Supreme Court No. 97662-7
(Court of Appeals No. 75560-9)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

KAMURAN CHABUK, Appellant.

PETITION FOR REVIEW

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State Rules

A. IDENTITY OF RESPONDENT, PETITIONER

Respondent, State of Washington, by Kimberly A. Thulin, deputy prosecutor for Whatcom County, seeks the relief designated in Part B.

B. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals decision to affirm the trial court's order for a new trial pursuant to CrR 7.5(a)(2) based on unpreserved prosecutor error and the appellate courts conclusion Chabuk's counsel was constitutionally ineffective for failing to object at trial. A copy of the Court of Appeal's Opinion and of the trial court's Decision are attached and incorporated herein as Appendix A and B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals decision upholding the trial court's order for new trial on unpreserved errors that were not obvious and could have been averted with a curative instruction conflicts with this Court's decisions in State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981), State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

2. Whether the Court of Appeals erred holding it was improper for the prosecutor to argue the facts and circumstances leading up to defendant's use of deadly force to argue and prove the defendant did not act in self-defense beyond a reasonable doubt.

3. Whether the Court of Appeals erred affirming the trial court's order for new trial predicated on misstatements in closing that were neither ill-intended nor could have resulted in an enduring prejudice in conflict to this Court's decisions in Emery, 174 Wn.2d 741, and Matter of Phelps, 190 Wn.2d 155, 410 P.3d 1142 (2018).

4. Whether the Court of Appeals erroneously concluded for the first time on appeal Chabuk's trial attorneys were prejudicially

ineffective without examining defense counsel's presumptively effective conduct in context of their strategies, ***all*** of the evidence, arguments and jury instructions given below?

D. STATEMENT OF THE CASE

After hearing a noise from a Bellingham neighborhood, Chabuk and his girlfriend Danielle walked down the street a block away to a house where Josh Kiener, his roommate Kyle Walker and friends were partying, to see if everything was ok. RP 261, 263. Chabuk was lawfully armed with a concealed 9 mm semi-automatic pistol, a flashlight and cell phone. RP 761. Chabuk, a graduate student the time, did not know Kiener who also happen to be an undergraduate student at Western Washington University. Once in front of Kiener's house, Chabuk observed Kiener and his friends were horsing around, partying and nobody was in distress. RP 846-9. Kiener and his roommate Kyle were intoxicated. RP 261, 306, 362. Another friend, Todd, less so. Todd testified he stopped drinking earlier and was sobering up when these events unfolded. RP 261.

Chabuk initiated contact with Kiener and his friends by standing in front of Kiener's front yard and video recording them with his cell phone while shining a flashlight to illuminate the yard. After approximately 12 seconds, Chabuk asked the group if there was a problem. RP 439, 519-20, 769. Todd described as awkward, unfriendly and antagonistic. RP 283-4, 266. Chabuk's girlfriend told Chabuk she thought they should go. RP 441, 925. As Chabuk was leaving, Kiener noticed he walked around the front

of Todd's car parked, then parked in front of the yard. RP 318. It was in this moment, Kiener perceived Chabuk had done something to Todd's car. RP 855. As Todd went back into the house, he overheard Kiener ask Chabuk what he had done to his car. RP 267, 774. Getting no response, Kiener began following Chabuk and Danielle repeatedly asking what Chabuk had done to Todd's car. RP 267, 272.

What happened next was disputed at trial. Chabuk claimed Kiener threatened him as he walked back to his apartment complex, that he thought Kiener had a big rock and was scared Kiener would hurt him. RP 584, 776, 822. Kiener in turn, testified he followed Chabuk and repeatedly asked Chabuk what he had done to Todd's car. When Chabuk reached the bottom of steps that led to a 80 foot walkway that ran perpendicular to his apartment complex from the road, Chabuk turned to face Kiener, began recording and shining his flashlight again, and asked "What did you say?" RP 586, 697, 798. Kiener said, "I was wondering why you were touching my private property." RP 798. Chabuk explained at trial that he thought recording Kiener again with his cell phone would de-escalate the situation and obviate any need to call 911. RP 862.

Kiener again asked Chabuk what he had done and Chabuk responded by informing Kiener he was on private property, that he needed to leave and that he was going to call the police. RP 294-5, 322. Josh told Chabuk he wasn't leaving until Chabuk told him what he was doing. RP

294-5. Kiener called Chabuk a pussy and continued to press for an explanation regarding Todd's car, Chabuk told Kiener "I think you better back off." RP 369, 370. Kiener responded "I don't give a fuck what you think." RP 374. Chabuk then responded, "it's not your property right? Do you think the police would be interested in this video?" RP 375. Josh again asked Chabuk, "well, why are you touching my property?" RP 381. Chabuk then announced "well, this is as far as I go," and denied touching the vehicle. RP 383. Chabuk then informed Kiener, "this is my property. You are on private property right now and I suggest you leave." RP 383-4.

Kiener noticed Chabuk pointed something at him but didn't understand it was a gun. RP 326. He asked Chabuk "what, are you going to Taze me with that or something." CP 304-308 (Exhibit 44, video recording of shooting). Chabuk, while still holding his cell phone and a flashlight in one hand and his gun in the other, did not respond and instead, asked if someone could call 911. RP 868, 384. In the video a woman can be heard saying "no, wait," then Chabuk fired, shooting Kiener in one leg and then saying "back off." Kiener responds "Fuck you." RP 387, 870, See also, CP 304-308 (Exhibit 92, Image 19A. Chabuk repeats "back off." RP 388. Seconds later Chabuk fires a second shot into Kiener's other leg. Kiener's hands are down by his side as he steps forward stating, "Fuckin derelict. Fuck you." "I am not going to hurt you dude." RP 388-9. Kiener proceeds forward and Chabuk fires a third time

into Kiener's abdomen. RP 390. Precisely where the parties were in relation to the pathway that led from the street to Chabuk's apartment door, each time Chabuk shot Kiener, was a contested issue at trial. RP 701, 704. Chabuk claimed he was at the door to his apartment whereas the State alleged based on forensic analysis, Chabuk was a third to two thirds down the pathway and Kiener 15-20 feet away, when he fired his first shot.

At trial, the prosecutor argued Chabuk had reasonable alternatives to the use of deadly force when he shot Josh Kiener three times, therefore Chabuk's use of deadly force was not necessary and he did not lawfully shoot Kiener in self-defense. Chabuk's trial attorneys in contrast, theorized Chabuk was a responsible gun owner who always tried to do the right thing and on this occasion reasonably believed shooting Kiener three times was his only reasonable alternative and therefore he shot Kiener in self-defense.

A jury found Chabuk guilty of assault in the second degree while armed with a deadly weapon. CP 309-320, 321-332. Several months after the November 2015 jury verdict, the trial court ordered a new trial pursuant to CrR 7.5 (a)(2) predicated on alleged unpreserved misstatements during closing argument and two questions on cross examination, by Chabuk's father not trial counsel, later adopted by conflict counsel. CP 274-286. The trial court also concluded that Chabuk's

trial attorneys were constitutionally effective. The State appealed. CP 287-301.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED

An order for new trial is an extraordinary remedy that should be limited to obvious, prejudicial errors preserved at trial. CrR 7.5(a)(2). The Court of Appeals decision in this case gives trial courts unfettered discretion to order new trials notwithstanding a defendant's failure to make ***any*** objection or take curative action during a trial based on allegations of prosecutorial error. By affirming the trial court's decision, the Court of Appeals condones the trial court's failure to evaluate alleged unpreserved errors in context to the entire record pursuant to the applicable standard of review, and ignores that a simple objection or request for curative instruction would have averted any prejudice subsequently claimed. An improper closing argument is not akin to a prejudicial instructional error. Arguing about the circumstances that led to the shooting and reasonable alternatives to the use of deadly force is not improper and could not have alleviated the standard of proof. The Court of Appeals additionally did not carefully examine the record as a whole to evaluate defendant's ineffective assistance of counsel claim. Strategic decisions to not object to two questions on cross examination or to closing arguments do not support a finding of ineffective assistance of counsel. The failure to object is a classic example of trial strategy. The Court of

Appeals erred in concluding that the trial court acted within its discretion ordering a new trial and for concluding for the first time on appeal, that Chabuk's attorneys were ineffective. This decision conflicts with this Court's decisions in State v. Williams, 6 Wn.2d 215, 643 P.2d 868 (1981); Emery, 174 Wn.2d 741; Matter of Phelps, 190 Wn.2d 155, 410 P.3d 1142 (2018); and, State v. Riley, 137 Wn.2d 904, 976 P.2d 624 (1999). Further review is warranted.

1. A new trial ordered pursuant to CrR 7.5(a)(2) should be predicated on obvious, preserved errors that actually implicate the fairness of the proceeding.

Whether a new trial is warranted or not pursuant to CrR 7.5 (a)(2) is a decision that rests within the discretion of the trial court. State v. Williams, 6 Wn.2d at 215. Here, the trial court ordered a new trial predicated on unpreserved errors that could have been averted with a simple objection or curative instruction. Appendix A, Slip. Op. 23 (# WL3413634.) While a much stronger showing of abuse of discretion is required to set aside an order granting a new trial than one denying it, the discretion to grant a new trial is, and should be, limited to obvious, preserved errors that implicate the fairness of the proceedings. State v. Williams, 6 Wn.2d at 221–22. Misstatements in closing that could have been averted by an objection or curative instruction are not errors that undermine or implicate the fairness of a trial sufficient to warrant a new

trial. Emery, 174 Wn.2d at 762. The Court of Appeals decision erroneously holds otherwise.

In Williams, the trial court improvidently granted a new trial pursuant to CrR 7.5(a)(2) based on errors Williams failed to preserve during trial. The assessment most critical in reviewing the appropriateness of an order for new trial post-verdict are the reasons provided by the trial court in making its decision. Williams, 96 Wn.2d 215. In Williams, the failure to preserve any of the alleged errors at trial was critical in concluding the trial court abused its discretion in ordering a new trial:

> Petitioner had many opportunities to request a mistrial and never did so. Had he felt the procedures used were inadequate for a fair trial, it was incumbent upon him to move for a mistrial at that time. He did not do so. Even after all the testimony was concluded and the jury was in the process of deliberating, petitioner declined to move for a mistrial ……. The defense made a tactical decision to proceed, "gambled on a verdict", lost, and thereafter asserted the previously available ground as a reason for a new trial. This is impermissible.

Williams, 96 Wn.2d 215, *citing* Nelson v. Martinson, 52 Wn.2d 684, 689–90, 328 P.2d 703 (1958) *reversing grant of new trial*. Pursuant to Williams, trial courts do not have unfettered discretion to order a new trial in the absence of any objection or attempt to request corrective measures below. "Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process." Emery, 174 Wn.2d at 762.

Chabuk's failure to object below to ***any*** of the prosecutor's arguments strongly suggests Chabuk did not perceive the prosecutor's conduct as critically prejudicial to the fairness of his trial. State v. Pastrana, 94 Wn. App. 463, 480, 972 P.2d 557 (1999), as amended (May 21, 1999), *as amended* (May 21, 1999). A simple objection or request for curative measures would have alleviated any prejudicial concerns. Emery, 174 Wn.2d 741. Timely objections discourage a prosecutor from continuing improper themes during argument. State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008).

While the trial court is typically best suited to evaluate whether a new trial is warranted, the findings in this case reflect the trial judge considered arguments in isolation, out of context to all of argument and without consideration that the jury was accurately instructed on the law. CP 274-286. The trial court's decision additionally reflects that the trial court impermissibly weighed the reasonableness of the prosecutor's factual arguments and based on his perceptions of the facts, would have acquitted. CP 274-286, Trial Court Letter, FF 3-8, 13 (concluding the prosecutor's argument that Chabuk could have called 911 as a reasonable alternative was unreasonable and that, but for the jury being the trier of fact, the judge would have granted a motion to arrest judgment). These findings suggest the trial court improperly relied on unpreserved errors because it disagreed with the verdict. Trial court discretion does not give

the trial court license to weigh the evidence and substitute its judgment for that of the jury simply because it disagrees with the verdict. Williams, 96 Wn.2d 215. Trial courts cannot "compel counsel to reason logically or draw only those inferences from the facts which the court believes to be logical." State v. Madry, 12 Wn. App. 178, 529 P.2d 463 (1974) *citing* City of Seattle v. Arensmeyer, 6 Wn. App. 116, 121, 491 P.2d 1305 (1971). As noted in State v. Marks, 90 Wn. App. 980, 980, 955 P.2d 406 (1998), "the latter functions are constitutionally reserved for the jury. The trial judge is not a "13th Juror." Id., *citing* Williams, 96 Wn.2d at 221–22.

