No. 98752-1

COA 51432-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

KENSHON STOKES,

Appellant/Petitioner.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO
AND THE
SUPERIOR COURT OF
THE STATE OF WASHINGTON,
PIERCE COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PARTY

Mr. Kenshon Stokes, appellant in the Court of Appeals and the accused in the trial court, is the Petitioner herein.

B. COURT OF APPEALS DECISION

Mr. Stokes seeks review of the decision of the court of appeals, Division Two, affirming a conviction for assault in State v. Stokes, __ Wn. App.2d ___ (unpublished) (2020 WL 1929276), issued April 21, 2020.[1]

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review under RAP 13.4(b)(3) where the Court of Appeals held that verbally refusing to give back a cellphone and retaining it once permission to possess it is revoked is a sufficient "aggression" as a matter of law to support giving a "first aggressor" instruction?

2. Does the Court of Appeals decision conflict with this Court's decision in State v. Riley, 137 Wn.2d 904, 976 P.2d 624 (1999)?

3. Does a prosecutor commit flagrant, prejudicial misconduct and misstate the law in arguing that jurors could find someone to be the "first aggressor" based simply on saying belligerent things and further, in telling jurors that the alleged victim had the right to initiate a physical altercation by using force to try to recover her property?

D. OVERVIEW OF RELEVANT FACTS

1. Accusations and trial

Petitioner Kenshon Stokes was charged with and convicted after jury trial in Pierce County before the Honorable Judge Jerry Costello of fourth-degree assault against a "family or household member." See CP 33-35, 109-12. Mr. Stokes was acquitted of second-degree assault for the

[1] A copy of the opinion is attached hereto as Appendix A.

same incident, which occurred between Stokes and his wife, Kalia Brown. TRP 108-14.[2] Both Stokes and Brown were alleged to have been unfaithful and they had started bickering about it in the early morning hours. TRP 115-17.

At trial, Brown first testified that Stokes grabbed her phone from the dining room table and started "scrolling" through it, refusing to give it back. TRP 118-19. She claimed he then grabbed her by the shirt and demanded to know who she was "talking to" on the device. TRP 118-19.

On cross-examination, however, Brown admitted that Stokes had picked up the phone with her permission. TRP 172-73. She had been in the other room and had told Stokes he was free to look through the phone if he was so concerned about her communications. TRP 117-19, 172-73.

Indeed, Brown conceded, she did not ask for the phone back for several minutes. TRP 117, 118-19, 172-73. He was looking through it and came into the room where Brown was, asking her questions about what he was seeing, so she decided she wanted the phone back. TRP 118-20, 174.

At first, Brown denied "jumping" on Stokes to try to grab the phone. TRP 120-21. She later admitted, however, that when she asked for it and he had it, she started trying to physically grab it from him and that might have included "jumping." TRP 120-21, 124. Ms. Brown also conceded that Stokes only grabbed her shirt to keep her away after

[2]References to the verbatim report of proceedings are explained in Appellant's Opening Brief ("AOB") at 3 n. 4.

Brown had approached him and started trying to physically grab the phone. TRP 120-24. He let go of her shirt the moment she told him to "back off." TRP 120-24.

Mr. Stokes told police that he had grabbed Brown only to try to hold her off when she was physically attacking him to retrieve the phone. TRP 204. Mr. Stokes testified at trial that Brown had told him to "go ahead" and look through the phone and when she ultimately demanded the phone back, she was not just asking verbally but was grabbing at him trying to get it. TRP 225-26. He denied grabbing Brown's shirt and only touched her when he was "holding her off." TRP 222-23.

Mr. Stokes was accused of *inter alia*, fourth-degree assault for the alleged grabbing of Brown's shirt. TRP 125-27. He asked for a self-defense instruction and one was given. TRP 245-55. Over defense objection, the trial court also gave a "first aggressor" instruction proposed by the state, which provided:

> 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 force upon 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.

CP 99; TRP 250. The trial court found the instruction was proper and the refusal to return the phone was a "first aggression," because the physical contact had occurred when Brown was just "wanting to get the phone back." TRP 251-52.

