SUPREME COURT NO. 95961-7

NO. 34837-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON WILLIAMS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John D. Knodell, Judge
The Honorable David G. Estudillo, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Jason Williams asks this Court to grant review of the Court of Appeals decision identified in Part B.

B. COURT OF APPEALS DECISION

Williams requests review in the Court of Appeals decision in State v. Jason Williams, No.34837-7-III, filed May 8, 2018 (attached as appendix).

C. ISSUES PRESENTED FOR REVIEW

1. Williams was charged and tried on one count of first degree murder and three counts of attempted first degree stemming from an altercation where four strangers beat him and assaulted his wife. During the altercation Williams shot at the assailants, killing one, because he feared he and wife faced either death or substantial harm at the hands of the assailants. A jury convicted Williams of the lesser included offense of second degree murder and three counts of first degree assault. CP 99-100; CP 102-104, 106, and 108.

At the State's request and over Williams's objection, the trial court gave a non-standard jury instruction (Instruction 26). CP 73. That instruction read;

> "Justifiable homicide committed in the defense of the slayer, or 'self-defense' is an act of necessity. The right of

self-defense does not permit action done in retaliation or revenge." Id.

On appeal, Williams argued that under the facts in his case the instruction, was misleading, improperly vitiated his defense, unconstitutionally shifted the burden to Williams to prove he did not act in self-defense or in defense of his wife and was an unconstitutional comment on the evidence.

The Court of Appeals ruled that in State v. Studd, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999) this Court approved the same instruction; therefore, the instruction was properly given. Because it found the instruction was properly given, the court did not address Williams's arguments. Slip. Op. at 5-7.

a. Was Instruction 26 misleading and an incorrect statement of the law warranting this Court's review under RAP 13.4(b)(4) as an issue of substantial public importance that this Court should determine?

b. Did Instruction 26 unconstitutionally shift the burden to petitioner to prove he acted in self-defense or defense of another, warranting this Court's review under RAP 13.4(b)(3) as a significant question of constitutional law?

c. Was Instruction 26 an unconstitutional comment on the evidence, warranting this Court's review under RAP 13.4(b)(3) as a significant question of constitutional law?

d. Should this Court clarify its decision in Studd, supra, and address the propriety of a revenge/retaliation instruction where there is not substantial evidence that a defendant claiming self-defense or defense of another acted solely from revenge or retaliation, and where this Court has never analyzed when the instruction is proper warranting this Court's review under RAP 13.4(b)(3) and (4)?

2. During closing argument, the prosecuting attorney told jurors:

> I would just suggest to you that when you've had a chance to fully discuss the case and you've got a decision to make and, you know, you might have a doubt about something. But if you can't assign a reason to that doubt, if you can't articulate or talk about what that doubt is, at that time you're beyond a reasonable doubt.

RP 2563.

The State conceded, and the Court of Appeals agreed, the argument was improper. The court held that because defense counsel did not object the argument was "was no so flagrant that the fairness of this trial was impacted." Sip. Op. at. 8. This Court should accept review of this issue as well because it raises the significant question of law under the

constitution of whether the argument shifted the burden to Williams to prove he did not act in self-defense of defense of another. RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

1. State's Case

Cynthia Martinez, Priscilla Abalos, Abalos's boyfriend, Luis Urbina, and a friend, Chris Guerra (Martinez group), went to a restaurant where they spent the next hour and a half drinking. RP 512-514, 615-616, 828. They then went to a bar and continued to drink. RP 514-515, 562-565, 617, 829. While they were there a fight broke out and everyone was told to leave. RP 516, 618. The four decided to go to a Jack-in-the-box restaurant to get something to eat. RP 517, 619, 831. They were all drunk. Abalos was too drunk to drive so Martinez drove Abalos's Fusion because she was a "heavy drinker" and could hold her alcohol. RP 518, 561-563, 619, 829.

