Supreme Court No. 98138-8
(Court of Appeals No. 36038-5-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KAZ MCKENZIE,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

Kaz McKenzie and his neighbor, Wayne Foss, had an ongoing dispute about the ownership and treatment of Mr. McKenzie's dog. Mr. Foss desperately wanted the dog for himself, and would routinely hide the dog in his apartment. The situation eventually came to a head and resulted in a physical fight between Mr. McKenzie and Mr. Foss in the common room of their apartment building. As a result of the fight, Mr. McKenzie was charged with second-degree assault.

Prosecutorial misconduct marred the ensuing trial and denied Mr. McKenzie his right to a fair trial. The trial court also prevented Mr. McKenzie from presenting his theory of the defense by giving a "first aggressor" jury instruction. The Court of Appeals affirmed Mr. McKenzie's conviction in an opinion that conflicted with this Court's precedent. Because of these conflicts and because Mr. McKenzie's case presents significant questions of constitutional law, this Court should accept review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Mr. McKenzie petitions this Court to review the opinion of the Court of Appeals in *State v. McKenzie*, No. 36038-5-III (filed December 31, 2019) (unpublished), attached here as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Prosecutorial misconduct may deprive a defendant of their constitutional right to a fair trial. In order to prevail on a claim of prosecutorial misconduct, a defendant must demonstrate prejudice. Under this Court's precedent in *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003), an error is presumed prejudicial unless it could not have rationally affected the verdict. Further, pursuant to this Court's precedent in *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946), it is improper for an appellate court to speculate on what evidence appealed to a jury. Here, the prosecutor improperly commented on the credibility of a defense witness. This misconduct rationally could have affected the verdict as the witness's testimony supported Mr. McKenzie's defense. The Court of Appeals acknowledged the prosecutor engaged in misconduct, but incorrectly held the misconduct harmless. Should this Court accept review to clarify the proper framework for assessing the prejudicial nature of prosecutorial misconduct in line with prior precedent? *See* RAP 13.4(b)(1), (3).

2. Jury instructions must permit the defendant to present his theory of the case as a matter of due process. A "first aggressor" instruction informs the jury that self-defense is not available if the defendant provoked or started the fight. Here, there was no evidence presented that

Mr. McKenzie provoked the need to act in self-defense, because the State's case and Mr. McKenzie's defense theory encompassed all of Mr. McKenzie's assaultive conduct, and thus there was no provoking act. Should this Court accept review of this case to clarify the constitutional confines of the first-aggressor instruction?[1] RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

1. Mr. McKenzie and Mr. Foss had a long-standing feud over Mr. McKenzie's dog that resulted in two physical altercations.

Kaz McKenzie purchased an eight-week-old puppy and named her Twyla. RP 310–311. Unbeknownst to Mr. McKenzie, Wayne Foss, who lived in the same apartment building as Mr. McKenzie, had previously arranged to purchase Twyla. RP at 313. However, this arrangement fell through, and Mr. McKenzie's purchase of Twyla greatly upset Mr. Foss and his fiancé, Loerita Gayman, who wanted the puppy for themselves. RP at 202, 204, 314.

The door to Mr. McKenzie's apartment was in need of repair and would not stay closed. RP at 204. As a result, Twyla and Mr. McKenzie's other dog, Bella, would occasionally escape from the apartment into the common area of the building. RP at 204, 312. When

[1] This Court is currently reviewing a similar issue in *State v. Grott*, No. 97183-8 (argued Nov. 19, 2019).

this occurred, Mr. Foss and Ms. Gayman would take the dogs into their apartment and refuse to return them to Mr. McKenzie. RP at 316–17. Mr. McKenzie reported these incidents to apartment management and law enforcement, but no action was ever taken. RP at 317.

A few weeks later, there was a physical altercation between Mr. McKenzie and Mr. Foss. RP at 322–23. Blows were exchanged, and Ms. Gayman's son, Nicholas Losche, got involved and bit Mr. McKenzie on the arm. RP at 323. This altercation led to disorderly conduct charges against Mr. McKenzie, Mr. Foss, and Mr. Losche that were later dropped. RP at 203–204, 222–224, 316.