2. Prosecutors should be permitted to argue the facts and circumstances leading up to the use of deadly force to prove beyond a reasonable doubt the defendant did not act in self-defense. The Court of Appeals erred holding otherwise.

The Court of Appeals decision erred affirming the trial court's conclusion that it was improper for the prosecutor to argue Chabuk initiated the conflict with Kiener and behaved antagonistically before the shooting; concluding this was an improper 'aggressor' argument. Slip. Op. at 28.

Prosecutors have traditionally been permitted to evaluate and argue the circumstances that lead to a defendant's use of deadly force in order to prove the absence of lawful self-defense beyond a reasonable doubt. State v. Riley, *see also* State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993) citing, State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984).

("*The longstanding rule in this jurisdiction is that evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.")* This standard includes consideration of facts and circumstances known to the defendant substantially predating the use of force. Id.

The prosecutor's arguments, "the evidence will tell you it irritated them;" "this started because he actually intruded on these peoples use of their yard;"… "he videotaped them, filmed them. He had a flashlight in their face, which certainly was guaranteed to irritate people," were grounded in the evidence and entirely appropriate. See, RP 853 (Chabuk concedes his actions seemed to irritate). The trial court concluded these statements constituted improper 'quasi aggressor' argument. CP 274-286, FF 6. But the trial court did not give a first aggressor instruction in this case. Nor did the prosecutor's argument suggest that the jury could not consider Chabuk's claim of self-defense if Chabuk initiated the conflict.[1] The prosecutor's argument did not alleviate the state's burden of proof. *See also*, State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136 (2009). (misstatements of the law where prosecutor repeatedly made a first

[1] A first aggressor jury instruction provides that self-defense is not available as a defense if the jury finds beyond a reasonable doubt that the defendant's intentional acts were reasonably likely to provoke a belligerent response from the victim and that it was this belligerent response that the defendant asserts was the basis for the need to act in self-defense. Riley, 137 Wn.2d 904.

aggressor argument using power point slides, ***over the objection*** of the defendant did not warrant a new trial.) (***emphasis added***.)

Arguing the circumstances that led to the shooting in this case was relevant to the jury evaluating Chabuk's subjective intentions at the time of the shooting and whether the state had proved beyond a reasonable doubt that Chabuk's use of deadly force was unnecessary, particularly when this entire encounter took only minutes to escalate to a deadly shooting. Equating the prosecutor's argument in closing with giving a first aggressor instruction conflicts with this Court's jurisprudence in both State v. Emery, 137 Wn.2d 904 and State v. Riley, at 910 n.10, because it suggests the parties may not argue their theory of a case when no aggressor instruction is given, and a statement in closing is akin to erroneously instructing the jury. This court has historically held in self-defense cases that the theories of the case can be argued and understood by the jury without the need for giving a first aggressor instruction. State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985).

3. The Court of Appeals erred evaluating whether the record reflects the alleged misconduct caused sufficient prejudice to warrant a new trial.

Chabuk's failure to object or request curative measures at trial should have been critical to the Court of Appeal's evaluation of whether the trial court abused its discretion ordering a new trial based on unpreserved prosecutor errors. Instead, the Court of Appeals affirmed the

trial court summarily, with no meaningful analysis of prejudice in the context of Chabuk's misconduct claims. The record reflects an objection during closing or request for curative instruction immediately after argument would have neutralized any of the prejudice Chabuk later claimed deprived him of a fair trial.

When a motion for new trial is requested based on prosecutorial error in closing, the trial court is required to apply the same standard as an appellate court would in reviewing such claims; the defendant must establish the prosecutor's conduct was both improper and prejudicial in the *context of all* of the arguments, the issues in the case, the evidence and the jury instructions given. (*emphasis added*.) State v. McKenzie, 157 Wn.2d 44, 51–52, 134 P.3d 221 (2006), State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Where as in this case, a defendant fails to object to alleged misconduct at trial, the error is waived unless the error "is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not been neutralized by an admonition to the jury." Id., *quoting*, State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

The Court of Appeals affirmed the trial court's order for new trial stating the trial court was in the best position to evaluate the impropriety of the prosecutor's arguments. Slip. Op. at 28. While this is generally the case, the trial court's findings reflect the trial court reached its decision improperly by reviewing *segments* of trial transcripts and *did not consider*

the context of alleged misstatements in light of all of the evidence, arguments, jury instructions or that some of the arguments the trial court relied on were in direct response to Chabuk's own arguments. See, State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), as amended (Aug. 13, 1997) (Prosecutors permitted to respond to defense arguments.) Moreover, the record reflects the trial court and Court of Appeals ***impermissibly equated a misstatement in closing to an erroneous jury instruction*** for purposes of evaluating prejudice**,** and ***impermissibly weighed the*** reasonableness of the prosecutor's factual arguments and did not meaningfully consider prejudice. Slip Op. 25, 28, See, CP 226 (Findings, 3, 4,7)("***some*** of the state's comments during closing inaccurately stated the law on the concept of alternatives to the use of deadly force…" ***emphasis added.***) (Trial court ***concludes that calling 911 was not a reasonable alternative*** to Chabuk's use of deadly force because "the facts of the case and the testimony as to the response time strongly suggests a phone call would have been to no avail." ….[T]he court is compelled to conclude that the arguments distracted the jury and misstated the law …inconceivable that the jury was not prejudiced thereby"…..) FF 8, CP 274-286. Consequently, this decision conflicts with this Court's decisions in both Emery, 174 Wn.2d 741 and Williams, 96 Wn.2d 215. Review is warranted.

In ordering a new trial predicated on unpreserved prosecutor error, the trial court focused on two statements, each statement having been used ***only once respectively*** during closing, to assert the prosecutor prejudicially misled the jury. RP 1332, CP 274-286. The prosecutor referred to Chabuk's "*heightened responsibility*" of a gun owner ***once*** in the context of arguing Chabuk could not lawfully use deadly force in self-defense if a reasonable alternative to the use of that force was available. RP 1302. The prosecutor referenced the phrase '*absolute obligation'* ***once*** at the end of opening arguments stating:

> The law allows self-defense and that's certainly a major part of our law, but you have to be responsible and you have to look at reasonable alternatives so that deadly force is not used. *The* defendant had many alternatives and he did not use any and the most egregious is that he hid the fact, he hid the fact that he had a gun in his possession and was willing to use it and in fact did. He didn't tell that to Josh. Kiener believed it was a Tazer. And that was something he had an absolute obligation to do. The ***evidence,*** ladies and gentleman, is clear. ***This was more force than necessary. He did not use alternatives that he had.***

RP 1302-3 (***emphasis added***). Rather than object, Chabuk's trial attorneys strategically chose to respond by arguing"[H]e didn't shoot until they came at him," he warned them to stay back by saying "back off, you are on private property." RP 1312. "Mr. McEachran wants to talk about how he didn't talk them down, how he didn't avail himself of alternatives….Is that really what happened here, ladies and gentlemen?" RP 1312-13. Chabuk's attorneys also pointed out to the jury "you aren't going to read

anything in the jury instructions that tells you that there ***has to be a warning*** that I'm going to use force before the law allows you to use it." RP 1313. Chabuk's attorneys' remarks reflect they did not perceive the prosecutor's arguments as sufficiently prejudicial to implicate the fairness of the trial.

While the Court of Appeals held these two statements when combined, misstated the law and thereby supports the trial courts assessment, this analysis falls short of explaining how these statements can be construed as ill-intended or found to result in an incurable prejudice sufficient to warrant a new trial. Misstatements of law are not the type of ill-intended misconduct that results in incurable prejudice. See, Matter of Phelps, 190 Wn.2d at 172–4 (finding of flagrant and ill-intentioned misconduct limited to set of cases where comments of race or membership to a particular group or argued in an inflammatory manner). The jury was instructed the lawyer's arguments were not evidence, the jury was accurately instructed on the law and they were directed to disregard any statement or argument not supported by the instructions. CP 95-127, RP 1247. A jury is presumed to follow the trial court's instructions. State v. Prado, 144 Wn. App. 227, 181 P.3d 901 (2008).

Moreover, the Court of Appeals reliance on State v. Phillips, 59 Wash. 252, 256–7, 109, 109 P. 1047 (1910) P.1047 (1910), *an instructional error case,* to conclude it was improper for the prosecutor to

argue Chabuk should have warned Kiener he had a gun, not a Tazer, as a reasonable alternative to the use of deadly force, is perplexing. The appellate court's reliance on Phillips reflects the Court of Appeal's decision erroneously equated the prosecutor's arguments to erroneous jury instruction. This was error. Particularly, when the singular reference to an 'absolute' obligation to avail oneself of a reasonable alternative to the use of deadly force is not an inflammatory type of error that could alleviate the state's burden of proof, or that could not have been neutralized by a prompt objection and curative instruction from the court to the jury. State v. Emery, 174 Wn.2d 741, 763–64, 278 P.3d 653 (2012) (Prejudice from comments misstating the presumption of innocence and undermining the burden of proof was neutralized by curative instruction.); Nelson v. Martinson, 52 Wash.2d 684, 689-90, 328 P.2d 703 (1958) (reversing grant of new trial); State v. Atkinson, 19 Wn. App. 107, 575 P.2d 240 (1978) (no complaint at trial); State v. McNallie, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), aff'd, 120 Wn.2d 925, 846 P.2d 1358 (1993)(A curative instruction will often cure any prejudice that has resulted from an alleged impropriety.) Even unpreserved instructional errors in self-defense cases are not presumptively prejudicial. State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009), *See also* , State v. Warren, 165 Wn.2d 17, 17, 195 P.3d 940 (2008) (Prosecutor's misstatements about the burden of proof

undermined the presumption of innocence but were not incurable). The prejudice alleged by Chabuk was curable. Emery, 174 Wn.2d 741.

4. The Court of Appeals failed to meaningfully evaluate whether Chabuk's attorneys were constitutionally ineffective in light of all the evidence, arguments and instructions given below.

The Court of Appeals erred concluding for the first time on appeal Chabuk's trial attorneys were constitutionally ineffective for failing to object to the prosecutor's closing arguments and two questions on cross examination. The trial court concluded Chabuk's attorneys were not ineffective. CP 274-286.

"[I]t is the defendant's burden to overcome the strong presumption that counsel's representation was effective. State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573 (2003). Ineffective assistance of counsel may not be predicated on reasonable trial strategy. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *rev. den.*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992). A decision not to object during argument or during cross examination is a classic example of trial strategy. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Only in egregious cases will the failure to object constitute incompetence of counsel requiring a new trial. State v. Neidigh, 78 Wn. App. 71, 895 P.2d 423 (1995).

Moreover, in assessing prejudice, it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding "… not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Strickland, 466 U.S. at 693. Judicial scrutiny of defense counsel's conduct must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. Strickland, 466 U.S. at 694–95.

The Court of Appeals here failed to meaningfully evaluate Chabuk's trial attorney's conduct in context to the evidence, instructions and arguments below, before summarily concluding ineffective assistance of counsel required a new trial. Slip. Op. at 32. Defense counsel chose in this case, not to object but address the prosecutor's arguments regarding reasonable alternatives to the use of deadly force in his closing statements. He pointed out that the law does not require a warning. RP 1313, 1331. Similarly, he chose not to object to two questions on cross examination that he could neutralize on re-direct. He understood that the jury was accurately instructed on the law and that they would reject any argument not supported by the evidence or the jury instructions. CP 95-127. The jury is presumed to have followed their instructions. State v. Lamar, 180

Wn.2d 576, 327 P.3d 46 (2014). Defense counsel's strategic choice not to object but to address arguments in response in closing and redirect *in this context* reflects Chabuk's attorneys made reasonable tactical choices that did not undermine the fairness of his trial. Particularly where, defense counsel understood that in context to the instructions and jury instructions, the prosecutor's arguments could not alleviate or shift the State's burden of disproving self-defense beyond a reasonable doubt.

F. CONCLUSION

Discretion in the context of considering whether to order a new trial, "does not give the trial court license to weigh the evidence and substitute its judgment for that of the jury, simply because of a disagreement of the verdict." Williams, 96 Wn.2d at 222. If there is substantial evidence on both sides of an issue, what the trial court believes after hearing the testimony, or in reviewing the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final. State v. Williams, 96 Wn.2d 215, 634 P.2d 868 (1981). *citing* Rettinger v. Bresnahan, 42 Wn.2d 631, 633–4, 257 P.2d 633 (1953).

Respectfully submitted this 16 day of September, 2019.