That same day Jason Williams and his wife, Martha Mejia, attended Mejia's uncle's wedding ceremony. RP 1015. Coincidently, the wedding party too went to the same bar that Martinez's group were at. RP 1022. After the fight broke out, Williams and Mejia left to go back to Mejia's uncle's house to pick up their children. RP 1941.

Mejia drove the couple's Yukon. RP 1941-1942, 1969. Williams noticed a car following them. Also, coincidently he told Mejia to drive into the same Jack-in-the box restaurant the Martinez group were going to. RP 2093. Mejia entered the restaurant's drive through lane. RP 2093. Martinez entered the drive through lane behind Mejia. There was another car in the lane in front of the Mejia and the driver was ordering food. RP 518, 570-571, 620, 990.

After a few minutes Mejia and Williams decided to leave. Because of the car in front of her, Mejia put the Yukon in reverse to back out of the lane. Abalos, who was sitting in the front passenger seat of the Fusion, which was behind Mejia's car, reached over and began honking its horn and then got out of the car and yelled at Mejia to stop. RP 624-625, 676-678, 704.

Mejia got out of her car and walked to the Fusion, and Mejia and Guerra started arguing. RP 527. Guerra and Urbina got out of the car and Guerra approached Mejia. RP 627, 683-684. Mejia yelled for Williams to help her. RP 530, 627-628, 687, 833. Williams got out of the Yukon, walked over to where Mejia and Guerra were standing, and he too started arguing with Guerra. RP 531-532, 630.

A fight then ensued between Williams and Guerra. RP 533-534, 631. Guerra did most of the hitting and Williams fell to the ground. RP

584-585. While Williams was on the ground Guerra started "whaling" on him. RP 632-633. While Guerra was beating Williams, Urbina grabbed and tossed Mejia. RP 537, 633, 836. Urbino then joined Guerra and he too began hitting Williams, who was badly beaten. RP 589-591, 690.

After beating Williams, Guerra got back into the Fusion. Martinez started to back up, but she hit a curb. RP 538, 539, 591-593, 633-634. According to Martinez, Mejia took out her phone and took pictures of the Fusion's license plate. RP 541-542, 544. Abalos got partially out of the Fusion and confronted Mejia. RP 646. According to Abalos, Mejia then went to where Abalos was sitting and reached inside the car and grabbed her by the hair. RP 647. Urbina then grabbed Mejia again and pulled her away from the car and onto the ground. RP 548, 650, 840.

In the meantime, Williams got up off the ground and went to where Guerra was sitting and swung at Guerra. RP 638, 835. Guerra began beating Williams again. RP 647, 721, 836-837, 888.

Urbina told police Williams then walked back to his car and Guerra followed him. RP 841, 895. Martinez and Abalos were unclear about what happened next. Abalos testified Williams started walking towards them tucking a gun into his pants. RP 650-651. Martinez testified Williams walked towards them with a gun in his hand. RP 550. Williams

shot at the Fusion and then Williams and Mejia got back into their car. RP 654.

Kristopher Hemmerling was also at the Jack-in-the-box. He saw Williams walk from the Yukon towards the Fusion, and Guerra walk towards Williams. RP 944, 966-967. Williams raised his arm and fired a gun. Williams then brought his arm down, did something, brought his arm back up and fired again. RP 971-972.[1] Hemmerling called 911.

Guerra had been shot and he said he needed to go to the hospital. Martinez and Abalos put Guerra into the car. RP 552-553, 656.

Before the group left, however, Mosses Lake police officer Kevin Hake arrived. RP 1127. Hake saw Urbina and Abalos but he did not see Martinez anywhere. RP 1098, 1127-1128, 1131. Abalos and Urbina told Hake *someone* was shot and described Williams's car and the direction it had gone. RP 657, 1082-1086, 1130. Inexplicably Abalos and Urbina *did not* tell Hake that it was Guerra who was shot and that he was in the Fusion bleeding. RP 1130, 1828-1829. Hake left and followed the Yukon. RP 1086, 1131.