Several months after the fight, Mr. McKenzie encountered Mr. Foss in the apartment building and told him politely but firmly to stop interfering with his dogs. RP at 175, 179, 320. In response, Mr. Foss swore at Mr. McKenzie. RP at 320. This interaction led to increased tension between Mr. Foss and Mr. McKenzie. RP at 323–24.

Shortly after that interaction, Mr. McKenzie walked into the common area of the apartment building and encountered Mr. Foss and Mr. Foss' cousin.[2] RP at 325. According to Mr. McKenzie, Mr. Foss had the handle of a long knife sticking out of his belt. RP at 326. Mr. McKenzie

[2] Mr. Foss and his cousin referred to each other "brothers" during trial but were in fact related as first cousins. *See* RP 176–77, 192.

believed Mr. Foss was discussing with his cousin how to take possession of Twyla. RP at 325.

Concerned that Mr. Foss was plotting to take his dog, Mr. McKenzie punched Mr. Foss and a fight ensued. RP at 327–28. According to Mr. McKenzie, he placed Mr. Foss in a chokehold to prevent him from reaching for his knife. RP at 329. The commotion attracted the attention of Ms. Gayman and Mr. Losche. RP 209–210, 229–230. As a crowd gathered, several other fights broke out simultaneously. *Id.* at 170–72, 211, 231–32, 280–81, 341, 343–45. When police arrived, Mr. McKenzie arrested and charged with second-degree assault. RP 136.

2. Mr. McKenzie is convicted of second degree assault after a flawed trial.

During the ensuing jury trial, eyewitnesses gave varying accounts of the altercation between Mr. Foss and Mr. McKenzie. During the cross-examination of the responding building manager, Amber Lawsha, the prosecutor for the State engaged in aggressive questioning tactics and the trial court had to remind him not the badger the witness. RP 287–95. The trial court also sustained an objection on the basis that the prosecutor's tone was "antagonistic and sarcastic." RP 292. Despite objections, the prosecutor made repeated comments about Ms. Lawsha's testimony, implying she lacked credibility. *See* RP 294–95. During his closing

argument, the prosecutor commented explicitly on Ms. Lawsha's credibility. RP 383.

Prior to deliberations, the court instructed the jury on Mr. McKenzie's right to defend his dogs and himself. CP 28–32. At the State's request and over Mr. McKenzie's objections, the jury also received a "first aggressor" instruction, which stated the jury must reject self-defense if it found "beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight." CP 27. The jury returned a guilty verdict. RP 415; CP 35–36.

On appeal, the Court of Appeals, Division III affirmed the conviction. *State v. McKenzie*, 2019 WL 7369438 at *1 (Dec. 31, 2019) (unpublished). The court acknowledged that the questioning of Amber Lawsha's and closing comments on her credibility were "improper," but held the misconduct harmless because it determined Ms. Lawsha was not a "key witness." *Id.* at *3. The court also held the "first-aggressor" instruction was validly given based on the evidence presented at trial. *Id.* at *4.

Mr. McKenzie now petitions this Court for review.

E. ARGUMENT

1. The prosecutor engaged in prosecutorial misconduct that prejudiced Mr. McKenzie's right to a fair trial.

The right to a fair trial is protected by the Sixth and Fourteenth amendments as well as article I, section 22 of the state constitution. *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (citing *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) and *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999)); *see also* U.S. Const. amend. VI, XIV; Const. art. I, § 22. "Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *Id.* at 703–704 (citing *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)). Prosecutorial misconduct is grounds for reversal if it is prejudicial, *i.e.*, if there is a substantial likelihood it impacted the jury's verdict. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011); *see also State v. Lindsay*, 180 Wn.2d 423, 440, 326 P.3d 125 (2014).

Here, the prosecutor improperly commented on the credibility of a key defense witness, Amber Lawsha. In questioning Ms. Lawsha – the building manager and girlfriend of Mr. McKenzie's brother – the prosecutor engaged in "antagonistic and sarcastic" questioning and had to be reminded by the trial court not to badger the witness. RP 288, 292.