Kimberly Thulin

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APPENDIX

A

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

THE STATE OF WASHINGTON, Appellant/Cross Respondent, v. KAMURAN DANIEL CHABUK, Respondent/Cross Appellant.	)	No. 75560-9-I (Consolidated with No. 75661-3-I) UNPUBLISHED OPINION FILED: July 29, 2019

SCHINDLER, J. — The State charged Kamuran Daniel Chabuk with assault in the first degree of Joshua Kiener while armed with a firearm. Chabuk asserted he acted in self-defense. The jury convicted Chabuk of the lesser included offense of assault in the second degree while armed with a firearm. The State appeals the trial court's decision to grant a new trial based on pervasive and prejudicial prosecutorial misconduct. In his cross appeal, Chabuk argues his attorney provided ineffective assistance of counsel by not objecting to the misconduct. We affirm the trial court's decision to grant a new trial. We also conclude defense counsel provided ineffective assistance of counsel that resulted in prejudice.

FACTS

On Saturday, May 11, 2013, 30-year-old Joshua Kiener and his friends Todd Buckley and Kyle Walker met for brunch in Bellingham. Kiener, Walker, and Buckley had been friends since high school. Kiener and Buckley do not recall how much they had to drink at brunch. Walker remembered having three drinks. At around 4:00 or 5:00 p.m., they drove to Kiener and Walker's house at 2718 Nevada Street to have a barbeque. Buckley took a nap. Kiener and Walker continued to drink. Laura Smith arrived between 6:00 and 7:00 p.m.

Walker said they drank "champagne and some wine," whiskey, and "there was probably some beers as well." Kiener drank "some whiskey" and "a 6-pack of Rainier tall boys." A "tall boy" is a 16-ounce can of beer.

After barbequing "in the side yard," the group went to the front yard. Buckley and Kiener began "wrestling." Buckley "tackled" Kiener. As he fell to the ground, Kiener pulled a metal gutter off the house. Buckley picked up the metal gutter and "pretended" to swing it at Kiener. The group was very noisy. Walker was making a loud "squawking sound."

Twenty-seven-year-old Kamuran Daniel Chabuk lived in a duplex located at 2633 Nevada Street with his girlfriend Danielle Shook and Angela Ybarra-Dunn and Nicholas Ostrovsky-Snider. Chabuk was a graduate student at Western Washington University and worked as a teaching assistant in the mathematics department. Chabuk had a permit to carry a handgun that he used for target practice.

Shook was concerned about their safety while walking the dog on a nearby trail at night. Chabuk agreed to take his handgun when they walked the dog at night. Chabuk carried the handgun in a holster "between my belt and my body."

On the night of May 11, Chabuk and Shook took their dog for a walk at approximately 9:45 p.m. After they returned, Chabuk heard "some kind of a shouting noise" at around 10:30 p.m. that "sounded like the words 'get out.' " Ybarra-Dunn heard "somebody screaming, 'Get out.' " Ybarra-Dunn was worried about the voice she heard and "just felt very startled and felt my heart jump." Shook heard a voice that "sounded really angry and the yelling was continuing, um, so it seemed like there could be a problem." Shook put on her shoes to go outside. Chabuk did not want Shook to go out alone. Chabuk grabbed his cell phone and the flashlight he used to walk the dog. His gun was still in the holster.

Chabuk and Shook walked down the block. Chabuk saw three men and a woman in the front yard of a house. Two of the men were "holding on to some kind of gutter or like a downspout or something, and swinging it at each other." Chabuk used his cell phone to start videotaping. After Chabuk talked to the group, "it was clear" to Chabuk that "they were just drunk, that no one was actually hurt." Chabuk stopped recording and began walking back to the apartment. After a couple of steps, Chabuk realized that Shook was not following him. Shook was still talking to the group, trying to explain why she was worried about the yelling. Chabuk turned back to signal Shook to leave and come with him. As Chabuk and Shook started walking away, Chabuk heard footsteps behind him. Chabuk turned around and saw a tall man, later identified as

Kiener, following him. Kiener is 6 feet 5 inches tall and weighs between 200 and 215 pounds. Chabuk is 5 feet 10 inches tall and weighs approximately 155 pounds.

Kiener thought Chabuk "was doing something . . . suspicious" to Buckley's car as he was leaving. Kiener told Chabuk, " 'Do you want me to fuck you up? Why are you touching my property?' " Chabuk told Kiener, " 'I didn't touch your property.' " But Kiener repeated, " 'I saw you touching my property.' "

As Chabuk and Shook walked toward the apartment building, Kiener continued to follow them. Chabuk said that as he was walking, his shirt caught on his gun holster and he pulled up his shirt to loosen it from the holster. Chabuk testified Kiener said, " 'Oh, you are flashing your Glock.' " As Chabuk turned to face Kiener, he saw Walker approaching. While Chabuk walked away, Kiener continued to accuse Chabuk of touching his property.

Kiener and Walker advanced toward Chabuk "acting very aggressive," accusing him of "touching my property." Chabuk repeatedly told Kiener to "[b]ack off." Chabuk heard Shook yell to Kiener and Walker, " 'He has a gun.' " In response, Kiener said, " 'I don't fucking care.' " Chabuk began recording Kiener and Walker with his cell phone. Chabuk continued to walk backwards and climb the stairs toward the walkway leading his unit of the duplex. Chabuk called out for someone to call 911 "right now." After Chabuk yelled for someone to call 911, Kiener and Walked moved even more quickly toward him. Chabuk warned Kiener to "back off." But Kiener and Walker continued to confront and "pursue" him. Chabuk pulled the gun out of the holster. Kiener said, " 'Come on, take your flashlight out. What, are you going to taze me with that? I see you fucking holding that thing.' "

Chabuk fired his gun at Kiener low, toward the ground. Neither Kiener nor Walker reacted. As Kiener continued to advance toward Chabuk, Chabuk yelled, "[B]ack off" and fired his gun again. Kiener did not react and continued to advance toward Chabuk. When Chabuk fired the third shot, Kiener stopped. Chabuk called 911.

Thirty minutes after arriving at the hospital, Kiener's blood alcohol concentration was .25, more than three times the legal limit.

The State charged Chabuk with assault in the first degree of Kiener while armed with a firearm. Chabuk asserted he acted in self-defense.

The two-week jury trial began on November 9, 2015. The State called a number of witnesses to testify, including Kiener, Walker, Buckley, Smith, and Bellingham Police Officer Richard Schwallie. The court admitted more than 100 exhibits into evidence, including the two cell phone videos and the 911 calls.

Kiener testified that on May 11, 2013, he went to brunch with Walker and Buckley and they planned to have a barbeque later at his house. Kiener said they drank alcohol at brunch and continued to drink alcohol at the barbeque.

Kiener testified that while he and Buckley were wrestling, he saw Chabuk and Shook. Chabuk shined a flashlight on them and recorded them with his cell phone. Chabuk asked if they were involved in a domestic dispute. Kiener testified that he and the others made sarcastic comments to Chabuk and Shook.

Kiener said he followed Chabuk and confronted him because Kiener thought Chabuk "was doing something" to Buckley's car. Buckley's car was parked in front of the house near the sidewalk. Kiener said, "I couldn't see exactly what was going on and it looked like he was doing something to the front end of the car, so I got suspicious."

Kiener asked Chabuk, " 'What are you doing? This is my friend's property. What did you do to the car.' " Kiener conceded he "couldn't tell" if Chabuk had actually "done something to the car."

Kiener testified he "started following" Chabuk and Shook as they began walking away. Kiener said he was "20 feet or so" behind them. Kiener testified, "I can't remember . . . how many times I asked them what they were doing or what they did to the car." Kiener testified that he followed Chabuk up the stairs to the duplex building. At that point, he was "10 or 15 feet away" from Chabuk. Kiener testified, "I remember asking [Chabuk] what's going on and he said it's private property and you need to get off the property. I said something like, 'I am not going to go.' " Kiener said, "I remember him pointing something at me and I responded, 'What, are you going to taze me?' Because, apparently, I thought it was a [T]a[s]er. I don't really recall exactly." Kiener testified that he "didn't know what was going on" when he was shot the first time or the second time. Kiener testified, "[T]he one shot I remember is . . . the third shot."

Defense counsel played the cell phone videos during cross-examination.

Each video recording lasts approximately two minutes. The first video is very dark and no one is visible on the recording. Chabuk asks, "What are you guys doing?" There is laughter in the background and someone asks, "Are you taking pictures?" Chabuk says, "It looked like there was some fighting going on. . . . There was some yelling." Someone says sarcastically, "[W]e just murdered a couple children." Shook says, "Seriously, like, we're trying to show concern . . . if there is, like, a domestic situation going on." Someone says in a slurred voice, "I wouldn't worry about us" and, "That's a gutter." Shook says, "I'm not saying you did anything, I'm just making sure—"

when she is cut off by laughter and someone telling Chabuk to "take a picture." The video shows Chabuk is standing on the sidewalk in front of the house. Chabuk asks, "You're gonna wave?" Someone is standing near the front porch and appears to be waving. Several people talk jokingly about the "weird" poses they can do for the camera and the recording stops.

On the second video recording, Chabuk asks, "So what was it you were saying?" Kiener says, "I was wondering why you're fucking touching my property" and, "[Y]ou're a pussy. You're a pussy, right?" Chabuk tells Kiener, "I think you'd better back off." Kiener says, "I don't give a fuck what you think."

Kiener and Walker continue to follow Chabuk. Chabuk turns and asks Kiener, "Do you think the police would be interested in this video?" Kiener said, "I don't give a fuck what the police or you think."

The video shows that as Chabuk continues moving toward his apartment, Kiener and Walker are combative, following him and repeatedly accusing Chabuk of "touching my property." Chabuk continues to deny touching his property. Kiener says, "[T]ake your flashlight out. . . . Come on. What, are you going to taze me with that? I see you fucking holding that thing." Chabuk then says, "This is about as far as I go." Kiener asks, "Why are you touching my property?" Chabuk repeats, "I didn't do that." Kiener responds, "No, seriously, right now, why are you touching my property." Chabuk tells Kiener, "This is my property. You're on private property right now, and I suggest that you leave." Kiener responds, "You were on private property when you touched my shit."

Chabuk calls out, "Do you have a cell phone? Can you please call 911 right now." Kiener then advances toward Chabuk more quickly. Chabuk fires his gun and

yells, "Back off." Kiener says, "Fuck you" as he moves toward Chabuk and Chabuk says again, louder, "Back off." The video shows Kiener advance forward toward Chabuk and say, "You fucking derelict, fuck you." Chabuk fires a second shot. Kiener does not flinch and continues to move toward Chabuk until he is within arm's reach and Chabuk fires a third time.

Kiener testified that he "recognize[d] my voice" on the videos and his "discussion about the touching [of] the property." Kiener admitted the video showed him repeatedly calling Chabuk a "pussy." Kiener testified he called Chabuk a "pussy" because "it seemed like he was avoiding me and my questions, and that seems kind of weak." Kiener admitted that after Chabuk called out to someone to call 911, "I take a step or two forward" toward Chabuk.

Walker testified he was "roughhousing" with Kiener and Buckley after the barbeque and the group was noisy. Walker testified that he did not see Chabuk or Shook do anything to Buckley's car. Walker did not recall following Chabuk to his apartment. Walker testified, "At that point, um, that's where I have a complete blank in memory. Um, the next thing I remember is [Kiener] walking back into the street and at that point realizing he had been shot." Walker estimated that on a scale of 1 to 10, his level of intoxication was 9 "or even" 10.

Bellingham Police Officer Schwallie testified he made "adjustments" to the two cell phone videos to "increase . . . the brightness" and "boost the volume." The court admitted the enhanced cell phone videos into evidence as exhibit 82. Officer Schwallie testified there is a gap of approximately one to two minutes between the two recordings. Officer Schwallie testified about still photographs from the videos. The still photographs

show Kiener moving closer and closer to the cell phone camera. Officer Schwallie estimated Kiener was 15 to 25 feet from Chabuk when he fired the first shot. Officer Schwallie said that approximately six seconds passed between the first and second shot. Kiener then "closed considerably" the distance between him and Chabuk until he was 8 to 15 feet away and Chabuk fired the second shot. Officer Schwallie testified Kiener was even closer when Chabuk fired the third shot, approximately 5 to 8 feet.

The defense called Chabuk, Shook, and Ybarra-Dunn to testify. Chabuk testified the "female voice" he heard at approximately 10:30 p.m. sounded "distressed." Chabuk said the noise "sounded like somebody was hurt or in some kind of distress." When he and Shook walked down the block, Chabuk saw "several people standing up in the yard" and "two of the guys" were "holding on to some kind of gutter or like a downspout or something, and swinging it at each other. Chabuk said, "[T]hey were kind of stumbling around. They weren't really stable. Like they were drunk."