Hake and other officers followed the Yukon to Mejia's uncle's house. RP 1086, 1089. Williams and Mejia were arrested and taken to jail. RP 1177-1178, 1414. Emergency medical personnel were called to

[1] The Jack-in-the-box security cameras captured some of the incident. Ex. 101; Ex. 129.

examine Williams, and a doctor advised that Williams needed immediate treatment. RP 1180. Williams was taken to the hospital. RP 1180-1181, 1838.

Guerra was shot in the right knee and pelvic area. RP 1329, 144, 1349. The shot to his pelvic caused internal bleeding that proved fatal. RP 1320, 1370.

2. Defense Evidence

When Mejia put the Yukon in reverse to leave, the Martinez group yelled at her, so she walked towards the Fusion and asked Martinez to let her back out. RP 1942-1943. Guerra then got out of the car and pushed Mejia. She fell back and hit her head on the ground. 1942-1943. When she got up another man came towards her from the right side of the car, so she screamed for Williams to help her. RP 1943-1946.

Williams, who was still sitting in the Yukon, saw Guerra swing at Mejia and he heard Mejia scream for help. RP 2104, 2109. Williams got out of the Yukon and confronted Guerra and a fight started. RP 2106-2109. Another man joined the fight, and they stomped on him and kicked him in the face as he tried to get up. RP 1950, 2110. As the beating continued Williams saw one of the assailants grab Mejia. RP 2115. Williams momentarily blacked out. RP 2111.

When the beating finally stopped Williams got up and walked back to where Mejia was standing next to their car. RP 2116. Mejia was dazed. Williams then walked over to the Fusion and screamed at the driver to back up. RP 2118-2119, 2190.

When the Fusion started to move, Williams walked back to his car, but Guerra followed him. RP 2120-2125. Guerra had a dark grey object in his left hand. RP 2126-2130. At that point Mejia was attacked again and she fell to the ground. RP 2144-2145. Guerra then grabbed Williams by the shoulder and hit him in the face with an object. RP 2131-2132. He dropped to the ground. RP 2134. When he got up he heard Mejia scream for help. He ran to his car and grabbed the gun from passenger door where it was stored. RP 2134-2136.

After Williams got the gun Guerra started coming at him again. RP 2141, 2145. Williams was nervous, scared and afraid for Mejia's and his life. RP 2146-2148. Williams wanted to scare the attackers, so he screamed that he had a gun. Guerra kept coming towards Williams and was cutting off Williams's access to Mejia, so Williams fired warning shots. Guerra was undeterred, so Williams shot again. RP 2149-2155. Williams fired low because he did not want to kill anyone. RP 2153.

When Williams saw Guerra fall to the ground he told Mejia to get back in their car. RP 2155-2156. Williams thought he heard gunshots, so

he quickly drove away. RP 2156, 2166. Williams drove to Mejia's uncle's house. Williams told Mejia's uncle he was jumped, and he dropped the gun on the bedroom floor. RP 2157-2158.

E. ARGUMENTS

1. THE COURT'S REVENGE/RETALIATION INSTRUCTION DENIED WILLIAMS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BECAUSE IT WAS UNSUPPORTED BY THE EVIDENCE, MISLEADING, FAILED TO ADEQUATELY CONVEY THE LAW, RELIEVED THE STATE'S BURDEN OF PROOF AND WAS A COMMENT ON THE EVIDENCE.

Williams does not contend that the right of self-defense does not permit action done in retaliation or revenge is not a correct statement of the law. However, instructing the jury of that in this case and the language of the instruction denied Williams his right to a fair trial.