When Ms. Lawsha indicated the prosecutor's aggression was starting to make her feel uncomfortable, the prosecutor replied, "Don't care." RP 288. And when Ms. Lawsha expressed confusion about a line of questioning, asking "Is that a question, sir?, Again, I'm –" The prosecutor cut her off, responding sarcastically, "Yeah. Try answering it." RP 288.

Despite a sustained objection to his tone, *see* RP at 292, the prosecutor repeatedly commented on Ms. Lawsha's credibility during cross examination. In one particularly heated exchange, the prosecutor clearly indicated he found Ms. Lawsha's testimony incredible:

> Q. Ms. Lawsha, *don't you think it's a little bit convenient* that the cameras for this dayroom went out just before this happened?
> A. Actually, no, I don't.
> Q. Yeah? *You don't think it's convenient* that you and another assistant manager just managed to show up with someone else who assaulted another tenant and the cameras just *magically* happened to stop working?
> A. No, because the cords were cut by mice. We had mice in the building and they had eaten the cords. We have previously replaced them since then, sir.
> Q. *I'm sure that's what happened.*

RP 294–95 (emphasis added). During closing, the prosecutor acknowledged he "went hard" at Ms. Lawsha, but not at another witness, stating "[a]t least [the other witness] told the truth." RP 383. The court

sustained an objection that the prosecutor was vouching for the credibility of witnesses. RP 383.

"It is impermissible for a prosecutor to express a personal opinion as to the credibility of a witness." *Lindsay*, 180 Wn.2d at 437 (citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). "It constitutes misconduct, and violates the advocate-witness rule, which prohibits an attorney from appearing as both a witness and an advocate in the same litigation." *Id.* (internal citation and quotation marks omitted). A defendant may be prejudiced when it is "'clear and unmistakable' that counsel is expressing a personal opinion." *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

Here, the prosecutor clearly and unmistakably expressed a personal opinion about Ms. Lawsha's testimony. He commented on her answers in an antagonistic and sarcastic tone, stated "I'm sure that's what happened" in response to one of her answers, and expressed a belief that she lied during closing argument. As the Court of Appeals recognized and the State conceded, the prosecutor's expression about his personal belief that Ms. Lawsha was not credible was misconduct. *See State v. McKenzie*, 2019 WL 7369438 at *3 (Dec. 31, 2019) (unpublished) ("The State

correctly conceded that the prosecutor improperly suggested Ms. Lawsha lied.")

In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the misconduct was prejudicial. *See State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). Prosecutorial misconduct may only be deemed harmless if it was "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in *no way* affected the final outcome of the case." *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947) (emphasis added). Here, the Court of Appeals held the prosecutor's misconduct was "harmless" because Ms. Lawsha "was not a key witness where questioning her truthfulness may have changed the case outcome" and because Mr. McKenzie "does not suggest how the prosecutor's misconduct impacted the verdict." *McKenzie*, 2019 WL 7369438 at *3.

The Court of Appeals' holding ran afoul of this Court's decisions in *State v. Robinson*, 24 Wn.2d 909, 167 P.2d 986 (1946) and *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). In *Robinson*, this Court acknowledged:

> It is highly improper for courts, trial or appellant, to speculate upon what evidence appealed to a jury. Jurors and courts are made up of human beings whose condition of mind cannot be ascertained by other human beings. Therefore it is impossible for courts to

> contemplate the probabilities any evidence may have upon the minds of the jurors.

24 Wn.2d at 990. Further, in *DeRyke*, this Court held that "an error is presumed prejudicial unless we conclude the error could not have rationally affected the verdict." 149 Wn.2d at 912.

Here, the Court of Appeals concluded the prosecutorial error was harmless because, in its determination, Ms. Lawsha was not a "key witness." *See McKenzie*, 2019 WL 7369438 at *3. In doing so, the Court of Appeals improperly speculated that the prosecutor's repeated commentary regarding the veracity of Ms. Lawsha's testimony had no impact on the jury. *See Robinson*, 24 Wn.2d 990.

