATTEMPTED BURGLARY IN THE FIRST DEGREE.

Rife argues the State did not present sufficient evidence to sustain the jury's verdict of guilty on Count II: Attempted Burglary in the First Degree. Brief of Appellant 31-35. The State presented sufficient evidence to sustain the jury's guilty verdict for Count II.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Presented Sufficient Evidence To Sustain Rife's Conviction For Count Two: Attempted Burglary In The First Degree.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re* Winship, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); State *v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to

the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Rife of Attempted Burglary in the First Degree, as charged in Count Two of the Third Amended Information, the State was required to prove, beyond a reasonable doubt, that Rife, on or about and between March 16, 2014, with the intent to commit a crime against a person or property therein, did attempt to enter or remain unlawfully in the building of another, and, in attempting to enter or while in the building or in immediate flight therefrom, the defendant or another participant in the crime was armed with a deadly weapon and/or did intentionally assault any person therein. RCW 9A.56.020; RCW 9A.28.020(1); RCW 9A.08.020(2)(c); CP 13, 48-49.

Rife argues there was no evidence he tried to get into the house at 512 Maple with the intent to commit a crime, and in fact, that he left the residence when asked. Brief of Appellant. 33. Rife goes on to state that the assaultive behavior occurred outside and then, the only attempt to return to the house was to get help for Logan. Brief of Appellant 34. While this is one version of the events as told by some of the witnesses, this is not the only version of the events testified to. Rife conveniently ignores the testimony of Mr. Burk, Mr. Atchison, Ms. Huff, Mr. Reopelle and Mr. Smolko. RP 96, 137, 151, 164, 174.

Mr. Burk admitted he was trying to kick in the door to the residence with Rife, trying to get inside. RP 96. Mr. Atchison testified that Rife punched Logan and then the following occurred:

> And then everyone in the house, they close the door, and then that's when all of Cole Rife and his buddies started freaking out and they started kicking the door, saying, "Come outside," like, "Come outside you pussies," and terms like that. And then they didn't. The door was locked. And that's when Cole came back to Logan and started throwing punches again. And I tried -- I attempted to pull Cole off, but his buddies came and threw me off, and then that's when Cole proceeded to -- proceeded to punch him and then got him on the ground.

RP 137.

Ms. Huff, the neighbor across the street described the scene as Rife screaming, going up to the door, pounding on it and then screaming for the people to let him in. RP 151. The people in the house were refusing to open the door. RP 151. Ms. Huff testified that the people eventually came out and Rife then punched somebody (Logan) in the face. RP 151.

Mr. Reopelle described the scene at the party:

> They were getting a little aggressive, so we decided that they should leave. They didn't want to leave. And then we kind of got them on the front porch and closed the door. They started pounding on the door. And then we opened the door again and a couple of our buddies got shoved, and then we closed the door again with our friends inside, the cops came, and we opened the door to a kid with a bloody face.

RP 164. Mr. Reopelle knew Rife was one of the guys who came to the door because Rife said, "'I'm motherfucking Cole Rife.'" RP 164. Mr. Reopelle described Rife as puffing up his chest, and trying to fight Mr. Reopelle and a couple other guys who were in the house, including Mr. Smolko, the owner/renter of the house. RP 165.

Mr. Smolko testified that Rife was told to leave. RP 173. Rife then started yelling at Mr. Smolko and everyone else. RP 174. According to Mr. Smolko, Rife was, "[j]ust yelling at us, telling us to try to fight him, and then we closed the door and got everybody inside, and then tried to call the police, and that's when Logan got hurt." RP 174. Mr. Smolko believed Rife was trying to get into the house. RP 174.

While there was evidence presented from Rife's witnesses that contradicts the State's witnesses, Rife must admit the truth of State's evidence and all reasonable inferences of that evidence are drawn in favor of the State. *Goodman*, 150 Wn.2d at 781.

Further, the determination of the credibility of witnesses and their testimony is solely within the scope of the jury and not subject to review by this Court. *Myers*, 133 Wn.2d at 38. Holding to these principles, viewing the evidence in the light most favorable to the State, the State presented sufficient evidence that Rife and Mr. Burk were attempting to enter the residence with the intent to assault the people therein. One

person even testified that they were shoved by Rife and his friends when they opened the door, which would constitute a completed Burglary in the First Degree. RCW 9A.52.020.