Jury instructions must more than adequately convey the law of self-defense and must make the relevant legal standard manifestly apparent to the average juror. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) Instructions that misstate the law of self-defense have a deleterious affect an accused Sixth and Fourteenth Amendment rights to due process and to a jury trial. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Where self-defense is claimed, evidence of the lawful use of force "is evaluated 'from the standpoint of the reasonably prudent person,

knowing all the defendant knows and seeing all the defendant sees.'" State v. Walden, 131 Wn.2d at 474 (quoting State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). This standard necessarily incorporates both subjective and objective 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.

Williams defense was that he acted in self-defense and in defense of his wife. In addition to other standard self-defense and defense of another instructions,[2] the court instructed the jury that, "Justifiable homicide committed in the defense of the slayer, or 'self-defense' is an act of necessity. The right of self-defense does not permit action done in retaliation or revenge." CP 73 (Instruction 26).

This revenge/retaliation instruction was lifted from language in State v. Studd, 137 Wn.2at 550, where an identical instruction was given. In Studd, the co-petitioner argued the instruction was improperly given because it was not an approved patterned instruction and improperly emphasized the State's theory of the case. Id. This Court rejected those

[2] CP 62-68, 70-72.

arguments finding the instruction comported with the reasoning in Janes. Id.

The issue in Janes was whether the trial court failed to consider evidence that showed Janes' subjectively believed the need to act in self-defense in denying his self-defense claim. Janes, 121 Wn.2d at 236. The Janes Court ruled the trial court failed to consider the defense evidence in light of Janes' subjective knowledge and perceptions Id. at 242. In dicta, this Court also briefly discussed the objective element of self-defense. It commented that as a general proposition:

> "The objective aspect also keeps self-defense firmly rooted in the narrow concept of necessity. No matter how sound the justification, revenge can never serve as an excuse for murder. '[T]he right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge.'" People v. Dillon, 24 Ill. 2d 122, 125, 180 N.E.2d 503 (1962).

Id. at 240.

Substantial evidence must support all jury instructions. State v. Fernandez–Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The "substantial evidence" requirement for a first aggressor instruction is particularly critical in a self-defense case because the instruction prevents a defendant from claiming self-defense. State v. Stark, 158 Wn. App. 952, 960-61, 244 P. 3d 433 (2010), *review denied*, 171 Wn.2d 1017, 253 P.3d 392 (2011).

The Janes Court observed that self-defense is not a valid defense where the person claiming the defense is a first aggressor or acts out of revenge or retaliation. Even if the State's theory is that the defendant was the aggressor, courts are required to use care in giving an aggressor instruction because it impacts a claim of self-defense and State's burden of disproving the claim beyond a reasonable doubt. State v. Riley, 137 Wn.2d 904, 910, n.2, 976 P.2d 624, (1999). For that reason, first aggressor instructions are disfavored. Id.

The revenge/retaliation instruction given in this case has the same impact as a first aggressor instruction. Like a first aggressor instruction, it informs the jury that self-defense is not a valid defense if the person claiming the defense acted out of revenge or retaliation.[3] Like a first aggressor instruction, unless substantial evidence supports a revenge/retaliation instruction a defendant is prejudiced because it prevents the defendant from claiming self-defense. Thus, the same legal principles should apply to the giving of a revenge/retaliation instruction.

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[3] The patterned aggressor instruction reads:

> "No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense [or] [defense of another] and thereupon [kill] [use, offer, or attempt to use force upon or toward] another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense [or] [defense of another] is not available as a defense."

11 Washington Pattern Jury Instructions (WPIC): Criminal 16.04 (4th ed.)

The altercation here was fluid, lasted a few minutes, and was ongoing when Williams retrieved his gun and ultimately fired it. The Court of Appeals fails to identify what "substantial evidence" supports the proposition that Williams acted out of any motive except fear of imminent harm or death. There was not substantial evidence to support the revenge/retaliation instruction.