Ms. Lawsha's testimony supported Mr. McKenzie's defense, including the disputed fact of whether Mr. Foss was carrying knife at the time of the altercation. RP 278–79. She was also the only witness besides Mr. McKenzie himself who testified she perceived Mr. McKenzie to be in physical danger.[3] RP 286. Accordingly, the prosecutor's excoriation of her credibility could have "rationally affected the verdict" and was thus prejudicial. *DeRyke*, 149 Wn.2d at 912. Further, the fact that the prosecutor's questioning of Ms. Lawsha's credibility was so repetitive and

[3] Mr. McKenzie's brother merely testified that the safety of "those in the room" was "questionable" prior to the physical altercation between Mr. Foss and Mr. McKenzie, but also testified that he didn't perceive "any imminent threat." RP 340.

continued despite repeated sustained objections further underscores its prejudicial nature. *See State v. Allen*, 182 Wn.2d 364, 376, 341 P.3d 268 (2015).

The Court of Appeals improperly speculated on the jury's accounting of Ms. Lawsha's testimony. Accordingly, this Court should take review in order to clarify the proper analysis for assessing the prejudicial nature of prosecutorial misconduct in light of the holdings of *Robinson* and *DeRyke.* RAP 13.4(b)(1), (3).

2. The "first aggressor" jury instructions improperly deprived Mr. McKenzie of his ability to claim self-defense.

a. <u>The State must prove each element of the offense as well as the absence of self-defense.</u>

"Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt." *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S. Ct. 2781, 61 L. Ed. 2d (1979); *In re Winship*, 397 U.S. 358, 365–66, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *see also* U.S. Const. amend. XIV; Const. art. I, § 22. "To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." *Id.* (citations omitted). The right to present a defense is "among the

minimum essentials of a fair trial" and is constitutionally protected. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 296 (1973).

"To be entitled to jury instructions of self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt." *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). "Jury instructions on self-defense must more than adequately convey the law. Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror." *Id.* (internal citations omitted).

b. <u>The first aggressor instruction relieved the State of its burden of proving the absence of self-defense.</u>

A "first aggressor" instruction informs the jury that self-defense is not available as a defense if the defendant "provoked or commenced the fight." *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989) (internal citations omitted). The provoking act cannot be the charged assault. *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). "[A]n aggressor instruction impacts a defendant's claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt.

Accordingly, courts should use care in giving an aggressor instruction." *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). "Few situations come to mind where the necessity of an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such an instruction." *Id.* at 161 (quoting *State v. Arthur*, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985)).

Here, the court provided the jury with a "first aggressor" instruction over Mr. McKenzie's objections. *See* CP 27 (Instruction No. 10); RP 303–304. This instruction immediately preceded the instruction on defense of self and defense of property. *See* CP 28 (Instruction No. 11).

This so-called "first aggressor" instruction was improperly given because there was no evidence presented Mr. McKenzie provoked the need to act in self-defense. *See Riley*, 137 Wn.2d at 910. Mr. McKenzie was initially acting in defense of his dog. *See* RP 327 (Mr. McKenzie's testimony that he believed he was "walking into yet another attempt to steal my dog" and so "I swung."); CP 28 (self-defense and defense of property instruction). Mr. Foss's subsequent actions reaching for his knife triggered Mr. McKenzie's need to use self-defense. RP 329 (Mr. McKenzie's testimony that he applied a chokehold because he didn't want to get stabbed by Mr. Foss). The State's case and Mr. McKenzie's defense theory encompassed all of Mr. McKenzie's assaultive conduct,

and thus there was no separate "provoking act." *Kidd*, 57 Wn. App. at 100; *State v. Kee*, 6 Wn. App. 2d 874, 879, 431 P.3d 1080 (2018) (the provoking act "cannot be the actual, charged assault"); CP 2–3 (affidavit of facts); RP 381 (prosecutor's closing argument that "[y]ou don't get to walk up to somebody, like Mr. McKenzie testified to, start swinging on them, and then go around and choke them out.").