After attempting to enter the residence for the purpose of fighting the participants therein, Rife assaulted Logan, breaking his jaw, lacerating his face and breaking several of Logan's teeth. This is sufficient evidence to sustain the conviction for Attempted Burglary in the First Degree.

F. THE DEPUTY PROSECUTOR DID NOT COMMIT PROSECUTORIAL ERROR.

Rife claims the deputy prosecutor committed prosecutorial error (misconduct)[6] by (1) vouching for a witness, (2) shifting the burden of proof, (3) impugning defense counsel, (4) testifying to a fact contrary to

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[6] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g., State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State will be using this phrase and urges this Court to use the same phrase in its opinions.

the truth, and (5) asking a defense witness to judge the testimony of other witnesses. Brief of Appellant 36-41. Rife's argument is without merit. The deputy prosecutor did not commit prosecutorial error. If any error occurred it is harmless.

1. Standard Of Review.

The standard for review of claims of prosecutorial error is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

2. The Deputy Prosecutor Did Not Commit Error When Discussing Mr. Burk's Plea Deal During His Rebuttal Closing Argument.

A claim of prosecutorial error is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). "[F]ailure 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 admonition to the jury." *State v. Thorgerson*, 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted).

To prove prosecutorial error, it is the defendant's burden to show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v.*

Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

A prosecutor commits prosecutorial error when he or she shifts the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). A prosecutor may commit error during closing

argument by minimizing or misstating the law regarding the burden of proof. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011).

Rife argues that the deputy prosecutor committed error when he argued, in his rebuttal closing argument, "Ty's just as guilty as this guy is. That's why he took a deal. Because he's an accomplice to this guy's actions. That's why an attorney advised him to take a deal." Brief of Appellant 39-40, citing RP 474. Rife asserts this statement was improper vouching and improperly shifted the burden. Brief of Appellant 40. Citing to *State v. Lindsay*, Rife argues these comments also impugned the role and integrity of defense counsel. Brief of Appellant 40, citing *State v. Lindsay*, 180, Wn.2d 423, 431, 326 P.2d 125 (2014). The deputy prosecutor did not commit error, as he was responding to an argument made by Rife's counsel, which Rife neglects to acknowledge in his briefing. Also, the conduct of the deputy prosecutor certainly cannot be compared to the rude and unprofessional conduct discussed in *Lindsay*.

a. The deputy prosecutor did not improperly vouch for Mr. Burk.

It is improper for a prosecutor to vouch for a witness. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). Vouching occurs when a prosecutor supports a witness's testimony with facts not in evidence or when the prosecutor expresses their personal belief regarding the

truthfulness of the witness. *Id. (citations omitted).* It is prosecutorial error "for a prosecutor to state a personal belief as to the credibility of a witness." *Id.*, *citing State v. Warren*, 165 Wn.2d, 17, 30, 195 P.3d 940 (2008).

Rife's trial counsel argued in his closing argument,

> I think there's some indication that Mr. Burk is there and is involved. Mr. Burk denies that, interestingly. And just one side note. It's interesting that Mr. Burk denies really any involvement other than being there, but then he takes this plea deal. And it's just strange to me that if you really didn't do anything, you didn't kick the guy, why would you -- why would you take the plea deal?

RP 471-72. Rife's trial counsel then goes on to discuss accomplice liability. RP 472-73. In response to this argument the deputy prosecutor in his rebuttal closing makes the following argument,

> Why did Ty Burk take a deal? Because Ty's just as guilty as this guy is. That's why he took a deal. Because he's an accomplice to this guy's actions. That's why an attorney advised him to take a deal. Of course he's guilty. Just as of course he's guilty of the same conduct. These guys both are guilty of Second Degree Assault.

RP 474. This argument is in direct response to the argument made by Rife's trial counsel. It is not improper vouching. There was evidence that Mr. Burk participated, he admitted he was encouraging the fight and tried to kick in the door of the residence. RP 96. The deputy prosecutor was not expressing his personal belief of the truthfulness of Mr. Burk, he did not state he believed Mr. Burk and so should the jury. A deputy prosecutor has

wide latitude, especially in rebuttal, when he is addressing an issue raised by the defense attorney in closing argument, which is what occurred here. *State v. Lewis*, 156 Wn. App. at 240. There was no vouching and no prosecutorial error.

b. The deputy prosecutor did not improperly shift the burden.