Chabuk testified he began recording the group with his cell phone and used his flashlight to illuminate them. Chabuk asked, "[W]hat was going on" and told them it "looked like there was some kind of fighting going on." After "it was clear to me that they were just drunk, that no one was actually hurt," Chabuk stopped recording and started to walk away.

When Chabuk realized Shook was not with him, he returned to get her. When Chabuk and Shook started walking away, Kiener followed them. Kiener said, " 'Do you want me to fuck you up? Why are you touching my property?' " Chabuk believed Kiener was "threat[ing]" him because to "fuck somebody up" means "to hurt them pretty badly." Chabuk testified that he was "concerned" because Kiener appeared to be

"[h]ostile," "angry," and "[a]ggressive." Chabuk testified that Kiener insisted, " 'I saw you touching my property.' " Chabuk said he denied touching the property approximately 10 times but Kiener would not believe him.

Chabuk and Shook walked toward their apartment and Kiener and Walker followed them. Chabuk testified that when he pulled up his shirt "caught" on his gun holster, Kiener said, " 'Oh, you are flashing your Glock.' " Chabuk testified that both men "were acting very aggressive," asking Chabuk, " 'Well, come on, what, are you a pussy? Are you a fucking pussy?' " Chabuk testified that he "kept moving backwards" and repeatedly told Kiener and Walker to "back off."

When Chabuk climbed the stairs to the walkway of his apartment, he saw Shook hiding in the bushes nearby. Chabuk testified that Shook shouted, " 'He has a gun' " and Kiener said, " 'I don't fucking care.' " Chabuk said Kiener's response to hearing Shook yell that he had a gun was "scary" because Kiener "just didn't — he wasn't deterred at all" by the fact that Chabuk had a gun. Chabuk decided to record Kiener and Walker with his cell phone a second time. Chabuk testified, "I thought I could — if I start to record and then this will get them to go away."

The defense played the beginning of the second video recording when Chabuk asked Kiener, " '[S]o what were you saying,' " and Kiener responded, " 'I was wondering why you are fucking touching my property. . . . What, are you a pussy? Why are you flashing the flashing light because you are a pussy, right.' " Chabuk testified that Kiener was about 10 feet away and he "felt intimidated, like threatening." Chabuk said, " 'I think you better back off.' " Kiener said, " 'I don't give a fuck what you think.' "

Chabuk testified that when he asked Kiener and Walker, " 'Do you think the police would be interested in this video,' " his intent was to "tell them that I was recording and that I would show it to the police if they didn't leave me alone." Chabuk said he expected Kiener and Walker to "go away" when he mentioned the police. Chabuk said that as he began to climb the stairs to the duplex building, "I was thinking that I would be able to try to get inside my house and then get [in] and lock the door after that." Chabuk did not expect Kiener and Walker to follow him up the stairs. Chabuk testified, "[I]t's a private area. . . . [I]t's a private walkway over to my place and so I — I was hoping that that would keep them from coming any farther." But instead, Kiener told Chabuk, " 'I don't give a fuck what the police or you think' " and followed him up the stairs with Walker behind him, asking, " 'Why were you touching my property.' " Chabuk testified Kiener and Walker were "threatening" him. Chabuk believed "this was like a private area around my home, that they were going to hurt me."

Chabuk testified Kiener and Walker followed him as he continued to walk backwards toward his unit. Chabuk testified that when he reached the end of the walkway, he told Kiener, " '[T]his is as far as I can go.' " Chabuk said Kiener "still kept saying the same thing like, 'Tell me why the fuck you were touching my property.' " Chabuk testified that Kiener "seemed to be getting more angry, more aggressive" than he was at the start of the encounter.

Chabuk testified that "as I was backing up[,] . . . I was getting really scared and I reached back and pulled the pistol out." Chabuk testified that he drew his weapon because "I was scared they were going to hurt me." Chabuk testified, "I was hoping it would keep them away from me[,] from hurting me." When Kiener says, " 'What, are

you going to taze me with that,' " Chabuk testified that he "thought that was a taunt" because Shook had already yelled that he had a gun.

Chabuk testified he heard a woman's voice nearby and called out, " 'Does somebody have a cellphone? Can you please call 911.' " At that point, both Kiener and Walker "started moving towards me quickly. . . . [I]t wasn't a sprint but it was fast." Chabuk testified he believed they would have reached him in "[m]aybe a second." Chabuk testified, "I was afraid if I didn't [fire] that they could seriously hurt me or something." Chabuk fired his gun. Chabuk testified that he "fired low" because "I wasn't trying to hurt him. I was just trying to stop them. Keep them away." Neither Kiener nor Walker reacted to the first shot. Chabuk testified, "[T]here was just no reaction in either of them. It was like nothing had happened."

When Kiener continued to move toward him, Chabuk shouted, "[B]ack off" and Kiener said, " 'Fuck you, you fucking derelict.' " Chabuk said Kiener "keep[s] coming" and he fires a second shot "low again." Chabuk said he fired a second time because "I was afraid that they were going to seriously hurt me, and I was trying to stop them to keep them away." Chabuk testified, "[I]t was like the first time. There was just no reaction." When Kiener continued to advance toward Chabuk, Chabuk fired his gun a third time. Chabuk testified that after the third shot, Kiener's "demeanor changed. . . . [H]e wasn't cussing anymore. . . . [H]e didn't sound so angry." Chabuk ran inside his apartment and called 911.

Shook testified that after they walked the dog, she "heard a really loud yell" and then "more yelling and it kind of sounded like somebody was saying, you know, 'Get out', and it was really angry." Shook "decided to go outside to see what was

happening." Shook was "worried that there was, um, a potential domestic violence situation going on and I just wanted to see if that was the case or not." Chabuk followed her outside.

Shook testified that when they arrived at 2718 Nevada Street, she saw "two men[ ]rolling around on the lawn" and "a man and a woman on the stairs." Shook said, "It wasn't clear at that point[ ]whether it was violent or just them having fun." Shook testified, "I said something about that I was worried that there was a domestic violence situation going on" but concluded they "were all pretty drunk and that this was just some sort of like really loud wild party."

Shook testified Chabuk "started to walk away" but when he "noticed that [Shook] wasn't following," turned around and walked back toward her. Shook said that when Chabuk walked back, "one of the guys got really upset and said something like what are you doing to my property and, um, then two of the guys kind of like got up and started, ah, moving really quickly towards us." Shook testified that one of the men asked Chabuk, " 'What did you do to my property.' " Chabuk denied touching the property but the man said, " 'I saw you touching it. You touched it.' "

Shook testified that the two men followed them. One of the men was "yelling" and "called [Chabuk] a pussy and he was yelling the F word and he was like 'Why did you touch my property.' " Shook testified that Kiener "said something like 'Go ahead, get your Glock out. You are not going to use it. You are a pussy.' " Shook testified, "I thought that I heard Mr. Kiener say, um, that he was going to like mess [Chabuk] up or something like that. . . . I couldn't hear one of the words. It was like I'm going to blank you up." Shook testified that Kiener was "threatening."

Shook testified, "I couldn't understand what was happening and I felt like I had heard . . . one of them mention the Glock and I felt like maybe I should say it again, so I, um, said really loudly he has a gun."[1] Shook testified that Kiener responded, " 'I don't fucking care. He is a pussy. He is not going to use it.' " Shook testified, "I was terrified. I realized . . . he doesn't care that [Chabuk] has a gun so I was really afraid and I started to feel like, um, that's when I started to feel like it was a life and death matter."

While hiding behind the bushes near the apartment, Shook heard Kiener continue to ask, "[W]hy did you touch my property" and heard Chabuk continue to deny touching the property. When she "heard [Chabuk] yell, um, someone call 911," Shook "saw the two guys rush at [Chabuk]." Shook testified that Kiener and Walker were standing "about two arms lengths apart" from Chabuk, "[m]aybe like six feet." Shook heard "a scuffle" and "heard the three shots."

Ybarra-Dunn testified that immediately afterward, Shook told her, " 'Why did this happen? I warned them he had a gun.' "

The court instructed the jury on the charged crime of assault in the first degree with a firearm and the lesser included offense of assault in the second degree. The court used the 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (4th ed. 2016) (WPIC) to instruct the jury on self-defense, including the lawful use of force,[2] the definition of "necessary,"[3] and that the law imposes no duty to retreat.[4] The court rejected the State's request to give a first aggressor instruction.

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[1] Laura Smith testified that before hearing the gunshots, she heard a woman say, "[H]e has got a gun."

[2] WPIC 17.02, at 268.

[3] WPIC 16.05, at 259.

[4] WPIC 17.05, at 280.

The jury found Chabuk guilty of the lesser included offense of assault in the second degree. Chabuk filed a motion to arrest judgment and a motion for a new trial.

The court denied the motion to arrest judgment. The court granted the motion for a new trial. In an eight-page letter ruling, the court identified the "definite reasons of law and facts" that supported the decision to grant a new trial.[5] The court found the prosecutor misstated the law on self-defense and improperly argued a first aggressor theory by repeatedly asserting Chabuk was responsible for the altercation.

The letter ruling states, "It is the court's firm belief" that "the repeated characterization of Chabuk's actions as falling below his legal obligation at every conceivable point in time," the "repeated misstatements of the concept of alternatives to the use of force by suggesting . . . it was a continuing obligation falling upon Chabuk even before 'the moment of self-defense,' " and "the suggestion that Chabuk was the party responsible for the aggression exhibited by Kiener" was "all prejudicial to such an extent that it would not have been remedied by an objection or curative instruction, and that it affected the jury's verdict."

> A jury is presumed to follow the law as provided by the court, and is instructed that the law is contained not in the argument of counsel but in the instructions provided by the court. But in this case the court is compelled to conclude that the arguments and the questions of the state as outlined herein distracted the jury and misstated the law to such an extent that it is inconceivable that the jury was not prejudiced thereby and without question this had a substantial likelihood of affecting the verdict of the jury. The court also finds that each of [the] matters described herein as prejudicial rose to such a level in both content and frequency that an objection by defense counsel or a curative instruction would have been of no avail.

The court entered "Findings, Conclusions, and Order Granting New Trial and Denying Motion to Arrest Judgment." The order incorporates by reference the letter

[5] Emphasis omitted.

ruling. The order states, "These Findings of Fact and Conclusions of Law are intended to briefly summarize that opinion letter, but not to supplant it."

The State appeals the Order Granting New Trial. In his cross appeal, Chabuk argues his attorneys provided ineffective assistance of counsel by not objecting to repeated prejudicial misconduct during cross-examination and closing argument.

ANALYSIS

Decision To Grant New Trial

The State contends the trial court abused its discretion by ordering a new trial under CrR 7.5. Under CrR 7.5(a), "The court on motion of a defendant may grant a new trial . . . when it affirmatively appears that a substantial right of the defendant was materially affected." CrR 7.5(a)(2) identifies "[m]isconduct of the prosecution" as grounds to grant a new trial.

We review a trial court's decision whether to grant a new trial for abuse of discretion. State v. Hawkins, 181 Wn.2d 170, 179, 332 P.3d 408 (2014). An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). We give even greater deference to the decision to grant a new trial. State v. Lopez, 190 Wn.2d 104, 117, 410 P.3d 1117 (2018); Hawkins, 181 Wn.2d at 179. The wide discretion of the trial court in deciding whether to grant a new trial stems from " 'the oft repeated observation that the trial judge who has seen and heard the witnesses is in a better position to evaluate and adjudge than can we from a cold, printed record.' " Hawkins, 181 Wn.2d at 179 (quoting State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)).

However, the deferential standard does not apply to questions of law or mixed questions of law and fact where we review the trial court's factual findings for substantial evidence and legal conclusions de novo. Lopez, 190 Wn.2d at 118. "Substantial evidence" is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding. Lopez, 190 Wn.2d 116 n.8.

The right to a fair trial is a fundamental right secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 3 and 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). "Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). "When deciding a motion for a new trial based on claims of prosecutorial misconduct, the trial court applies the same standard as an appellate court reviewing such claims" under an abuse of discretion standard. State v. McKenzie, 157 Wn.2d 44, 51-52, 134 P.3d 221 (2006); State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

To prevail on a claim of prosecutorial misconduct, a defendant must show the prosecutor's conduct was both improper and prejudicial. Glasmann, 175 Wn.2d at 704; State v. Lindsay, 180 Wn.2d 423, 430-31, 326 P.3d 125 (2014). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

A prosecutor has wide latitude in closing arguments to draw and express reasonable inferences from the evidence. State v. Perez-Mejia, 134 Wn. App. 907, 916,

143 P.3d 838 (2006). But the prosecutor "owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated" and is held to a higher standard than defense counsel. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Lindsay, 180 Wn.2d at 442.