The first-aggressor instruction also muddied the waters of Mr. McKenzie's claimed defenses and appeared to lessen the State's burden of disproving self-defense. *See Riley*, 137 Wn.2d at 910 n.2; *see also Walden*, 131 Wn.2d at 473. The instruction specifically directed the jury that "self-defense is not available as a defense" if the "defendant's acts and conduct provoked or commenced the fight." CP 27. The language of the instruction appeared to effectively remove the State's burden of proof in disproving Mr. McKenzie's defense of property and defense of self theories. *See Riley*, 137 Wn.2d at 910 n.2. As a result, the relevant legal standard was not "manifestly apparent to the average juror." *See Walden*, 131 Wn.2d at 473 (citations and internal quotation marks omitted). Accordingly, the first-aggressor instruction deprived Mr. McKenzie of his theory of the defense. *Wasson*, 54 Wn. App. at 160.

This Court is currently reviewing a similar issue in *State v. Grott*, No. 97183-8 (argued Nov. 19, 2019). There, the defendant shot 48 rounds

into a man who had continually threatened to kill the defendant over a period of time. *State v. Grott*, 2019 WL 1040681 at *1, 7 Wn. App. 2d 1065 (Mar. 5, 2019) (unpublished). The man died, and the defendant was charged with his murder as well as seven counts of first degree assault, as there were bystanders to the shooting. *Id.* A trial, the court gave a first-aggressor instruction. *Id.* at *2. The Court of Appeals held this was reversible error because the State failed to produce evidence the defendant "made an intentional act – *prior to the shooting* – that a jury could reasonably assume would provoke a belligerent response from the victim." *Id.* at *3 (emphasis in the original). Further, the State conceded that "the first shot is part of the actual charged incident to which self-defense is claimed." *Id.* at *4.

Similarly here, the State's case and Mr. McKenzie's defense theory included Mr. McKenzie's initial punching of Mr. Foss as well as the subsequent strangulation. Should this Court uphold the Court of Appeals' reasoning in *Grott*, Mr. McKenzie should receive the benefit of that decision. *See State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018) (defendant's case was on appeal as a matter of right and thus he was entitled to the benefit of changes in the law that came into effect following his conviction).

c. The erroneous jury instruction requires a new trial.

"Where jury instructions are inconsistent, the reviewing court must determine whether the jury was misled as to its function and responsibilities under the law." *State v. Irons*, 101 Wn. App. 544, 559, 4 P.3d 174 (2000). The State has the burden of showing that misleading jury instructions are harmless beyond a reasonable doubt. *See id.* "An instructional error is harmless only if it 'is an error which is *trivial*, or formal, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case.*'" *Walden*, 131 Wn.2d at 478 (quoting *State v. Wanrow*, 88 Wn. 2d 221, 237, 559 P.2d 548 (1977)) (emphasis in the original). Here, the State cannot meet this burden, because the first-aggressor instruction may have undermined Mr. McKenzie's defenses and muddled the relevant legal standard. *See Riley*, 137 Wn.2d at 910 n.2; *see also Walden*, 131 Wn.2d at 473 (erroneous jury instructions were not harmless because the "may have" affected the outcome of the case).

This Court should accept review because the propriety of the first-aggressor instruction presents a significant question of constitutional law. *See* RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated above, this Court should accept review.

DATED this 30th day of January, 2020.

Respectfully submitted,

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APPENDIX A

FILED
DECEMBER 31, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. KAZ A J MCKENZIE, Appellant.	))))))))))	No. 36038-5-III UNPUBLISHED OPINION

KORSMO, J. — Kaz McKenzie appeals from a conviction for second degree assault, arguing that judicial and prosecutorial errors deprived him of a fair trial. We affirm.

FACTS

Mr. McKenzie and Wayne Foss resided in the same apartment building. The two men had prior confrontations due to McKenzie's belief that Foss wanted to steal his dog. On December 4, 2017, Foss sat outside his apartment taking off his shoes when McKenzie approached and repeatedly punched him. McKenzie then started to strangle Foss, purportedly out of fear that Foss might use the knife he regularly carried to defend himself. Witnesses included Mr. McKenzie's brother and an assistant manager, Amber Lawsha, who were both called to the scene shortly before the confrontation. Mr. Foss's cousin also observed the altercation.