A prosecutor commits prosecutorial error when he or she shifts the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). There is nothing in the deputy prosecutor's argument that shifts the burden upon Rife. The deputy prosecutor does not argue there is some evidence that Rife should have produced to show his innocence. The deputy prosecutor does not state that Rife should have pled guilty. As argued above, the deputy prosecutor was properly responding to an argument made by Rife's trial counsel during his closing argument. There was no burden shifting and no prosecutorial error.

c. The deputy prosecutor did not impugn defense counsel.

A deputy prosecutor cannot impugn the integrity or the role of defense counsel. *Lindsay*, 180 Wn.2d at 431-32. "Prosecutorial statements that malign defense counsel can severely damage an accused opportunity to present his or her case and are therefore impermissible." *Id.* at 432, *citing Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cr. 1983).

In *Lindsay* the deputy prosecutor made offensive statements such as, ""She doesn't care if the objection is sustained or not, We're going to have like a sixth grader argument, and We're into silly." *Id.* The deputy prosecutor took it further by interrupting during defense counsel's objections, stating, "'Maybe if counsel and her client could be quiet for a few minutes they might be able to hear something.'" *Id.* The Supreme Court noted that those comments, alone though would not require reversal. *Id.* The Supreme Court discussed more egregious conduct of past cases that did require reversal, such as statements that defense counsel was "'being paid to twist the words of witnesses.'" *Id.* at 433, citing *State v. Negrete*, 72 Wn. App. 62, 66, 863 P.2d 137 (1993). Another example from the Supreme Court was where the deputy prosecutor stated that a defense attorney's role was to his client and the deputy prosecutor's role was "'to see that justice was served.'" *Id.*, citing *State v. Gonzales*, 111 Wn. App. 276, 283, 46 P.3d 2005 (2002). Finally, the Supreme Court discussed *Bruno v. Rushen* "'the obvious import of the prosecutor's comments was that *all* defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth.'" *Id.*, citing *Bruno v. Rusen*, 721 F.2d 1193, 1194, (9th Cir. 1983).

There is nothing in the deputy prosecutor's comments that impugn Rife's trial counsel. The deputy prosecutor was responding to Rife's trial

counsel's closing argument asking why Mr. Burk had pled guilty. The response, because he was guilty, he was advised to do so. Mr. Burk testified he talked with his attorney prior to taking the plea deal. RP 105. The deputy prosecutor's arguments were based in facts did not infer that another attorney would have told Rife to take the deal. The argument explained why Mr. Burk took the deal. The deputy prosecutor permissibly argued the two men were accomplices, Mr. Burk had testified to that, and the jury should hold Rife accountable for the same actions that Mr. Burk had taken responsibility for. This is not impugning defense counsel, this is proper rebuttal argument. There was no prosecutorial error.

d. If there was error, it was not flagrant.

While not conceding error, if the deputy prosecutor's statements during closing arguments did impermissibly shift the burden, impugn defense counsel or vouch for Mr. Burk, there was no objection, there was no objection to the statements and Rife has not met his burden to show the deputy acted flagrantly or that he was prejudiced in any way.

Jurors are instructed that they must decide a case based upon the evidence that was presented at trial and accept the law as given in the jury instructions. WPIC 1.02. Jurors are also instructed that a lawyer's remarks, arguments or statements are not evidence, the law is contained in the instructions and the jury must disregard any statement, argument or

remark by the lawyer that is not supported by the law in the instructions or the evidence. WPIC 1.02. A jury is presumed to follow the jury instructions. *State v. Yates*, 161 Wn.2d 714, 163, 168 P.3d 359 (2007) (citations omitted).

Rife failed to object to the deputy prosecutor's statements. A curative instruction and an admonishment to the jury to disregard the prosecutor's argument would have sufficiently cured the possible resulting prejudice incurred by the improper statements. Because this prejudice could have been cured had a timely objection been raised, Rife waived his right to raise the issue for the first time on appeal.

Further, the deputy prosecutor's statements are not flagrant and ill-intentioned. Within the context of the entire record, Rife cannot show he was prejudiced by any alleged misstatement, therefore, there is no prosecutorial error and Rife's convictions should be affirmed.