To show prejudice, the defendant must demonstrate a substantial likelihood that prosecutorial misconduct affected the jury's verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Where the defendant does not object at trial, any error is waived unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. Emery, 174 Wn.2d at 760-61. 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 court should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. Emery, 174 Wn.2d at 762.

Reasonable Alternatives Argument

The State contends the prosecutor did not misstate the law or mislead the jury on self-defense and reasonable alternatives to the use of deadly force. Chabuk argues the record supports the trial court's findings and the conclusion that the prosecutor repeatedly misstated and misrepresented the law regarding reasonable alternatives to the use of force. "A prosecuting attorney commits misconduct by misstating the law."

State v. Allen, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015) (citing State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008)).

The use of force is not unlawful if the defendant has a reasonable belief he is about to be injured and uses no more force than necessary "to prevent an offense against his or her person." RCW 9A.16.020(3);[6] State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). A jury evaluates evidence of self-defense both subjectively and objectively. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The jury must consider the apparent threat from the defendant's point of view and what a reasonably prudent person would have done in the defendant's situation. Walden, 131 Wn.2d at 474. "Accordingly, the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." Walden, 131 Wn.2d at 474. " 'Necessary' means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended." RCW 9A.16.010(1). The State has the burden to prove beyond a reasonable doubt the absence of self-defense. State v. Jordan, 180 Wn.2d 456, 465, 325 P.3d 181 (2014). It is improper to shift the burden of proof to the defendant. Warren, 165 Wn.2d at 26-27; State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007).

The State contends the trial court erred by focusing only on the phrase "absolute obligation." The State argues that in context, the argument that Chabuk should have warned Kiener that he had a gun, that Chabuk should have called 911, or that Chabuk

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[6] RCW 9A.16.020(3) states that the use of force is lawful

> [w]henever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

could have diffused the situation by apologizing was appropriate. The State claims the comment that Chabuk had an "absolute obligation" was an isolated remark. The closing argument supports the finding that the prosecutor misled and misstated the law on reasonable alternatives to the use of force.

At the beginning of closing argument, the prosecutor displayed the to-convict jury instruction.[7] The prosecutor told the jury the State proved beyond a reasonable doubt that Chabuk assaulted Kiener and "acted with intent to inflict great bodily harm." But the prosecutor stated that whether Chabuk acted in self-defense as defined in the jury instructions is "what we are going to talk about and that's the issue in this case." Specifically, "really whether the actions the defendant took, the force that he used, whether it was necessary and whether it was lawful and that really is the issue that we are dealing with."

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[7] The to-convict jury instruction states:

To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 11, 2013, the defendant assaulted Joshua Kiener;

(2) That the defendant acted with intent to inflict great bodily harm;

(3) That the assault

(a) was committed with a firearm, or

(b) resulted in the infliction of great bodily harm;

(4) That the defendant's actions were not lawful, as defined in these instructions; and

(5) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (4) and (5), and either (3)(a) or (3)(b) has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives (3)(a) or (3)(b) have been proven beyond a reasonable doubt, as long as each juror finds that either (3)(a) or (3)(b) has been proven beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

The prosecutor addressed the lawful use of force[8] and the jury instruction that defined "necessary." Jury instruction 9 states:

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

The prosecutor emphasized the importance of whether there was "no reasonably effective alternative" under the circumstances as they reasonably appeared to Chabuk at the time. The prosecutor then identified "what reasonably effective alternatives could have been embraced by the defendant all the way through this."

> When you look at this in the beginning, this started because he actually intruded on these people's use of their yard. They were in their yard. There was no huge problem going on by any stretch of the imagination. He videotaped them. Filmed them. . . .
>
> At that point when [Chabuk and Shook] could tell they were being irritated, all they would have had to have done is say, "Look, I'm sorry. I thought there was a problem here. Excuse me. There was not a problem. We heard some shouting and I thought there was a real concern. Please go on and I will leave."
>
> Instead, he did something, you recall he made this real complicated statement about turning around near the car and that's when [Kiener] thought he had done something to the car. He could have explained that.

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[8] Jury instruction 8 states:

> It is a defense to a charge of Assault in the First Degree and Assault in the Second Degree that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured, by someone lawfully aiding a person who he reasonably believes is about to be injured, in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The use [of] force upon or toward the person of another is lawful when used in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to all charges.

> He could have engaged them in a conversation. He could tell they were intoxicated, but he did not try to do that. So what does he do? He goes down and does the same thing that irritated them at the beginning. He starts filming and shining the flashlight at them. He did not look at a reasonably effective alternative.

The prosecutor argued Chabuk could have called 911. The prosecutor pointed out that in the second video recording, Chabuk "calls out, 'Anyone have a phone? Call 911.' " The prosecutor states Chabuk "is the only guy with a phone but he is not using it as a phone"; instead, Chabuk uses his cell phone "to videotape in this case. He is not using it as a phone. He had the lifeline he could have used." The prosecutor argued, "When they started following him, he could have called. He could have called right then. He had a number of minutes that went by. He did not do it."

The prosecutor asserted Chabuk should have told Kiener that he had a gun but instead Chabuk "concealed" the fact that he had a gun.

> When [Kiener] indicated, "You are going to taze me with that," this is a critical factor because he could have told them this is not a [T]a[s]er. He could have pulled the gun out, put his flashlight on it and said, "This is a gun. Tell you what, you keep on coming closer, I'm going to shoot you". He could have given a warning. He did not. He kept this gun a secret.
>
> Now, he had a permit and we know that it's lawful to bear arms in our state. He had a permit to carry a concealed weapon. It's lawful to carry a concealed weapon but with that comes the right and the responsibility and with those rights to make sure that that gun and the use of that gun, which is a deadly weapon, is going to be used responsibly.
>
> At this point, he knew [Kiener] was intoxicated. He knew that he thought this was a [T]a[s]er and he hid the fact that this was a gun from him. Do you think that's using all of the effective alternatives that he could have done? Do you think that was necessary that that wasn't one of the main things he could have done? He could have said, "This is a gun" and shot in the ground and said, "Stay away. This isn't a [T]a[s]er". He didn't do that. He didn't do anything, any of those things, and he concealed the fact that he had a deadly weapon and could inflict deadly — a deadly force on [Kiener], which he did. He made a decision not to disclose that.

The prosecutor argued Chabuk had a "heightened responsibility" as a gun owner to "look at reasonable alternatives" to the use of deadly force. The prosecutor told the jury Chabuk had an "absolute obligation" to tell Kiener that he had a gun.

> Our laws allow people to carry firearms, to bear arms. The Constitution allows that. If you get a concealed weapons permit, you can carry a gun and conceal it, but with that comes a great deal of responsibility, and when you decide to strap your gun on and to go out and check on noises in your neighborhood and to be an investigator, to go out and patrol, to be a police officer, you have a much heightened responsibility to make sure you don't harm someone of the public with your gun.
>
> The law allows self-defense and that's certainly a major part of our law, but you have to be responsible and you have to look at reasonable alternatives so that deadly force is not used.
>
> The defendant had many alternatives in this case and he did not use any and the most egregious is that he hid the fact, he hid the fact that he had a gun in his possession and was willing to use it and in fact did. He didn't tell that to [Kiener]. [Kiener] believed it was a [T]a[s]er. And that was something that he had an absolute obligation to do.
>
> The evidence, ladies and gentlemen, is clear. This was more force than was necessary.

In rebuttal argument, the prosecutor reiterated, "[A]ll [Chabuk] had to do was use the phone that he had for the purpose that it was and that was to call and call 911." But "[h]e never did it." The "greatest point" to consider in determining whether there was a "reasonably effective alternative" was that Kiener "believed that this was a [T]a[s]er," Chabuk "concealed the fact that he had a gun," and he "concealed the fact that he had a deadly weapon" in "violation of his responsibility."

> [Defense counsel] can't answer it. He can't answer it the way that he would want to because it's not in favor of Mr. Chabuk. He purposefully hid the fact that this was a gun and then he used it in an effort to stop [Kiener]. . . . That is something that he hid and that was a violation of his responsibility.

The findings granting a new trial state, in pertinent part:

> The Court finds that the State's comments in its closing argument inaccurately stated the law and did so to such an extent that a curative instruction would have been to no avail, and that this had a substantial likelihood of affecting the jury's verdict. The state said, in part, '[T]he defendant had many alternatives in this case and he did not use any and the most egregious is that he hid the fact, he hid the fact that he had a gun in his possession and was willing to use it and in fact did. He didn't tell that to [Kiener]. [Kiener] believed it was a [T]a[s]er. And that was something he had an absolute obligation to do."
>
> Telling the jury that Chabuk had an "absolute obligation" to tell Kiener that he had a gun and that he "was willing to use it" is a misstatement of the law and in fact could have had no effect but to mislead and prejudice the jury. In a self-defense situation, an individual has an obligation to exercise judgment and restraint and use only such force as is necessary under the circumstances, and may use force only if there is no reasonably effective alternative. But the law does not impose an "absolute obligation" to do or say anything specific with respect to the immediate situation confronting the person who is seeking to defend themselves. There is no obligation to warn of the presence of a firearm (or a weapon of any type). Chabuk had the option to do so but had no obligation to say anything whatsoever, and to suggest to the jury that he did have such an obligation — "an absolute obligation" — and that this "absolute obligation" related to specific statements he must make is a misleading and incorrect statement of the law. To tell the jury that Chabuk could have made such statements as one of his available options would have been acceptable, but the state took it to an impermissible level when it imposed this specific legal obligation upon Chabuk.[9]

The trial court also concluded the prosecutor improperly suggested Chabuk had the "legal obligation" to call the police "when he was considering alternatives to the use of force in a self-defense situation."

> [T]he law imposes no obligation to call the police, and for the state to say "if (Chabuk) had done things right that night, he would have called the police" is to tell the jury that he did not fulfill a legal obligation and that is tantamount to saying he affirmatively did something wrong by not calling the police, and that is not the law. The court finds it was prejudicial for the state to tell the jury that Chabuk did not fulfill a legal obligation when no such obligation existed.[10]

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[9] Emphasis in original.

[10] Emphasis in original.

The court concluded the prosecutor improperly shifted the burden of proof:

> [A]lthough arguing things which Chabuk could have done was entirely proper, arguing specific things Chabuk was legally obligated to have done, when those things are not supported by the law, was prejudicial and would have the operative effect of reducing, in the mind of the jury, the state's burden of proof by declaring that Chabuk had failed to comply with "obligations" that the law does not impose and that, ergo, Chabuk was a wrongdoer per se.[11]

The court found an objection and a curative instruction could not obviate the improper pervasive and prejudicial misstatements.

> It is the court's firm belief that the repeated characterization of Chabuk's actions as falling below his legal obligation at every conceivable point in time, the repeated misstatements of the concept of alternatives to the use of force by suggesting, et al, it was a continuing obligation falling upon Chabuk even before "the moment of self-defense", and the suggestion that Chabuk was the party responsible for the aggression exhibited by Kiener was all prejudicial to such an extent that it would not have been remedied by an objection or curative instruction, and that it affected the Jury's verdict.[12]

The record supports the trial court's conclusion that the prosecutor misstated the law by arguing Chabuk had the heightened duty of "an absolute obligation" to warn Kiener that he had a gun and call 911.

The State cites State v. Stockhammer, 34 Wash. 262, 267, 75 P. 810 (1904), to argue the prosecutor did not misstate the law by telling the jury that a "warning should be given." But six years later in State v. Phillips, 59 Wash. 252, 256-57, 109 P. 1047 (1910), the Washington Supreme Court held that instructing the jury "that a person against whom a murderous, felonious assault is committed with a deadly weapon must retreat or give warning, before taking the life of his assailant in self-defense, . . . imposed upon him a burden which the law does not sanction."

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[11] Emphasis in original; italics omitted.

[12] Italics omitted.

First Aggressor Argument

The State argues the prosecutor did not make an improper first aggressor argument. The State asserts the prosecutor properly addressed the facts and circumstances that led to the shooting. The record supports the trial court's conclusion that the prosecutor improperly argued Chabuk provoked the altercation and was the first aggressor.

An aggressor who provokes an altercation in not entitled to assert self-defense unless he "in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action." State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

The State proposed the court give the following first aggressor jury instruction:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon 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 is not available as a defense.