Police responded to the building and contacted Mr. McKenzie at his apartment. While officers stood in the hallway, Mr. McKenzie stepped out and fully admitted he started the fight and choked Mr. Foss. McKenzie was charged with second degree assault by strangulation. After a CrR 3.5 hearing, the trial court ruled that McKenzie's statements to law enforcement at the apartment were admissible.

Mr. McKenzie testified at his jury trial that he started the fight to protect his dogs. One of his proposed witnesses was another apartment building manager, Patrick Kinchler, who would testify that Foss habitually carried a large "Bowie" knife. The trial court excluded Kinchler's testimony because he did not see Foss on the date of the offense and others testified Mr. Foss regularly carried a knife. Mr. McKenzie also called manager Amber Lawsha as a defense witness. She claimed that she received a phone call from an individual about a situation at the apartment, which was contradicted by Mr. McKenzie's brother's testimony that he and Ms. Lawsha were called by Mr. McKenzie to his apartment just before the fight. The prosecutor aggressively cross-examined Ms. Lawsha and questioned her truthfulness during closing. The trial court cautioned the prosecutor during cross-examination and sustained an objection to the prosecutor's commentary concerning Lawsha in closing.

At the State's request, the trial court gave a first aggressor jury instruction. The jury convicted Mr. McKenzie of second degree assault. After the court imposed a

standard range sentence, Mr. McKenzie timely appealed to this court. A panel heard oral argument of his appeal.

ANALYSIS

This appeal presents five issues, which we address in the following order: (1) *Miranda* violation, (2) exclusion of a defense witness, (3) prosecutorial misconduct, (4) first aggressor instruction, and (5) legal financial obligations.

Miranda

Mr. McKenzie first argues that his statements to law enforcement were improperly admitted at trial because he believed he was not free to leave during questioning. However, the undisputed facts establish that his statements were not made during custodial interrogation.

Appellate courts treat uncontested findings of fact from a CrR 3.5 hearing as verities on appeal and, if challenged, examine whether the findings of fact are supported by substantial evidence. *State v. Broadaway*, 133 Wn.2d 118, 134, 942 P.2d 363 (1997). Substantial evidence exists if the evidence is sufficient to persuade a fair-minded rational person of the truth of the evidence. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Whether the findings of fact support the trial court's legal conclusions is a question of law reviewed de novo. *State v. Lorenz*, 152 Wn.2d 22, 30, 93 P.3d 133 (2004).

Prior to conducting a custodial interrogation, an officer must first advise the suspect of his rights regarding the interrogation. *Miranda v. Arizona*, 384 U.S. 436, 444,

86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A suspect is in custody for purposes of *Miranda* when a reasonable person would believe his freedom of action is curtailed to the degree associated with a formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984).[1] The test is an objective one. *Id*. A person is not in "custody" merely because he has been "seized." A seizure exists when, under the totality of the circumstances, "a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); *see also Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). While contact initiated voluntarily with law enforcement at one's home is less likely custodial, the circumstances could create a custodial environment where officers control the individual's movement and engage in interrogational questioning. *State v. Rosas-Miranda*, 176 Wn. App. 773, 781, 309 P.3d 728 (2013).

Mr. McKenzie was in his apartment when police asked him about his encounter with Mr. Foss. He spoke with police at the door of his apartment. Later, Mr. McKenzie testified at the CrR 3.5 hearing that he did not feel free to leave. His subjective opinion of the encounter does not control. Here, the evidence only showed a consensual encounter and conversation. There was no seizure, let alone custodial interrogation.

[1] In *Berkemer*, the court concluded that routine roadside seizure and questioning following a traffic stop did not amount to custodial interrogation. 468 U.S. at 440.

There were no indicia of custody and no indication that Mr. McKenzie was ever restrained to the degree associated with formal arrest. The trial court correctly concluded that this was not a custodial interrogation.