When it requested the revenge/retaliation instruction, the State explained its theory was that when Williams fired his gun there was "no necessity" and the response was "unreasonable." RP 2476. It asserted the instruction was appropriate because "it helps the jury understand that self-defense is different than retaliation or revenge." RP 2477. However, the State was not prevented from arguing its theory absent the revenge/retaliation instruction. And, there is no plausible reason why the instruction was necessary to help "the jury understand that self-defense is different than retaliation or revenge" then would an aggressor instruction, for example, where substantial evidence does not support giving that instruction. See State v. Wasson, 54 Wn.App. 156, 158–59, 772 P.2d 1039 (1989) ("[I]t is error to give such an instruction when it is not supported by the evidence.") (citations omitted).

On the other hand, the instruction effectively prevented Williams from arguing his claim of self-defense. Where, like in this case, a person is

beaten and witnesses their spouse assaulted, it is almost a certainty the person would feel anger and desire revenge. But those emotions do not somehow foreclose fear where the person reasonably believes the perpetrators of the beatings and assault intend to continue to inflict imminent substantial harm or death. Revenge *and* fear are *not* mutually exclusive emotions. Even if substantial evidence supported an inference that Williams's actions were motivated *in part* out of revenge, *and* by a reasonable fear of imminent death or substantial harm, it cannot be the law that a self-defense claim is unavailable.

A reasonable juror could infer that Williams, like most people in his situation, experienced anger and desired revenge. The same juror considering all the facts and circumstances could also reasonably conclude that Williams reasonably believed he and his wife were in imminent danger of death or substantial harm if he did not take protective action. But, the instruction unequivocally told the jury "[t]he right of self-defense does not permit action done in retaliation or revenge." Thus, if jurors inferred that Williams was only in part motivated by revenge, jurors were left with no choice but to reject his defense. The revenge/retaliation instruction effectively prevented the jury from making the critical decision whether Williams reasonably believed that he was in imminent danger of death or substantial bodily harm, considering all the facts and

circumstances known to him. See State v. Kelly, 102 Wn.2d 188, 197, 685 P.2d 564 (1984).

Another problem with giving the instruction in a case like this is that it relieves the State of its burden to prove the absence of self-defense. Unlike the first aggressor instruction, which requires jurors to "find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight" (WPIC 16.04), the revenge/retaliation instruction did not. The instruction required Williams to prove his motive was not revenge thereby relieving the State's burden of disproving beyond a reasonable doubt that Williams did not act in self-defense. See State v. Acosta, 101 Wn.2d 612, 615-617, 683 P.2d 1069 (1984) (due process demands the State prove the absence of self-defense beyond a reasonable doubt).

Because the revenge/retaliation instruction vitiates a self-defense claim in the same way as a first aggressor instruction, where substantial evidence supports the instruction it should be crafted similarly to a first aggressor instruction to adequately convey the law. It should at least inform the jury that if it "finds beyond a reasonable doubt that the defendant actions were done *solely* for revenge or retaliation then self-defense or defense of another is not available as a defense."

There is yet another problem with the instruction. In the context of this case it was an unconstitutional judicial comment on the evidence. Judges may not "charge juries with respect to matters of fact." Const. art. IV, § 16. The comment need not be expressly made; it is sufficient if it is implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). A statement is a judicial comment if the court's attitude can be inferred. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

A jury instruction is not an impermissible comment on the evidence when sufficient evidence supports it and the instruction is an accurate statement of the law. State v. Johnson, 152 Wn.App. 924, 935, 219 P.3d 958 (2009) (citing State v. Hughes, 106 Wn.2d 176, 193, 721 P.2d 902 (1986)). The facts and circumstances of the case determine whether words or actions amount to a comment on the evidence State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). In Studd this Court opined in dicta that the same revenge/retaliation instruction was not a comment on evidence. Studd, 137 Wn.2d at 550. Presumably, the Studd Court found there was substantial evidence to support the instruction in that case.

In this case substantial evidence did not support the instruction. Under the facts in this case, jurors would have reasonably interpreted the instruction as an indication the judge believed that Williams nonetheless

acted in retaliation or out of revenge and therefore under the express language of the instruction his defenses were legally unpermitted.