3. The Deputy Prosecutor Did Not Commit Error By Testifying To Facts Contrary To The Truth.

Rife argues that the deputy prosecutor's declaration, in front of the jury, "Mr. Groberg obviously knows that's [years in prison] is not what is a possibility in a crime like this, and to ask that question, I don't know if that's going to entitle the State to - - he's talked about years in prison.", was testifying to facts contrary to the truth, and therefore prosecutorial error. Brief of Appellant 37-38. Rife argues Mr. Burk was subject to 19.5

to 25.5 months in prison. *Id.* at 38. But this assertion is contrary to the testimony. The testimony was Mr. Burk was facing Assault in the Second Degree, which he pled down to Assault in the Third Degree. RP 99. Mr. Burk also testified that the State added an Attempted Residential Burglary charge. RP 99. Mr. Burke never testified that his original charges included Attempted Burglary in the First Degree, which would carry the 19.5 to 25.5 months in prison with an offender score of zero, like Rife. *See* RCW 9A.28.020; RCW 9A.52.020; RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.595.

The standard range with an offender score of one, which it would have been with another current offense, for Assault in the Second Degree would have been six to 12 months in jail. RCW 9A.36.021; RCW 9.94A.510; RCW 9.94A.515. The standard range for an Attempted Residential Burglary, with an offender score of one, would have been 4.5 to nine months in jail. RCW 9A.52.025; RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.595.

There were no facts presented at trial that Mr. Burk was facing the more serious Attempted Burglary in the First Degree charge. See RP. Therefore, Rife's argument that the deputy prosecutor introduced evidence that was contrary to fact is baseless and should not be considered by this Court. Rife's claim of prosecutorial error fails.

4. Any Error The Deputy Prosecutor Made By Asking Bo Rife If He Was Present At The House That Evening Was Harmless.

Rife argues the deputy prosecutor's first cross-examination question of Bo Rife, which was objected to and the objection was sustained, was improper because it would have forced Bo to call other witnesses liars. Brief of Appellant 37.

Rife asserts Bo's testimony was critical and his credibility was central to Rife's case. *Id.* The deputy prosecutor asked Bo, "Are you sure you were at 512 Maple? You seem to have seen something that no one else saw?" RP 234. The deputy prosecutor's question was argumentative, which was why it was sustained. RP 234. While the question may have been improper, Rife can show no prejudice. Bo did not answer the question. The objection was sustained. There was no request for a curative instruction, because none was needed as the question was not answered. This type of comment by the deputy prosecutor could have been properly and permissibly argued in closing argument.

Rife has not met his burden to show that the improper comment was prejudicial within the context of the entire record. To prove prosecutorial error, it is the defendant's burden to show that the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *Gregory*, 158 Wn.2d at

809. Rife has not shown that there is a substantial likelihood that this one, unanswered questioned, affected the jury's verdict. *Brown,* 132 Wn.2d at 561. Therefore, Rife's claim of prosecutorial error fails and his convictions should be affirmed.

G. RIFE RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Rife's attorney provided competent and effective legal counsel throughout the course of his representation. Rife asserts his trial counsel was ineffective for failing to object to the deputy prosecutor's alleged improper comments during closing arguments and improperly elicited testimony of Mr. Burk. Brief of Appellant 41-43. Rife's attorney was not ineffective in any of the areas of his representation of Rife. If Rife's attorney was deficient in any way, Rife cannot show he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *McFarland,* 127 Wn.2d at 335 (citations omitted).

2. Rife's Attorney Was Not Ineffective During His Representation Of Rife Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Rife must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

a. Rife's attorney was not ineffective for failing to object to the deputy prosecutor's questioning of Mr. Burk in regards to his plea agreement and statements regarding the plea deal during closing.

Failure to object to testimony will constitute ineffective assistance of counsel only in "egregious circumstances" or testimony central to the State's case. *State v. Neidigh*, 78 Wn. App. 71, 77, 895 P.2d 423 (1995). If trial counsel's failure to object could have been a legitimate trial tactic counsel is not ineffective and the ineffective assistance claim fails. *Neidigh*, 78 Wn. App. at 77.