The court rejected the request. The court ruled that giving a first aggressor instruction is not "supported by the facts in this case."

> It's clear and I think it's agreed that there was a withdraw from what took place initially at 2718 [Nevada Street]. Moreover, I would find that it would seem that, or I don't see any reading of the facts as they took place at the first location that even evidenced an act likely to provoke a belligerent response as it talks about in the instruction anyway.
>
> And as the two gentlemen came up the stairs towards Mr. Chabuk, the only issue of contention seems to have been the allegation that Mr. Chabuk did something to someone's property. I don't think we ever really learned specifically what the concern was, but I think it was made clear that it wasn't Mr. Kiener's property in any event. And as Mr. Chabuk continued to back away filming it, he ultimately fired the shots that gave rise to the charges here.

The court found the prosecutor repeatedly and "improperly characterized" Chabuk as "the de facto first aggressor" throughout the entire encounter.[13] The findings state:

> The state's closing arguments regarding alternatives to the use of force included an assertion that an alternative to the use of force would have been for Chabuk to have not gone to the party house where he believed there was an altercation or, once having gone there, to say upon viewing the situation "Look, I'm sorry. I thought there was a problem here" and then to depart peacefully. But the issue of alternatives to the use of force in self-defense was not and could not have been an issue during the time at the party house because there was no testimony to even remotely indicate that Chabuk felt fearful at this time, nor did he take any action in self-defense until long after Kiener began pursuing him.
>
> The law allows one to protect oneself against imminent harm. The discussion of what constitutes imminent harm, or when a person believes he is "about to be injured", must relate to the moment when the decision is made . . . ["]the moment of self-defense", it may be called. The state acknowledges this at one point in closing by saying ["]the critical time is at the first shot", but repeatedly casts blame upon Chabuk for his actions not only during his retreat up the walkway (I note again that retreating was something he had no legal obligation to do), but also during the initial contact at the party house. The state attempted to characterize all of Chabuk's actions as being an effort to confront, to provoke, and to incite anger, and did so throughout the trial, including closing argument, and repeated this characterization at the motion for a new trial. In this context, the court finds that the state's arguments were virtually indistinguishable from a "first aggressor" argument. . . .
>
> . . . .
>
> Indeed, this final approach towards Chabuk is that which in the law could be considered "the moment of self-defense"—the moment when a reasonable person would most likely form a belief as to whether or not harm was imminent. Chabuk did not use force of any kind before that moment. Yet the state maintained . . . that Chabuk needed to consider alternatives to the use of force not just at "the moment of self-defense", but also back at the party house, and that this obligation continued during the entire time that he "knew they were following him."[14]

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[13] Italics omitted.

[14] Emphasis added; first alteration in original.

The record supports the court's findings of fact and conclusion that the prosecutor improperly and repeatedly characterized Chabuk as the first aggressor.

The prosecutor argued the evidence showed that when Chabuk approached the group on the lawn at Kiener's house, Chabuk starts videotaping on his cell phone "before [he] said anything" and shines his flashlight at the group:

> It was dark at this point and the video is very dark and the light from the flashlight and the light from the camera did not project well enough to light up what was before it.
>
> But at that point, and we had testimony from [Buckley], from [Kiener], from [Walker] and from [Smith] that the defendant was shining the flashlight and was filming and the flashlight was in their eyes and they didn't know who he was, didn't know who Danielle Shook was. And he kept on filming and was talking to them and asked them — it all starts off in the video and you will hear this, is what are you doing and that's what he is asking and he is asking that as he is videotaping and as he is shining the flashlight on them.
>
> . . . .
>
> . . . [T]he evidence shows clearly that if you want to irritate people, a very good way to do it is to approach them, shine a flashlight on them, and then take a picture of them and ask them what they are doing when they are in that yard, that had that effect in this case. That would have had that effect, I would submit, when you look at the evidence, whether the people were drinking or not.

The prosecutor told the jury Chabuk was responsible for the altercation:

> What is necessary. And what should someone do before they use deadly force? What efforts do you have to do? What alternatives do you have? [Chabuk] starts off [in the second video] by saying, "Yeah, so what were you saying?" He has his flashlight and he has his camera, and he could tell from the first time, the first video and the flashlight and the camera upset these people. That would upset anybody enjoying themselves in their yard and private area, someone comes up and shines lights and takes pictures. . . .
>
> . . . .
>
> . . . [T]his started because he actually intruded on these people's use of their yard. They were in their yard. There was no huge problem going on by any stretch of the imagination. He videotaped them. Filmed them. He had a flashlight in their face, which certainly was guaranteed to irritate people.

> At that point when they could tell they were being irritated, all they would have had to have done is say, "Look, I'm sorry. I thought there was a problem here. Excuse me. There was not a problem. We heard some shouting and I thought there was a real concern. Please go on and I will leave."
>
> Instead he did something, you recall he made this real complicated statement about turning around near the car and that's when [Kiener] thought he had done something to the car. He could have explained that. He could have engaged them in conversation. He could tell they were intoxicated, but he did not try to do that. So what does he do? He goes down and does the same thing that irritated them at the beginning. He starts filming and shining the flashlight at them. He did not look at a reasonably effective alternative.

At the end of closing argument, the prosecutor reiterates that Chabuk was responsible for provoking the altercation with Kiener:

> To look at that, what alternatives, what reasonably effective alternatives could have been embraced by the defendant all the way through this? When you look at this in the beginning, this started because he actually intruded on these people's use of their yard. They were in their yard. There was no huge problem going on by any stretch of the imagination. He videotaped them. Filmed them. He had a flashlight in their face, which certainly was guaranteed to irritate people.[15]

In rebuttal argument, the prosecutor told the jury:

> There were reasonable alternatives. He could have talked to him. He didn't need to have this confrontation down further near his property. He could have handled it as he went down there. He could have diffused this. He did not try. He kept on filming. He kept on videoing.

The prosecutor argued:

> On this night he was the one that occasioned this entire situation by intruding on to these people. He didn't have to do that. When they were across the street, he could have very easily seen that there was not a problem and all he had to do was use the phone that he had for the purpose that it was and that was to call and call 911. It would have been plenty of time for the police to come if something had gone on and there would have been plenty of time when he walked away after he had been filming these people to call the police. He never did it.

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[15] Emphasis added.

The prosecutor's repeated assertions that Chabuk provoked the altercation support the trial court's conclusion that the argument was improper.

Prejudice

The State argues the court erred in concluding there was a substantial likelihood the misconduct affected the jury verdict because a timely objection and curative instruction to the jury could have addressed misleading arguments or misstatements of the law.[16] Where, as here, the defense attorney "fails to object or request a curative instruction at trial," the issue of prosecutorial misconduct is waived unless the conduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. Lindsay, 180 Wn.2d at 430.

Here, the trial court found the prosecutor's comments during closing argument "inaccurately stated the law and did so to such an extent that a curative instruction would have been to no avail." The court concluded the pervasive misconduct and repetitive misstatements during closing argument had the "substantial likelihood of affecting the jury's verdict."

The trial court's findings of fact and conclusions of law state, in pertinent part:

> 3. Some of the state's comments in its closing argument inaccurately stated the law and the court concludes that this was done to such an extent that a curative instruction would have been to no avail, and this had a substantial likelihood of affecting the jury's verdict.
>
> 4. By telling the jury that the defendant had an "absolute obligation" to tell Josh Kiener that he had a gun and that he "was willing to use it," the State misstated the law, and the court concludes that this misled the jury and prejudiced the defendant.

[16] The State also asserts the court did not find the prosecutor's conduct was ill intentioned. But the focus is "less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." Emery, 174 Wn.2d at 762.

5. The state's misrepresentations of the law were not limited to closing argument, and such misrepresentations were flagrant and prejudicial and almost certainly had a cumulative impact on the jury. The court concludes that these improper and prejudicial statements could not have been cured by instructions and the court finds a substantial likelihood that they affected the jury's verdict.

6. The state misrepresented the law of use of force and imminent harm. The state also improperly characterized the defendant as the de facto first aggressor in that the state maintained that the defendant had created the situation entirely by his own conduct and by arguing that he also had a duty to diffuse the situation, insisting that this duty continued while he was being pursued during his retreat up the dark walkway to his residence. This theme was pervasive throughout the trial (examples from the state's arguments include, in opening: "the evidence will tell you it irritated them", in closing argument: "this started because he actually intruded on these people's use of their yard . . . he videotaped them, filmed them. He had a flashlight in their face, which certainly was guaranteed to irritate people", and in rebuttal: "on this night he was the one that occasioned this entire situation by intruding on to these people"). The court concludes this was prejudicial, and the fact that a first aggressor instruction was not given does not overcome that prejudice.

7. The court finds that the state's repeated assertion that defendant's actions consistently fell below defendant's legal obligations, the state's repeated misstatements of the concept of alternatives to the use of force, and the state's suggestion that defendant was the party responsible for the aggression exhibited by Kiener were all prejudicial and the court concludes that this was prejudicial to such an extent that it would not have been remedied by an objection or curative instruction, and that it affected the jury's verdict.

8. A jury is presumed to follow the law as provided by the court and is instructed that the law is contained not in the argument of counsel but in the court's instructions. But in this case the court is compelled to conclude that the arguments and the assertions of the state as outlined in the court's opinion letter distracted the jury and misstated the law to such an extent that it is inconceivable that the jury was not prejudiced thereby and without question this had a substantial likelihood of affecting the verdict of the jury and that certainly their combined effect operate to buttress the court's conclusion that a new trial is mandated.[17]

[17] Italics omitted; alteration in original.

"An objection is unnecessary in cases of incurable prejudice" because " 'a new trial is the only and the mandatory remedy.' " Emery, 174 Wn.2d at 762 (quoting State v. Case, 49 Wn.2d 66, 74, 298 P.2d 500 (1956)). And " 'the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.' " Glasmann, 175 Wn.2d at 707 (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)). We conclude the record supports the trial court's findings and the trial judge was "in the best position to determine whether the prosecutor's actions were improper and whether, under the circumstances, they were prejudicial." Ish, 170 Wn.2d at 195-96.

However, even if a timely objection and curative instruction could have obviated any prejudice, the uncontroverted record supports ineffective assistance of counsel. We review claims of ineffective assistance of counsel de novo. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To establish he received ineffective assistance of counsel, Chabuk must show (1) that defense counsel's conduct was deficient and (2) that the deficient performance resulted in prejudice. Grier, 171 Wn.2d at 32-33. Here, defense counsel did not object to improper questions, misleading arguments, or misstatements of the law either during the cross-examination of Chabuk or at any point during closing argument. The record does not indicate that the failure to object was a legitimate trial strategy or tactic and we conclude the record establishes a reasonable probability that absent counsel's unprofessional errors, the result of the proceeding would have been different. Grier, 171 Wn.2d at 33-34.

We affirm the order granting a new trial and conclude Chabuk's attorney provided ineffective assistance of counsel that resulted in prejudice.

Schindler, J.

WE CONCUR:

Smith, J.

Andrus, J.

APPENDIX

B

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WHATCOM COUNTY
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM COUNTY

STATE OF WASHINGTON, Plaintiff, vs. KAMURAN DANIEL CHABUK, Defendant.	NO. 13-1-00528-2 **Findings, Conclusions, and ORDER** Granting New Trial and Denying Motion to Arrest Judgment

THIS MATTER came on regularly for hearing on March 9, 2016, and the parties were represented by their respective counsel. The court reviewed relevant portions of the trial transcript and, in an eight–page single-spaced opinion letter consisting of 4,697 words, set forth in detail its Statement of Reasons and its rulings on the post-trial motions, including definite reasons of law and facts for matters within the record (quotations from the record were included, though an official transcript with page numbers is not yet available). As regards that which was based upon matters outside the record, the court's opinion letter stated the facts and circumstances upon which it relied. In so doing, the court complied with the requirements of CrR 7.5 (d). That opinion letter is attached hereto and incorporated herein by reference. These Findings of Fact and Conclusions of Law are intended to briefly summarize that opinion letter, but not to supplant it.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. This case was tried to a Jury from November 9 – November 23rd, 2015. The jury convicted defendant of the lesser-included offense of assault in the second degree.

2. At the close of the state's evidence the defense argued a timely motion to dismiss, alleging insufficient evidence to disprove self-defense. The court concludes that there was sufficient evidence to allow the trier of fact to decide the case.

3. Some of the state's comments in its closing argument inaccurately stated the law and the court concludes that this was done to such an extent that a curative instruction would have been to no avail, and this had a substantial likelihood of affecting the jury's verdict.