Review is warranted because substantial evidence did not support the instruction, it was misleading, relieved the State of its burden of proving the absence of self-defense, an impermissible comment on the evidence, and failed to make the relevant legal standard "manifestly apparent." State v. LeFaber, 128 Wn.2d at 900. This Court should also take review to clarify its decision in Studd by addressing the issues of substantial evidence to support a revenge/retaliation instruction, and if supported by substantial evidence the language the instruction should include to pass constitutional muster. RAP 13.3(b)(3) and (4).

2. THE STATE'S IMPROPER CLOSING ARGUMENT DENIED WILLIAMS HIS RIGHT TO A FAIR TRIAL.

During closing argument, the prosecuting attorney told the jurors:

> I would just suggest to you that when you've had a chance to fully discuss the case and you've got a decision to make and, you know, you might have a doubt about something. But if you can't assign a reason to that doubt, if you can't articulate or talk about what that doubt is, at that time you're beyond a reasonable doubt.

RP 2563.

It is improper for a prosecutor to argue that jurors must have a reason for having a reasonable doubt because the law does not require that a reason be given for a juror's doubt. State v. Kalebaugh, 183 Wn.2d 578,

585, 355 P.3d 253 (2015). This type of improper argument has consistently and repeatedly been condemned because it subtly shifts the burden of proof to the defense. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011) *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012); State v. Venegas, 155 Wn.App. 507, 228 P.3d 813 (2010); State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009). Where case law and professional standards are available to the prosecutor and clearly warn against the conduct, such conduct meets the flagrant and ill-intentioned standard. In re Pers. Restraint of Glasmann, 175 Wn. 2d 696, 707, 286 P.3d 673 (2012).

The Court of Appeals correctly found the argument improper. Slip. Op. at 7. It ruled, however, the argument "was not so flagrant that the fairness of this trial was impacted" because an objection "could easily have led to a correction of clarification of the statement." Id. at 8.

It is difficult to conceive of how the statement could be cured nor does the Court of Appeals offer any suggestion. The plain language of the standard reasonable doubt instruction, which was given in this case, states "a reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." CP 50 (Instruction 4). A reasonable juror could read Instruction 4 to require a reason for the doubt as opposed

to a doubt based on reason. An attempt to explain to the jury that the argument was improper because the law does not require that a reason be given for a juror's doubt would have conflicted with that instruction. This Court should accept review. RAP 13.4(b)(3) and (4).

E. CONCLUSION

Williams requests this Court grant review.

DATED this 1 day of June 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

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FILED
MAY 8, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JASON DONTE WILLIAMS, Appellant.	)	No. 34837-7-III UNPUBLISHED OPINION

KORSMO, J. — Jason Williams appeals his convictions for second degree murder and three counts of first degree assault, primarily arguing that the court erred in giving an instruction advising jurors that revenge did not constitute self-defense. We affirm.

FACTS

This case involved a shooting in the drive-through lane of a Moses Lake Jack-in-the-Box restaurant around 1:30 a.m. on January 18, 2015. After a night of heavy drinking following a family wedding, Mr. Williams and his wife, Martha Mejia, pulled into the drive-through lane on their way home. Ms. Mejia was driving. A car driven by Cynthia Martinez also pulled into the drive-through lane behind the Mejia-Williams vehicle. There were four occupants of Ms. Martinez's vehicle, all of whom also had engaged in heavy drinking.

Deciding to leave, Ms. Mejia tried to back up, leading Ms. Martinez to honk her car's horn to stop Mejia from colliding with her. Ms. Mejia got out of the car and began arguing with Ms. Martinez.[1] Christian Guerra got out of the car to urge Mejia to calm down. Ms. Mejia called for assistance from Mr. Williams. Williams began arguing with Guerra and the two men began fighting between the two vehicles. Williams was knocked to the ground and Guerra continued beating on him.