Rife argues his trial counsel was ineffective for failing to object when the deputy prosecutor asked Mr. Burk, "Is part of the reason that you entered into this agreement based on advice of counsel?" Brief of Appellant 42, citing RP 405. Rife further argues his trial counsel's failure to object to the State's statement during closing, "that's why an attorney advised him to take a deal." was ineffective. *Id.* Rife argues this was improper vouching and there was no legitimate trial strategy for failing to object. *Id.*

In this case, Rife's attorney may have wanted to avoid calling attention to Mr. Burk's testimony that his attorney advised him to take the plea deal. RP 405. Further, it is common sense that a person would enter

into a plea agreement after being advised by their attorney that it would be a benefit to them to do so. It was clear from the testimony that Mr. Burk had received a benefit from entering into the plea agreement and agreeing to testify. A person of average intelligence would know and understand that this kind of deal would have been worked out by Mr. Burk's attorney and the deputy prosecutor.

As argued above, the deputy prosecutor's closing argument in regards to Mr. Burk's plea deal was not prosecutorial error and therefore, there was no reason for Rife's trial counsel to object. An attorney need not, and should not, make a frivolous objection.

Moreover, counsel, who is in the courtroom and sitting in the presence of the jury, is in the best position to determine the impact of a particular piece of evidence, and whether the impact was such that reemphasizing the evidence is worth that risk. Trial counsel's failure to object to the remarks at the time they were made "'strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'" *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied,* 498 U.S. 1046 (1991).

Arguendo, if it was deficient for Rife's attorney to not object to the testimony and argument, Rife suffered no prejudice from the error. As stated above, it is common sense that Mr. Burk consulted with his attorney

before entering into his plea agreement with the State. Further given the evidence presented, including Rife's own testimony that he was the only one who touched Logan, there is not a reasonable probability that but for failing to object to the deputy prosecutor's question or statement during closing argument that the outcome of the trial would have been different. RP 350; See *Horton*, 116 Wn. App. at 921-22. Trial counsel was not ineffective.

H. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON SELF-DEFENSE.

Rife argues the trial court improperly instructed the jury on self-defense, giving a necessity instruction that is applicable only to justifiable homicide, thereby impermissibly lowering the State's burden. Brief of Appellant 43-46. The trial court gave the appropriate self-defense instructions, including the necessity instruction, and there was therefore no error.

1. Standard Of Review

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Bennett,* 161 Wn.2d at 307. Juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

2. The Trial Court Gave The Proper Self Defense Instructions.

Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). A proposed instruction should be given by the trial court if it is not misleading, properly states the law and allows the party to argue her or his theory of the case. *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), *citing State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). "When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party." *Webb*, 162 Wn. App. at 208, *citing State v. Hanson*, 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990).

A defendant is entitled to a jury instruction on self-defense if the defendant produces some evidence that demonstrates self-defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (citation omitted). Once the defendant is entitled to the self-defense instruction, it then

becomes the State's burden to prove beyond a reasonable doubt the absence of self-defense. *Id.*

> Evidence of self-defense is evaluated from the standpoint of reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees. This standard incorporates objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

Id. at 474. A person is only entitled to use the degree of force necessary that a reasonable prudent person would find necessary under similar conditions as they appeared to the defendant. *Id.* "The refusal to give an instruction on a party's theory of the case when there is supporting evidence is reversible error when it prejudices the party." *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) (citation omitted).

Washington Courts hold to the principle of invited error, which precludes a party from raising issue on appeal regarding a jury instruction he or she request be given by the trial court. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1998). The Supreme Court notes that the invited error doctrine is a strict rule, but that it declines the opportunity to adopt a more flexible approach. *Studd,* 137 Wn.2d at 547. Even when a clearly erroneous instruction is given, as occurred in *Studd*, the invited error

doctrine is followed and an appellant cannot complain about an instruction he or she requested the trial court give. *Id* at 546.

Rife argues the trial court erred because it used the wrong legal standard, using the necessity instruction applicable to justifiable homicide, thereby lowering the State's burden in regards to his self-defense claim. Brief of Appellant 44-46. Rife requested the trial court give WPIC 17.02, the standard self-defense instruction, which it did give. RP 374-80; CP 16, 43; WPIC 17.02. In the Note on Use section of WPIC 17.02 it states:

> Use this instruction in any case in which the defense is an issue supported by the evidence.
> ...
>
> With this instruction, use WPIC 16.05, Necessary – Definition...