In closing argument, the prosecutor told jurors that the "first aggressor" instruction applied because no one can "basically provoke a

response where somebody is naturally going to create a physical altercation between the two of them." TRP 270. The prosecutor then gave an example involving only verbal conduct i.e, if you "get up into somebody's face in a bar" and start swearing at them and they hit you, "you don't get to say self-defense when you punched them and because you provoked that fight with your language and demeanor." TRP 270.

A moment later, the prosecutor again told jurors the first "aggression" could be verbal. TRP 270-71. The prosecutor then told jurors that someone cannot "take somebody's cell phone, refuse to give it back, and then claim self-defense when a fight ensues." TRP 270-71. The prosecutor declared that Brown had "a right to that phone" and to use physical force to try to get it back. TRP 270-71.

2. Court of appeals proceedings

On review, the Court of Appeals first recognized that the "first aggressor" situation is when an accused has engaged in aggressive acts which force a victim into responding. App. A at 5. The Court noted that the instruction is given to tell jurors that a "victim, defending [her]self against the aggressor, is using lawful, not unlawful force," and, as a result, the accused cannot claim "self-defense." App. A at 5, quoting, Riley, 137 Wn.2d at 911 (quotations omitted). Division Two recognized that this Court had held that it was error to give a first aggressor instruction "[w]here words alone constitute the asserted provocation" under Riley. App. A at 5. But Division Two held that there was a sufficient "aggressive act" in addition to the verbal acts Stokes had committed by saying he would not give back the phone. App. A at 7.

More specifically, the Court of Appeals held, "Stokes'[] words, when he refused to give Brown her phone upon her request, were accompanied by another intentional act, holding onto her phone" when he no longer had permission to have it. App. A at 7-8.

As a result, the Court concluded, by telling Brown he would not return the phone and by retaining the phone when he no longer had permission to have it, Stokes had committed a "first aggression" and created his own need to act in self-defense when Brown started to physically try to retrieve the phone and Stokes then had to push her away. App. A at 7-8.

The Court of Appeals also found that the Stokes had "waived" the issue of whether the prosecutor had misstated the law in closing by arguing that verbal aggression was enough to make someone a "first aggressor." App. A at 8. Although it recognized that the prosecutor had given an improper argument, Division Two declared without further explanation that "[l]ittle if any prejudice resulted" from the prosecutor saying that someone could not claim self-defense if they provoked a fight with their "language and [their] demeanor." App. A at 9. The Court also found that it was proper for the prosecutor to argue, "[y]ou don't get to take somebody's cell phone, refuse to give it back, and then claim self-defense when a fight ensues," and that Brown had "a right to that phone and a right to get it back." App. A at 9.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THE COURT OF APPEALS DECISION CONFLICTS WITH THAT OF THIS COURT IN RILEY AND THE QUESTION WHETHER REFUSING TO RETURN A PHONE WHEN PERMISSION TO POSSESS IT IS REVOKED IS A SUFFICIENT "AGGRESSIVE ACT" TO SUPPORT A "FIRST AGGRESSOR" INSTRUCTION RAISES SIGNIFICANT ISSUES OF DUE PROCESS

In the past, this Court has granted review in several cases in order to address the scope and limits of the "first aggressor" doctrine and its related instruction. See Riley, 137 Wn.2d at 911; see also, State v. Grott, 195 Wn.2d 256, 458 P.3d 750 (2020). This Court should similarly grant review under RAP 13.4(b)(3) here, because the decision of the Court of Appeals runs afoul of Riley and presents a significant constitutional question regarding the proper scope and application of the "first aggressor" doctrine used in our state.