4. By telling the jury that the defendant had an "absolute obligation" to tell Josh Kiener that he had a gun and that he "was willing to use it," the State misstated the law, and the court concludes that this misled the jury and prejudiced the defendant.

5. The state's misrepresentations of the law were not limited to closing argument, and such misrepresentations were flagrant and prejudicial and almost certainly had a cumulative impact on the jury. The court concludes that these improper and prejudicial statements could not have been cured by instructions and the court finds a substantial likelihood that they affected the jury's verdict.

6. The state misrepresented the law of use of force and imminent harm. The state also improperly characterized the defendant as the *de facto* first aggressor in that the state maintained that the defendant had created the situation entirely by his own conduct and by arguing that he also had a duty to diffuse the situation, insisting that this duty continued while he was being pursued during his retreat up the dark walkway to his residence. This theme was pervasive throughout the trial (examples from the state's arguments include, in opening: "the evidence will tell you it irritated them", in closing argument: "this started because he actually intruded on these people's use of their yard...he videotaped them, filmed them. He had a flashlight in their face, which certainly was guaranteed to irritate people", and in rebuttal: "on this night he was the one that occasioned this entire situation by intruding on to these people"). The court concludes this was prejudicial, and the fact that a first aggressor instruction was not given does not overcome that prejudice.

7. The court finds that the state's repeated assertion that defendant's actions consistently fell below defendant's legal obligations, the state's repeated misstatements of the concept of alternatives to the use of force, and the state's suggestion that defendant was the party responsible for the aggression exhibited by Kiener were all prejudicial and the court concludes that this was prejudicial to such an extent that it would not have been remedied by an objection or curative instruction, and that it affected the jury's verdict.

8. A jury is presumed to follow the law as provided by the court and is instructed that the law is contained not in the argument of counsel but in the court's instructions. But in this case the court is compelled to conclude that the arguments and the assertions of the state as outlined in the court's opinion letter distracted the jury and misstated the law to such an extent that it is inconceivable that the jury was not prejudiced thereby and without question this had a substantial likelihood of affecting the verdict of the jury and that certainly their combined effect operate to buttress the court's conclusion that a new trial is mandated.

9. A juror volunteered information in a post-verdict discussion (in the presence of counsel and the trial judge) in which he stated that he had made several factual determinations, and the court finds that these factual determinations were unsupported by the evidence. The defense moved for a new trial based on juror misconduct. Without affidavits from jurors bearing on this issue, the court concludes that this does not constitute a basis for a new trial, as it cannot be determined that the statements and conclusions of the juror had any impact on the verdict.

10. The failure of defense to call a use of force expert brings forth specific issues which bear on the question of ineffective assistance of counsel. The court finds no basis to find ineffective assistance of counsel. The court concludes that there is no evidence to support allegations of ineffective assistance counsel.

11. The court finds no legal basis to support the suggestion that analogies made by the state during jury selection or the admission of photos of Mr. Kiener were improper, nor does the court find any error regarding instructions relating to "injury" rather than "great personal injury.

12. The defense submitted timely post-trial motions for new trial pursuant to CrR 7.5 and arrest of judgment pursuant to CrR 7.4.

13. It is the duty of the jury, not the court, to decide whether the state's proposed alternatives to the use of force were reasonable or legitimate alternatives at the point in time when the defendant made the decision to act, which the court referred to in its letter opinion as "the moment of self-defense'. It is for this reason and this reason alone that the court concludes that motion to arrest judgment should be denied.

FROM THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW, the Court now makes the following:

ORDER

IT IS HEREBY ORDERED that, for the reasons stated herein and as set forth more fully in the court's attached opinion letter, Defendant's motion for new trial is hereby granted, and that the defendant's motion for arrest of judgment is denied.

Dated this 25th day of July, 2016.

IRA UHRIG, Judge

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

STATE OF WASHINGTON, Plaintiff, vs KAMURAN DANIEL CHABUK, Defendant.	No. 13-1-00528-2 COURT'S RULING FROM HEARING ON MARCH 9, 2016

Counsel,

I submit this opinion letter outlining my ruling on the most significant issues raised at the most recent hearing in State v. Chabuk. All quotations herein are from those limited portions of trial transcript that have been provided to me by my court reporter. Those transcript portions do not contain a page numbering format such as that which will appear in the official transcript when it becomes available, so I have not provided page citations. A brief subject heading will precede each major section of my discussion, and in my discussion I shall articulate the reasons underlying my conclusions.

A trial court must not weigh the evidence and substitute its judgment for that of the jury, that is clear. But the issues raised in the defense motions require the court to exercise its best judgment in determining issues deeply rooted in the entire trial process. This decision has been a difficult one indeed, and I cannot sufficiently convey the deep respect I have for both the state's counsel and for Mr. Chabuk's trial counsel. And as great an ordeal as this has been for all persons concerned, I am firmly convinced that justice requires that I grant Mr. Chabuk's motion for a new trial. I do not come to this decision lightly, but carefully and thoughtfully. I note that in over a quarter-century of serving on the bench, I can recall only one other occasion where I have seen fit to grant a motion for a new trial.

Statements concerning an absolute obligation to warn of gun's presence & the alleging of wrongdoing by not calling 911 -- Prejudicial

The Court finds that the State's comments in its closing argument inaccurately stated the law and did so to such an extent that a curative instruction would have been to no avail, and that this had a substantial likelihood of affecting the jury's verdict. The state said, in part, "the defendant had many alternatives in this case and he did not use any and the most egregious is that he hid the fact, he hid the fact that he had a gun in his possession and was willing to use it and in fact did. He didn't tell that to Josh. Josh believed it was a tazer. And that was something he had an absolute obligation to do".

Telling the jury that the Chabuk had an "absolute obligation" to tell Kiener that he had a gun and that he "was willing to use it" is a misstatement of the law and in fact could have had no effect but to mislead and prejudice the jury. In a self-defense situation, an individual has an obligation to exercise judgment and restraint and use only such force as is necessary under the circumstances, and may use force only if there is no reasonably effective alternative. But the law does not impose an "absolute obligation" to do or say anything specific with respect to the immediate situation confronting the person who is seeking to defend themselves. There is no obligation to warn of the presence of a firearm (or a weapon of any type). Chabuk had the option to do so but had no obligation to say anything whatsoever, and to suggest to the jury that he did have an such obligation – "an absolute obligation" -- and that this "absolute obligation" related to specific statements he must make is a misleading and incorrect statement of the law. To tell the jury that Chabuk could have made such statements as one of his available options would have been acceptable, but the state took it to an impermissible level when it imposed this specific legal obligation upon Chabuk.

The state articulated its position on this issue not only in closing, but mentioned it throughout other phases of the trial as well. To present just a few examples, I note that, in opening, the state said "Josh indicated 'are you going to taze me with that?' At no point did the defendant say 'no, this is a gun and this gun is going to shoot you'". During rebuttal argument the state said: "(h)e concealed the fact that he had a deadly weapon. Is that the right thing to do? Mr. Follis in his argument didn't mention that he couldn't answer that question because he can't answer it. He can't answer it the way he would want to because it's not in favor of Mr. Chabuk. He purposefully hid the fact that this was a gun and then he used it in an effort to stop Josh...That is something that he did and that was a violation of his responsibility".

In its rebuttal, the state also said "if (Chabuk) had done things right that night, he would have called the police. He had the opportunity, the availability, and he could have done that". This incorrectly suggests he had another legal obligation: the obligation to call the police when he was considering alternatives to the use of force in a self-defense situation. Indeed, calling the police may be a wise measure to take in many circumstances (even though the response time would likely be several minutes in a situation such as the one in this case). But the law imposes no obligation to call the police, and for the state to say "if (Chabuk) had done things right that night, he would have called the police" is to tell the jury that he did not fulfil a legal obligation and that is tantamount to saying he affirmatively did something wrong by <u>not</u> calling the police, and that is not the law. The court finds it was prejudicial for the state to tell the jury that Chabuk did not fulfil a legal obligation when no such obligation existed.

It would not have been inappropriate for the state to suggest Chabuk <u>could</u> have used his phone to summon aid (though the facts of the case and the testimony as to response time strongly suggest that a phone call would have been to no avail), just as it would not have been inappropriate for the state to suggest that Chabuk <u>could</u> have spoken of the fact that he had a gun, but just as it was entirely inappropriate to insist to the jury that Chabuk had "an absolute obligation" to say he had a gun and "was willing to use it", it was also inappropriate to say if he had "done things right that night, he would have called the police".

It is ironic that the state argued that Chabuk's obligation was to exercise these legally non-existent duties during the time he was being pursued up the walkway by Kiener, yet at that very time Chabuk was actually avoiding conflict by doing something that he had no duty to do -- he was retreating from the inebriated Kiener and his companion. The facts are also clear that during Chabuk's retreat from Kiener, Kiener was using what even the most disinterested observer would consider to be foul and abusive language and an aggressive tone, he was demonstrating an unwillingness to consider Chabuk's responses to his questions, he was articulating a lack of concern over police involvement, and he was also refusing to follow Chabuk's directive to leave Chabuk's property (that is, rental property within Chabuk's control). Thus, though Chabuk had no duty to retreat, he was in fact retreating. The state chose to impose upon Chabuk duties which the law does not require as regards alternatives to the use of force, but Chabuk was actually avoiding conflict and the use of force by doing something that the law does not even require him to do.

The court also finds that the state misdirected the jury as to Chabuk's level of civic responsibility. The state asked Chabuk whether, as a gun possessor, he had a "greater

responsibility". The state asked the question at least twice during cross-examination of Chabuk and again in re-cross – and eventually elicited a response of "yes" from Chabuk. Not only was Chabuk's personal opinion on this legal issue not relevant, but the Court knows of nothing in the law that imposes a "greater responsibility" on a gun possessor than on any other citizen. All citizens, whether they possess a firearm or any sort of weapon -- or possess no weapon at all -- are required to obey the law and to act as would a reasonably prudent person.

All would agree that a gun owner or possessor must act responsibly, and if he or she does not do so, significant harm may be inflicted intentionally or negligently. Though the capacity to inflict serious or fatal injury may be heightened by the presence of a firearm, the degree of responsibility is not. The law contains no such standard as that of "reasonably prudent armed person". The same could be said of a person driving an automobile, which is quite capable of inflicting serious or fatal injury. Though it cannot be denied that one who possesses a firearm (or drives a car) bears a great responsibility, it does not follow that the law imposes a "greater responsibility" on an individual who has a firearm (or drives a car), but the level of responsibility is merely that of a reasonably prudent person who is carrying a firearm (or driving a car) – and that person must act in accordance with the law, as must we all.

The court concludes that, although arguing things which Chabuk could have done was entirely proper, arguing specific things Chabuk was legally obligated to have done, when those things are not supported by the law, was prejudicial and would have the operative effect of reducing, in the mind of the jury, the state's burden of proof by declaring that Chabuk had failed to comply with "obligations" that the law does not impose and that, *ergo*, Chabuk was a wrongdoer *per se*.

Misstatement of the Law of Self Defense as concerns imminent harm and the improper characterization as Quasi-First Aggressor -- Prejudicial

The state's closing arguments regarding alternatives to the use of force included an assertion that an alternative to the use of force would have been for Chabuk to have not gone to the party house where he believed there was an altercation or, once having gone there, to say upon viewing the situation "Look, I'm sorry. I thought there was a problem here" and then to depart peacefully. But the issue of alternatives to the use of force in self-defense was not and could not have been an issue during the time at the party house because there was no testimony to even remotely indicate that Chabuk felt fearful at this time, nor did he take any action in self-defense until long after Kiener began pursuing him.

The law allows one to protect oneself against imminent harm. The discussion of what constitutes imminent harm, or when a person believes he is "about to be injured", must relate to the moment when the decision to defend is made..."the moment of self-defense", it may be called. The state acknowledges this at one point in closing by saying "the critical time is at the first shot", but repeatedly casts blame upon Chabuk for his actions not only during his retreat up the walkway (I note again that retreating was something he had no legal obligation to do), but also during the initial contact at the party house. The state attempted to characterize all of Chabuk's actions as being an effort to confront, to provoke, and to incite anger, and did so throughout the trial, including closing argument, and repeated this characterization at the motion for a new trial.

In this context, the court finds that the state's arguments were virtually indistinguishable from a "first aggressor " argument. Examples from the state's argument include, in opening, "the evidence will tell you it irritated them", in closing "this started because he actually intruded on these people's use of their yard...he videotaped them, filmed them. He had a flashlight in their face, which certainly was guaranteed to irritate people", and in rebuttal "on this night he was the one that occasioned this entire situation by intruding on to these people". The state's firm belief in this theory was also maintained in the argument on the Motion for a New Trial in stating "(y)ou could see that the first contact, there was nothing going on...You could tell also by his shining the flashlight in their faces and by videotaping them (he) was becoming an irritant...all that would have been necessary at that point was to break off and say 'excuse me, nothing happened to warrant us to be here' ".