WPIC 17.02. Rife now complains that the approved accompanying WPIC, WPIC 16.05, which under the comments of WPIC 17.02, a jury instruction he requested, is required to be given, was given by the trial court. Under the invited error doctrine Rife is precluded from complaining that the trial court gave the required accompanying WPIC 16.05. *Studd*, 137 Wn.2d at 546. Even though Rife did not specifically request WPIC 16.05, he requested WPIC 17.02 which the Notes on Use state to give WPIC 16.05.

Further, The Notes on Use for WPIC 16.05 state, "[u]se this instruction when the word "necessary" is used in the instructions relating to defenses in WPIC chapters 16 and 17." WPIC 16.05. WPIC 16.05 does

not only apply to justifiable homicide self-defense claims but all self-defense claims. Rife's argument to the contrary has no merit and he cites to no authority to support his claim that WPIC 16.05 should only be used when self-defense is raised under a justifiable homicide claim. See Brief of Appellant 45-46.

Rife also argues the trial court erred by failing to give two of his proposed jury instructions regarding self-defense. Brief of Appellant 44-46. Rife requested a jury instruction for no duty to retreat and for lawful use of force actual danger not necessary. RP 375, 377-80; CP 17, 18; WPIC 17.04; WPIC 17.05. The trial court properly denied trial counsel's request to give either instruction, as neither was applicable in Rife's case.

Rife requested the trial court give WPIC 17.04 – Lawful Force – Actual Danger Not Necessary. CP 17. WPIC 17.04 states:

> A person is entitled to act on appearances in defending *[himself][herself][another]*, if *[he][she]* believes in good faith and on reasonable grounds that *[he][she][another]* 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 evidence in Rife's case, according to Rife and his witnesses, was that Logan was the aggressor and he hit Rife after an exchange of words between Logan and Rife and Logan continued to strike at or wrestle with Rife until the fight was over. RP 229-30, 264, 320-21, 325.

The evidence, according to the State's witnesses, was that Rife's attack on Logan was unprovoked and Logan did nothing to fight back except attempt to grab Rife in a headlock to stop Rife from hitting him. RP 67-69, 91-94, 112-13, 136-37, 151-52, 174-75, 401-02, 409-10. There was nothing in the record to support an instruction for the appearance of actual danger because either Rife was in danger because Logan pushed him and hit him, or in the alternative, Rife attacked Logan for no reason. The trial court properly denied Rife's request to give WPIC 17.04 because the evidence did not support giving the instruction.

Rife's trial counsel also requested the trial court give WPIC 17.05 – Lawful Force – No Duty To Retreat. CP 18. WPIC 17.05 states:

> 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][she]* is being attacked to stand*[his][her]* ground and defend against such attack by the use of lawful force.
>
> *[The law does not impose a duty to retreat.][Notwithstanding the requirement that lawful force be "not more than is necessary," the law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonably effective alternative."]*

The trial court properly denied Rife's trial counsel's request for the inclusion of this instruction because the evidence was clear that Rife did not have a right to be at Ryan Smolko's residence, which would include the front yard and porch area where the fight occurred. RP 377-78.

Mr. Smolko is the renter of the house located at 512 Maple Street. RP 173. Mr. Smolko and others who lived at the house told Rife he was not welcome and had to leave. RP 173-74. This was further evidenced by the people who were lawfully at the residence going inside and locking the door to get away from Rife and his group of friends when they refused to leave. RP 167. At the point Rife was told to leave and continued to remain on the porch and in the front yard area, yelling and challenging people to fight, he was trespassing on Mr. Smolko's property. RCW 9A.52.010(6); RCW 9A.52.080. Any license or permission Rife may have had to be on the property was revoked. Rife was not in a place where he had right to be, therefore, the no duty to retreat instruction did not apply to him and the trial court's ruling was not in error.

The trial court correctly instructed the jury on self-defense. The State's was held to the proper burden of proof and Rife's claims to the contrary are without merit. This Court should affirm Rife's convictions.