Due process requires the state to bear the full weight of proving a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970); City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). A claim of self-defense negates an essential element of a crime, so the state must disprove self-defense, beyond a reasonable doubt. See State v. Douglas, 128 Wn. App. 555, 562-63, 116 P.3d 1012 (2005). In Riley, this Court found that a "first aggressor" instruction disrupts the burden and thus care should be used in giving it. 137 Wn.2d at 910 n.2. More recently, in Grott, this Court clarified that the "first aggressor" instruction does not "actually relieve the State of its burden of proof" in every case, so that error in giving such an instruction is not necessarily "manifest constitutional error" which

may be raised for the first time on review. 195 Wn.2d at 271. The Court also clarified that the question whether a "first aggressor" instruction was properly given is usually a fact-specific inquiry and that "[f]irst aggressor instructions are disfavored only where they are not justified." 195 Wn.2d at 271.

Here, the instruction was not justified and the Court of Appeals decision upholding it improperly extends the "first aggressor" doctrine far beyond its scope. Courts review de novo the question of whether the state presented sufficient evidence to support a "first aggressor" instruction. See State v. Stark, 158 Wn. App. 952, 959, 244 p.3d 433 (2010). The evidence is viewed in the light most favorable to the party requesting the instruction. State v. Wingate, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005). The "first aggressor" instruction is proper where there is credible evidence that the defendant provoked a fight, for example by shooting first (see, e.g., State v. Hughes, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986)), or by being the first to draw a gun. See Wingate, 155 Wn.2d at 823.

But a "victim" does not have impunity to "respond" with force in every situation. Instead, there must be more than words which amount to a "first" aggressive act justifying the victim's use of force. Riley, 137 Wn.2d at 911. In Riley, this Court noted that allowing expansion of the "first aggressor" theory to situations in which there were belligerent words used would render the right to self-defense "essentially meaningless," because insults could then justify a victim using force - and preclude a claim of self-defense by the accused. 137 Wn.2d at 911.

In affirming here, Division Two recognized that there must be an *act* of first aggression, not just words, but relied on a 1916 case in holding that the verbal statements refusing to return the phone and the physical act of retaining it when asked to return it were somehow a sufficient "aggressive" act. App. A at 5-6. The Court of Appeals found a 1916 case it thought was on point and supported its conclusion in this one. App. A at 5-6.

But this Court has cautioned against the broad reading of the very case upon which Division Two relied. See App. A at 5, citing, State v. Hawkins, 89 Wash. 449, 450, 154 P. 827 (1916). In Riley, this Court noted that Hawkins is one of several older cases which appear to have improperly indicated "that words alone may justify the conclusion that the speaker is an aggressor." Riley, 137 Wn.2d at 911, 911 n. 3.

In Hawkins, the defendant and victim were neighboring farmers and the defendant was missing some hogs and one had been castrated without his consent. Hawkins went to his neighbor's to confront him, ran into the barn, demanded answers about his hogs, and accused the neighbor and a group of men in the barn of not only being involved in the theft but and castration but also of them being involved in a "damn lie." 89 Wash. At 450-51. The neighbor, Miller, confronted Hawkins and asked if Hawkins was saying Miller was lying and, when Hawkins did not answer, Miller "tapped" Hawkins in the head with a fist. Hawkins then drew a gun and ended up shooting and killing Miller. 89 Wn. at 450.

The jury was instructed that, although Miller had "made the first attack" by hitting Hawkins with his fist, jurors could still find that

Hawkins had not acted in self-defense if the jurors found that Miller had "ceased his attack upon the defendant and in good faith withdrew from the conflict by retreating or otherwise" before the fatal shooting had occurred. 89 Wash. at 454. The Court also declared, "[w]hile appellant may not have been the aggressor in the sense of striking the first blow, he manifestly was the aggressor in the sense that his actions brought on the affray[.]" 89 Wn.2d 455-46.

In Riley, this Court cited Hawkins by name, along with a few other cases, noting that they contained language to "suggest that words alone" can amount to sufficient provocation to render someone a "first aggressor." 137 Wn.2d at 911. Further, this Court noted the problem with the decision in Hawkins was how broadly it could be read, because "[o]n the one hand, the defendant there did not strike the first blow and thus the case might be read to indicate" that his words accusing the others were sufficient. 137 Wn.2d at 911 n. 3. On the other hand, this Court noted, "the defendant did approach the victim in a threatening manner" which, it is presumed, supported the Hawkins result. Riley, 137 Wn.2d at 911.