Exclusion of Defense Witness

Mr. McKenzie next argues that the court prevented him from presenting his defense when it excluded one of his proposed witnesses. Because he had no right to present the proposed testimony, the trial court did not abuse its discretion by excluding the witness.

Appellate review of trial court evidentiary decisions is governed by well settled law. The decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Clark*, 187 Wn.2d 641, 648-649, 389 P.3d 462 (2017); *State v. Guloy*, 104 Wn.2d 412, 429-430, 705 P.2d 1182 (1985). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Under both the Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington Constitution, a defendant is entitled to present evidence in support of his defense. *State v. Strizheus*, 163 Wn. App. 820, 829-830, 262 P.3d 100 (2011). That right, however, does not include a right to present irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). As the proponent of the evidence, the defendant bears the

burden of establishing relevance and materiality. *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981 (1986).

Kinchler's testimony was excluded as cumulative. Witnesses for the prosecution and defense both testified that Mr. Foss habitually carried a knife, and varied only as to whether he was in possession of the Bowie knife at the time he was attacked. The trial court ascertained Mr. Kinchler did not see Mr. Foss on December 4 and could not testify about what knife, if any, Mr. Foss carried that day. In light of the trial testimony, Kinchler's proposed testimony was at most cumulative and was not at all relevant to the true issue in the trial. The court had very tenable reasons for excluding the testimony.

Mr. McKenzie fails to show how his right to present a defense was violated under these circumstances. He was allowed to present his theory that Foss habitually wore a Bowie knife. All of the other witnesses testified to the one piece of relevant information Kinchler had, and he had no information bearing on the question of how Foss was armed at the time of the crime. The proposed testimony was either cumulative or irrelevant, and in either instance was properly excluded.

There was no error.

Prosecutorial Misconduct

Mr. McKenzie next argues that misconduct by the prosecutor deprived him of a fair trial. Although he has established some error, he has not shown that he was denied a fair trial.

The appellant bears the burden of demonstrating prosecutorial misconduct on appeal and must establish that the conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Prejudice occurs where there is a substantial likelihood that the misconduct led the jury to decide the case on improper grounds. *In re Glasmann*, 175 Wn.2d 696, 710-711, 286 P.3d 673 (2012). We look to the cumulative impact of all errors to determine if the defendant was deprived of a fair trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Reversal is not required where an objection and curative instruction would have addressed the error. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). Failure to object waives misconduct claims unless the remark was so flagrant and ill-intentioned that it evinced an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Swan*, 114 Wn.2d 613, 665, 790 P.2d 610 (1990). Finally, a prosecutor has "wide latitude" in arguing inferences from the evidence presented. *Stenson*, 132 Wn.2d at 727.

A prosecutor cannot comment on a witness's credibility or truthfulness. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). During closing, a prosecutor also cannot present evidence not admitted at trial or attempt to inflame the jury's passion to convict the defendant. *Glassman*, 175 Wn.2d at 705, 707. Misconduct that addressed insignificant or inconsequential evidence, such as questioning the truthfulness of a secondary witness, is less likely to have prejudicial impact. *Ish*, 170 Wn.2d at 199-200.

While Mr. McKenzie brings up five separate allegations of misconduct from the State's closing argument, he only objected to two instances during trial. The State correctly conceded that the prosecutor improperly suggested Ms. Lawsha lied. However, we note the trial court sustained an objection to this statement and admonished the prosecutor. Mr. McKenzie did not argue at trial the admonishment was insufficient and, on appeal, does not suggest how the prosecutor's misconduct impacted the verdict. The dispute over Ms. Lawsha's testimony gave the incident some context, but she was not a key witness where questioning her truthfulness may have changed the case outcome. While improper, this misconduct was harmless.

Mr. McKenzie also argues the prosecutor gave an incorrect statement on self-defense standards when stating self-defense requires a degree of immediacy. Defense counsel quickly objected. The trial court noted to the jury this was purely argument and the jury was to follow the court's instruction. Mr. McKenzie has not established that the court's instruction was an inadequate remedy.