The portions of the trial transcript available to the court as of this writing indicate that the partygoers were perhaps surprised and confused by Chabuk's actions, but do not disclose that they were angered (Kyle Walker, for one, was asked by the state whether the situation was comfortable or uncomfortable. Mr. Walker said "it wasn't anything truly uncomfortable but it was kind of awkward"). Similarly, the video of the encounter at the party house does not indicate that any persons present were angered. The evidence of the events at the party house can be seen as minimally relevant to provide some context for the events of the evening and allowed the state to establish that Kiener did not simply appear 'out of nowhere', but the state used the situation to cast a dark cloud over Chabuk from the beginning of the trial to the end.

The evidence was clear that there was a discussion between Chabuk and his companion and the group at the party. The partiers mockingly but good-naturedly challenged the questions about domestic violence, and then Chabuk and his companion went on their way, satisfied that there was no cause for concern and no need to contact law enforcement. The state criticized Chabuk repeatedly for his actions and suggested that he and his companion were acting as a self-appointed citizen ad-hoc law enforcement committee of two.

However, whether one views Chabuk's initial actions as an attempt to provoke and incite anger amongst the drunken party-goers as the state maintained or whether one views it as a legitimate exercise of the duties of a concerned citizen such as are encouraged by some communities through various types of formal and informal "Neighborhood Watch" programs, that initial contact was broken-off, there was no aggression manifested by anyone, and Chabuk and his companion departed peacefully.

The facts are also clear that Kiener and his companion made a decision to pursue Chabuk down the street, followed him across the street, and followed him up the walkway, all the while making accusations that turned out to have been unfounded and based entirely upon Kiener's mistake.

The state suggested to the jury that Chabuk had created the situation entirely by his own conduct and that he also had a duty to diffuse the situation and that this duty continued while he was being pursued during his retreat up the dark walkway. Indeed, the state suggested repeatedly that there were many things that Chabuk could have done to calm Kiener, to console Kiener, to respond to Kiener's question about "touching (Kiener's) property". The testimony is clear that Chabuk actually did respond to and denied the false allegations (as verified by the video). The

state suggested that Chabuk should have used his phone to summon aid, though the video also makes clear that as he called-out for someone to notify 911, he was using his phone to film Kiener's each and every action in an apparent attempt to gain evidence for law enforcement and perhaps to get Kiener to reassess his behavior in light of the very fact that it was being preserved on video (this is based upon Chabuk's statement to Kiener in the video). Chabuk's request for someone to call 911 appears from the video to be the very event that precipitated Kiener's most aggressive physical act as he rapidly approached Chabuk approximately 2.7 seconds later (according to the video), which resulted in Chabuk firing his gun.

Indeed, this final approach towards Chabuk is that which in the law could be considered "the moment of self-defense"—the moment when a reasonable person would most likely form a belief as to whether or not harm was imminent. Chabuk did not use force of any kind before that moment. Yet the state maintained, even at the motion for new trial, that Chabuk needed to consider alternatives to the use of force not just at "the moment of self-defense", but also back at the party house, and that this obligation continued during the entire time that he "knew they were following him (and) he could have used the phone for the purpose that a phone is made for and..(that is) a reasonably effective alternative to the use of force".

It is the court's firm belief that the repeated characterization of Chabuk's actions as falling below his legal obligation at every conceivable point in time, the repeated misstatements of the concept of alternatives to the use of force by suggesting, *et al,* it was a continuing obligation falling upon Chabuk even before "the moment of self-defense", and the suggestion that Chabuk was the party responsible for the aggression exhibited by Kiener was all prejudicial to such an extent that it would not have been remedied by an objection or curative instruction, and that it affected the jury's verdict.

Additionally, in the court's opinion, none of the state's proposed alternatives to the use of force were reasonable or legitimate alternatives at "the moment of self-defense" – the moment Kiener rushed towards him after he asked for 911 to be called. Yet it is the duty of the jury, not the court, to decide this issue, as set forth in the jury instructions, and it is for this reason and this reason alone that the motion to arrest judgment is denied. Though the state's burden is to prove the absence of self-defense, the court knows of no requirement for the state to propose or for the jury to accept a specific alternative, though it was prejudicial for the state to, in effect, reduce its burden by insisting upon alternatives that bore no temporal connection with "the moment of self-defense" or to tell the jury that Chabuk had non-existent legal burdens.

Post-trial juror disclosure – <u>Non-Prejudicial</u>

The issue concerning the comments by one of the jurors after the trial require the court's comment. No mention of this was made by counsel at the motion for a new trial, but the statement was of such a nature that, though the court was reluctant to inject any information into the discussion, it was duty-bound to do so, for it is well-established that if the trial court becomes aware that the jury **may have been** exposed to extrinsic influence or information, it **must** investigate the alleged impropriety.

However, the court's inquiry is limited to matters pertaining to the existence of any impermissible extraneous influences, the nature of the extraneous influence, and the manner in which it occurred. The court cannot ask a juror whether the extraneous information had an effect on the outcome of the case. For example, once it is established that extrinsic material did find its way into the jury room, a new trial is required unless there is no reasonable possibility that the jury's verdict was influenced by the improper extraneous material. In a criminal case, "the burden is on the Government to demonstrate the harmlessness of any breach to the defendant." See, generally, United States v. Gaffney, 676 F.Supp. 1544 (M.D. Fla. 1987) United States v. Posner, 644 F.Supp. 885 (S.D. Fla. 1986), *affd.*, 828 F.2d 773 (11th Cir. 1987), *cert. denied,* 108 S.Ct 11 10 (1988); United States v. Avarza-Garcia, 819 F.2d 1043 (11th Cir.), *cert. denied,* 108 S.Ct. 465 (1987); Llewellyn v. Stynchcombe, *609* F.2d 194 (5th Cir. 1980). United States v. Winkle, 587 F.2d 705, 714 (5th Cir.), *cert. denied,* 444 U.S. 827 (1979.

The information provided by the juror in this case was not in response to any questions from counsel or the court, but was volunteered in the post-verdict discussion in which jurors and counsel often participate. Representatives of all counsel (and the trial judge) were present when a juror stated candidly that he had significant experience with firearms, and that upon examining the gun he was able to determine that there was substantial wear on the slide mechanism, and from that he concluded that Chabuk had practiced with the firearm frequently and was thus skilled in its operation and was also an experienced marksman. From that he concluded that Chabuk deliberately and skillfully shot Kiener first in one leg and then the other, seeking out Kiener's knees as targets, with the specific intent to inflict permanent and crippling injuries. No affidavit of the juror was presented, but Ahmet Chabuk and Eric Richey both recounted the discussion. Their accounts vary slightly in detail but not in the primary point that at least one juror concluded that the wear on the firearm was occasioned by Chabuk and that Chabuk was an excellent shot and placed his shots deliberately and carefully with an intent to inflict great bodily harm.

It is well-established that in ruling on a motion for new trial, the court may not consider testimony about matters which inhere in the verdict. A juror's personal knowledge and life experiences are an important part of the jury system and a juror need not abandon his or her technical knowledge that may apply to facts in a given case. As our State Supreme Court has said of Judges in State v. Grayson, 154 Wn2d 333(2005), we do not expect jurors to "leave their knowledge and understanding of the world behind and enter the courtroom with blank minds" and we should not expect that jurors need to puzzle over "whether fire is hot or water is wet". The state is correct in its summary of the type of matters that generally inhere in a jury's verdict. Here we had, according to Mr. McEachran's (signed but unsworn) affidavit contained within sub-number 215 in the court file, between eight and ten jurors with knowledge and expertise related to firearms. If a juror knows the difference between a 9mm and a .45 caliber, or if a juror knows the direction of cylinder rotation and/or cartridge capacity in a Colt Detective Special *vis a vis* that of a Smith & Wesson Chief's Special, then it is fine for that juror to bring that knowledge to the jury room. It is not impermissible for a juror to conclude that a firearm with heavy wear on the slide has likely received heavy usage during its life, and perhaps even a juror without specialized knowledge of firearms or metallurgy could reach a similar conclusion.

But it goes too far for a juror to make the leap in logic to conclude, without any additional supporting evidence, that the wear on the firearm was caused by Chabuk's frequent use and training and that, *ergo*, he was a skilled marksman and that he deliberately took aim in a manner designed to maim the victim. This is an impermissible bit of extrapolation unsupported by the evidence and as such does not inhere in the verdict.

However, the resultant effect of this on the jury is far from clear. If any juror had considered this as a factor and found Chabuk guilty of 1st Degree Assault, then this alone would be grounds for a new trial. But the jury did not reach a verdict on 1st Degree Assault and went on to find Chabuk guilty of 2nd Degree Assault, which does not contain an element of intent to inflict great bodily harm. Therefore it cannot be determined that the extra-evidentiary conclusion had any impact on the verdict. Without affidavits from jurors bearing on this issue, I cannot find this as an independent basis for a new trial.

Failure to Call Use of Force Expert and the Tueller Drill ("21 foot rule") – Non-Prejudicial

The failure of defense to call a use of force expert brings forth specific issues which bear on the question of ineffective assistance of counsel.

Certainly the issue of disparity of force relating to both the size and number of the aggressors could be understood by the jury. Issues pertaining to some of the state's proposed alternatives to the use of force could potentially have been a valid part of Chabuk's defense. For example, one would expect that a use of force expert might offer his or her opinion about the wisdom of alerting an assailant to the presence of a gun; the wisdom, propriety, or legality of firing a warning shot; and even have something to offer to counter the state's suggestion that an aggressor will universally "blade" himself, take a "fighting stance", or "threaten(ing) to do harm" before attacking someone. However, no declaration from a use of force expert has been provided, and the court will not engage in speculation on this issue and will presume that the decision to not call such an expert was a strategic one. Moreover, the defense may have had no reason to expect that the state would raise extraneous issues requiring a use of force expert by creating non-existent legal obligations upon Chabuk, so no ineffective assistance of counsel is found.

Ahmet Chabuk brought forth another issue pertaining to a use of force expert as regards the Tueller Drill, (the Tueller Drill gave rise to a concept sometimes known as "the 21-foot rule"). It is mentioned as being of great significance to the defense. In the court's opinion, its relevance would not necessarily be to show whether or not Chabuk himself knew of this rule, but potentially to provide the jury with an understanding of the real-life dynamics of physical confrontation and how quickly an aggressor (whether armed or unarmed) can act to inflict serious or fatal injury, even upon an armed individual. Juries may have a common-sense understanding that attackers can act quickly, but real-life testimony as to the time/distance component may be helpful to a jury in some cases. To that extent, I disagree with the cited case of People v. Vanderhorst, 117 A.D. 3rd 1179 (New York, 2014). But the court can find no basis to find ineffective assistance of counsel on the facts presented here.

Jury Selection, Admission of Photos, Great Potential Injury Instruction – Non-Prejudicial

The court finds no issues of concern with regard to the analogies made by the state during jury selection or the admission of photos of Mr. Kiener, nor does the court find any error regarding instructions relating to "injury" rather than "great personal injury".

CONCLUSION

A jury is presumed to follow the law as provided by the court, and is instructed that the law is contained not in the argument of counsel but in the instructions provided by the court. But in this case the court is compelled to conclude that the arguments and the questions of the state as outlined herein distracted the jury and misstated the law to such an extent that it is inconceivable that the jury was not prejudiced thereby and without question this had a substantial likelihood of affecting the verdict of the jury. The court also finds that each of matters described herein as prejudicial rose to such a level in both content and frequency that an objection by defense counsel or a curative instruction would have been of no avail. *See* State v. Swan 114 Wn2d 613 (1990) and State v. Feely, (February 22, 2016). Under State v. Badda, 63 Wn2d 176 (1963), the combined effect of several errors can justify a new trial if they might not do so standing alone, but here the court believes that they are indeed sufficient, standing alone. Certainly their combined effect operate to buttress the court's conclusion.

I ask counsel to prepare appropriate Findings, Conclusions, and Orders consistent with my ruling, and to provide a copy of this communication to Ahmet Chabuk, as I do not have his e-mail address at hand and my bailiff in not in today.

Respectfully submitted,

Ira Uhrig, Judge
Department 1

WHATCOM COUNTY PROSECUTOR'S OFFICE APPELLATE DIVISION

September 16, 2019 - 10:57 AM

Filing Petition for Review

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