I. THE STATE CONCEDES THE TRIAL COURT'S FAILURE TO MEANINGFULLY CONSIDER THE REQUESTED MITIGATING SENTENCE REQUIRES THIS COURT TO REMAND FOR A NEW SENTENCING HEARING.

Rife argues, and the State concedes, the trial court refused to exercise discretion when Rife requested a mitigated sentence below the standard range. The trial court's failure to meaningfully consider Rife's

request requires this Court to remand the case back to the trial court for a new sentencing hearing.

1. Standard Of Review.

An appellate court will review a standard range sentence if the trial court has rendered its sentence by relying on an impermissible ground for denying an exceptional sentence below the standard range or when the trial court has refused to exercise its discretion. *State v. McGill*, 112 Wn. App. 95, 99-100, 47 P.3d 173 (2002).

2. The Trial Court Failed To Consider Exercising Its Discretion, It Failed To Consider Sentencing Rife To A Mitigated Sentence Below The Standard Range.

A sentence within the standard range is generally not appealable. RCW 9.94A.585(1). Although a defendant is entitled to request at sentencing that the trial judge consider a sentence below the standard range, the defendant is not entitled to have such a sentence implemented. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Remand for resentencing is appropriate if the reviewing court is not "confident that the trial court would impose the same sentence when it considers only valid factors." *McGill*, 112 Wn. App. at 100. Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (citations omitted). The remedy for an erroneous sentence is remand for resentencing. *Id.*

In *McGill* the trial court erroneously believed it did not have the discretion to give an exceptional sentence below the standard range. *McGill*, 112 Wn. App. at 98-99. The trial court stated the sentence did not seem justified and that McGill had made tremendous efforts while in custody and had the support of his friends and family, all which could have been considered in an exceptional sentence below the standard range. Because of the trial court's comments the appellate court held that it could not "say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option." *Id.* at 100-01.

The State is in the unfortunate position of having to concede this issue. Rife's attorney requested a mitigated sentence below the standard range and presented materials and an argument in support of such a sentence. RP (8/27/14) 9-14. The trial court remarked that it had read the letters that everyone had written to him on Rife's behalf. RP (8/27/14) 18. The trial court stated it believed the writers to be sincere in their statements. *Id.* The trial court explained that situation at hand was unfortunate, but that trial judges have been stripped of much of their discretion by the Sentencing Reform Act (SRA), the Courts and the legislature. RP (8/27/14) 20-22. The trial court stated,

> I'm constrained by the SRA. I can't just do what I want to. Those days are long past, and they certainly haven't existed in this state with respect to felony offenses since 1981.

RP (8/27/14) 22. The trial court then sentenced Rife to low end of the standard range for Attempted Burglary in the First Degree, 19.5 months, and the high end of the standard range for Assault in the Second Degree, 14 months. RP (8/27/14) 22-23. The trial court appeared to be unaware it could exercise its discretion and impose a mitigated sentence below the standard range pursuant to RCW 9.94A.535(1). This Court should remand the case back for a new sentencing hearing for the trial court to consider whether a mitigated sentence below the standard range would be appropriate.

IV. CONCLUSION

The trial court did not violate the appearance of fairness doctrine when it failed to recuse itself because it did not have a personal relationship with Rife. The trial court did not abuse its discretion when it allowed the State to file a third amended information adding a charge of Tampering with a Witness. Rife's right to be present was not violated when peremptory challenges of jurors were conducted at a sidebar conference. The trial court did not violate Rife's right to an open court proceeding by conducting peremptory challenges to jurors at a sidebar conference. There was sufficient evidence presented to sustain Rife's conviction for Attempted Burglary in the First Degree. The deputy prosecuting attorney did not commit prosecutorial error and Rife received

effective assistance from his trial counsel. The trial court gave the appropriate self-defense jury instructions. Finally, the State concedes that the trial court failed to meaningfully consider Rife's request for a mitigated sentence below the standard range. Therefore, this Court should affirm Rife's convictions and remand Rife's case back to the trial court for consideration of the mitigated sentence below the standard range.

RESPECTFULLY submitted this 14th day of September, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. COLE RIFE, Appellant.	No. 46638-4-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On September 15, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Travis Stearns, Washington Appellate Project, attorney for appellant, at the following email address: wapofficemail@washapp.org.

DATED this 15th day of September, 2015, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

September 15, 2015 - 10:09 AM

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