For the first time on appeal, Mr. McKenzie challenges three statements from the prosecutor's closing argument. None of his challenges are meritorious and certainly none of the statements were so flagrant and ill-intentioned that the trial judge could not have cured the error. The prosecutor's comparison between Mr. McKenzie's actions and vigilantism was proper argument and also was not particularly inflammatory. Similarly, the prosecutor's suggestion that Mr. McKenzie had arranged the fight was drawn from

reasonable inferences based on the testimony of McKenzie's brother. Finally, Mr. McKenzie argues the prosecutor inappropriately referenced his military service. The prosecutor's statement was part of a story about removing shoes when he and his wife were "in the service" in Hawaii. This passing statement was not an appeal to patriotism or authority. None of these instances individually or as a whole were improper or sufficiently inflammatory to require a new trial.

In summary, there was only one instance of misconduct. In light of the entire case, the misconduct was harmless as there was no evidence it impacted the jury's verdict.

First Aggressor Instruction

Mr. McKenzie also argues that the court erred in giving the first aggressor instruction. Once again, there was no abuse of the court's discretion.

We review whether evidence supported a jury instruction in the light most favorable to the requesting party. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000). Self-defense is only available to respond to the *unlawful* use of force. *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). Thus, one who provokes another to lawfully act in self-defense is not responding to unlawful force and has no right of self-defense. *Id.* at 909. Juries must often sort out which party, if any, was justified in using force. "Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an

aggressor instruction is appropriate." *Id.* at 909-910. If the evidence is in conflict about who precipitated an encounter, the instruction is appropriate. *State v. Davis*, 119 Wn.2d 657, 665-666, 835 P.2d 1039 (1992).

There was credible evidence that the defendant provoked his alleged need to act in self-defense. He attacked first and then escalated his assault due to his fear that the victim would defend himself with a weapon. Viewing the evidence in a light most favorable to the State, the first aggressor instruction was necessary to inform the jury that Mr. McKenzie could not properly claim self-defense under the circumstances. *Riley*, 137 Wn.2d at 909-910.

Nonetheless, Mr. McKenzie argues that the instruction served to undercut his defense and, thus, should not have been given. His argument is not a basis to deny the State a proper instruction, but, instead, addresses the impact an improper aggressor instruction could have on a particular case. Accordingly, we need not address this argument, but we take time to note that this was also an instance where an erroneous first aggressor instruction would have constituted harmless error. One of the few instances where a first aggressor instruction is harmless error is when no reasonable jury could find the defendant acted in lawful self-defense. *State v. Kidd*, 57 Wn. App. 95, 101, 786 P.2d 847 (1990). That is the situation here.

Mr. McKenzie sought the instruction on the basis of his claimed need to protect a dog that was safely in his apartment from potential theft. However, he presented no

evidence that Foss was in the process of stealing his dog when the attack was launched, nor has he explained how punching Foss to prevent theft constituted a defense to the charge of second degree assault based on the ensuing strangulation.[2] Instructing the jury on self-defense was a very charitable act for the trial court. Errors relating to self-defense were harmless in this case.

The court did not err in giving the first aggressor instruction.

Financial Obligations

Lastly, Mr. McKenzie argues that the court erred in assessing the criminal filing fee and the DNA collection fee. In light of recent changes in Washington law and the absence of opposing argument from the State, we strike the $200 criminal filing fee and $100 DNA fee.

Affirmed and remanded to strike the noted fees.

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

Korsmo, J.

WE CONCUR:

Pennell, A.C.J.

Siddoway, J.

[2] He likewise has not presented authority suggesting that lethal force can be used to prevent theft.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 36038-5-III
	)	
KAC MCKENZIE,	)	
	)	
PETITIONER.	)	

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JANUARY, 2020, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SPOKANE, WA 99260		

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF JANUARY, 2020.

X_____

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Appellate Court Case Title:	State of Washington v. Kaz Airk Joshua McKenzie
Superior Court Case Number:	17-1-04892-6

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