The fight eventually ended and the combatants returned to their vehicles. Ms. Martinez again attempted to back up to escape the drive-through lane, but hit a curb and halted. Ms. Mejia got out and attempted to take pictures of Martinez's car's license plate. A female passenger in the Martinez vehicle yelled at Ms. Mejia to stop taking pictures. Mejia responded by going to the car, reaching through the window, and grabbing the passenger by her hair. Another passenger got out and pulled Mejia away, tossing her to the ground.

Williams then got out and returned to the Martinez car and attempted to punch Guerra through an open window. Guerra got out of the car and the two men engaged in another fight between the two vehicles. Once again losing the encounter, Williams walked back to his car and attention turned to where Mejia was in a struggle. Williams returned with a gun and pointed it at Guerra, who raised his hands above his head.

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[1] The restaurant's video camera captured much, although not all, of the ensuing events.

Williams began firing at Guerra and at the car. Wounded, Guerra fell to the ground. Williams and Mejia drove to their house. Martinez and her passengers drove Guerra to the hospital where he expired.

Williams was charged with one count of first degree murder, three counts of attempted first degree murder, and three counts of first degree assault. All counts contained a firearm enhancement. The case eventually proceeded to jury trial. The defense obtained jury instructions on self-defense, defense of others, and no duty to retreat. Over defense objection, the State obtained an instruction on revenge:

> Justifiable homicide committed in the defense of the slayer, or "self-defense," is an act of necessity. The right of self-defense does not permit action done in retaliation or revenge.

Clerk's Papers (CP) at 73 (Instruction 26).

The parties argued the case under the competing theories of self-defense or unjustified retaliation. The jury convicted Mr. Williams of the included offense of second degree murder and on the three counts of first degree assault. All four offenses were committed with a firearm.

After receiving a mitigated exceptional sentence that still tallied 40 years, Mr. Williams appealed to this court. A panel considered the case without hearing argument.

ANALYSIS

This appeal presents two claims.[2] We initially will consider Mr. Williams' claim that the court erred by giving the revenge instruction. We then will turn to a contention that misconduct in closing argument requires a new trial.

Jury Instruction

The first contention is that the trial court erred in giving the revenge instruction, with Mr. Williams arguing that it unduly limited his right to act in self-defense by focusing on the element of necessity. Since the record supported the instruction, the trial court did not abuse its discretion.

Settled law governs this contention. Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. *State v. Dana*, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). The trial court also is granted broad discretion in determining the wording and number of jury instructions. *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). Discretion is abused when it

[2] Mr. Williams also filed a personal statement of additional grounds that we will not separately discuss. Some of the contentions are merely variations on his counsel's argument, while the other matters involve factual allegations outside of the record of this case. His remedy, if any, for those claims is to bring a personal restraint petition in which he can present his evidence in support of the arguments and allow the State to do the same. *See, e.g., State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995); *State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159 (1991).

is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The essence of Mr. Williams' argument here is that the instruction was erroneous because it focused on necessity rather than his subjective view of the need for self-defense. This is not a proper comparison of the purposes of the instructions. The standard for using self-defense was set out in Instruction 16. CP at 62. Following that instruction were a series of instructions focusing on differing aspects of the justifiable use of force. For instance, Instruction 18 advised jurors that a person acting in self-defense can only use necessary force. CP at 64. The definition of "necessary" was set out in Instruction 25. CP at 72. It was in this context that Instruction 26 advised jurors that revenge was not necessity. CP at 73.

Instruction 26 did not purport to be the complete law of self-defense, just as the other instructions supporting and explaining Instruction 16 did not themselves fully define the concept. Instead, each instruction had a specific part to play in explaining the concept of self-defense in its totality. Instruction 26 was not misleading and did allow the State to argue its theory of the case—Mr. Williams was acting out of vengeance rather than necessity. Nothing in that instruction prevented Mr. Williams from arguing his theory of the case. Accordingly, Instruction 26 was proper. *Dana*, 73 Wn.2d at 536-537.

Although he raises several distinct arguments against Instruction 26, they all flow from his perception that the instruction is erroneous. We need not address the contentions

separately because the instruction has already been upheld by *State v. Studd*, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999). *Studd*, a consolidated appeal addressing six different cases, primarily involved challenges to pattern self-defense instructions. Some of the cases also presented additional challenges. The Pierce County case involving defendant Lee Cook, Jr., was one of them.

The trial court had given an instruction identical to the one at issue in this case. *Id.* Arguing that the instruction improperly emphasized the State's theory of the case, Mr. Cook claimed that the instruction had never been approved and was improper. *Id.* The court disagreed, noting that it was consistent with the court's decision in *State v. Janes*, 121 Wn.2d 220, 240, 850 P.2d 495 (1993). Concluding its discussion of the instruction, the *Studd* court stated:

> We find that the instruction correctly stated the law, and did not unfairly emphasize the State's theory of the case or, in any way, comment upon the evidence.

137 Wn.2d at 550.

Studd answers Mr. Williams' argument here. The instruction was not erroneous. Moreover, this court, of course, is bound by a decision of the Washington Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). The trial court correctly gave the revenge instruction under these facts. There was no error.

Closing Argument

Mr. Williams next argues, quite correctly, that the prosecutor erred in closing argument by challenging the jury to articulate any reasonable doubt it might be entertaining. The State now, also correctly, concedes the error. It argues, and we agree, that the error was not prejudicial.

In closing argument, the prosecutor told jurors that "if you can't assign a reason to that doubt, if you can't articulate or talk about what that doubt is, at that time you're beyond a reasonable doubt." Report of Proceedings (RP) at 2563. There was no objection by defense counsel.

It is improper for a prosecutor to urge jurors to "fill in the blanks" or otherwise force them to explain why they have a reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 584-585, 355 P.3d 253 (2015); *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). This error "subtly shifts the burden to the defense." *Emery*, 174 Wn.2d at 760. We agree with the parties that the statement was erroneous.

However, erroneous statements of this kind are not automatically grounds for reversal. *Id.* at 762-763. If defendant did not object at trial, the error is deemed waived unless the prosecutor's misconduct was so flagrant and ill-intentioned that it could not have been neutralized by a curative instruction. *Id.* at 760-761. The "flagrant and ill-intentioned" standard for misconduct requires the same "strong showing of prejudice" as the test for manifest constitutional error under RAP 2.5(a). *State v. O'Donnell*, 142 Wn.

App. 314, 328, 174 P.3d 1205 (2007). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

The prosecutor's error was not prejudicially harmful under this demanding standard. The prosecutor's remark immediately followed a statement where he told jurors that the burden of proof "always" remained "at this table" and was the only statement of its kind occurring during a lengthy closing argument. RP at 2563. He concluded his argument by requesting that jurors find the defendant guilty of first degree murder of Mr. Guerra and attempted murder of the other three. He also told jurors that if they did not agree, second degree murder of Mr. Guerra and either first or second degree assault of the others were appropriate verdicts. RP at 2606. The jury rejected the greater charge in each instance and returned verdicts on the lesser offenses.

In the context of the argument, it is not likely that the jury considered the prosecutor's remarks as a shift in the burden of proof. More critically, the error was close enough that an objection could easily have led to a correction or clarification of the statement. This passing remark simply was not so egregious that the court could not have cured the problem. Although erroneous, the remark simply was not so flagrant that the fairness of this trial was impacted.

The convictions are affirmed.[3]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Pennell, A.C.J.

Siddoway, J.

[3] Mr. Williams also asks that appellate costs be waived. In light of the prosecutor's statement that costs will not be sought, this issue is moot.

NIELSEN, BROMAN & KOCH P.L.L.C.

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