Here, there was no threatening approach and no threatening words. Mr. Stokes picked up the phone with Brown's permission from the table. Ms. Brown was not even in the same room. When Brown changed her mind and decided she wanted the phone back, Stokes refused verbally and did not physically hand over the phone. It was Ms. Brown who then turned the dispute physical, "jumping" on Stokes trying to retrieve her property. Division Two's reliance on Hawkins runs afoul of

the overly broad reading and application this Court warned about in Riley.

Division Two also declared that no reasonable juror could have have relied on Stokes's "words alone" as provoking Brown's response, because those words were accompanied by Brown's act of not handing back the phone. App. A at 7. The Court of Appeals dismissed as "irrelevant" whether Brown had the right to lawfully use force to regain possession. App. A at 5 n. 3. But the "first aggressor" doctrine is based on the principle that the defendant has caused the victim to behave as she has, i.e., to respond to the first aggression with "lawful force." Riley, 137 Wn.2d at 912. Under RCW 9A.16.020, a person may use force and that force is not unlawful if they are trying to *retain* property in their possession, as long as the force is "not more than is necessary." RCW 9A.16.020(3). The use of force is allowed to defend against someone taking property from your possession but such violent self-help is not allowed when that taking is complete . See State v. Yelovich, 191 Wn.2d 774, 776-77, 426 P.3d 723 (2018).

As this Court has noted, allowing use of force to retrieve property already taken is a hallmark of prior days when violence was allowed to be used to resolve property disputes. See State v. Valentine, 132 Wn.2d 1, 18, 935 P.2d 1294 (1997).

This Court should grant review under RAP 13.4(b)(3). Division Two erred in holding that there was sufficient evidence as a matter of law to support giving a "first aggressor" instruction where the "aggression" was a verbal refusal to return property originally possessed

with permission, coupled with not handing over the phone. Division Two here far extended the scope of when a "first aggressor" instruction is proper. Further, the prosecutor then exploited the error by repeatedly telling jurors that one could be deemed a "first aggressor" if their "language and demeanor" had provoked the fight. On de novo review, this Court should hold that the refusal to return a phone without more does not amount to a "first aggressor" act, and that an owner of a phone cannot start a physical altercation trying to retrieve it, then rely on the refusal to return it as somehow "provoking" the physical incident which results. It should also hold that the prosecutor committed flagrant, ill-intentioned and prejudicial misconduct by repeatedly misstating the law and telling jurors that one could be a "first aggressor" based solely on what they said.

F. CONCLUSION

The Court of Appeals decision converted refusing to return a phone with a "first aggression." That decision runs afoul of Riley and presents a substantial issue of constitutional due process. This Court should grant review.

DATED this 15th day of July, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I caused to be sent a true and correct copy of the attached Petition for Review to opposing counsel at Pierce County Prosecutor's Office via the Court's upload service and caused a true and correct copy of the same to be sent to appellant by depositing in U.S. mail, with first-class postage prepaid at the following address: Mr. Kenshon Stokes, 4418 S. Asotin St., Tacoma, WA. 98408.

DATED this 15th day of July, 2020.

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Filed
Washington State
Court of Appeals
Division Two

April 21, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENSHON DEVONTE STOKES, Appellant.	No. 51432-0-II UNPUBLSIHED OPINION

MELNICK, J. — A jury found Kenshon Stokes guilty of assault in the fourth degree. He argues that the trial court erred by giving a first aggressor instruction because the evidence did not support it and because the instruction allowed the jury to find that he was the first aggressor based on words alone. He also contends that the State committed prosecutorial misconduct in its closing argument. Lastly, he argues that the trial court imposed unauthorized legal financial obligations (LFOs). We affirm the conviction but remand for the court to review the imposition of LFOs.

FACTS

Kalia Brown and Stokes, a married couple, lived together. One evening, Brown reported that Stokes grabbed her and later pointed a shotgun at her. The State charged Stokes with assault in the fourth degree based on him grabbing Brown and assault in the second degree related to Stokes pointing the shotgun at Brown.[1]

[1] The jury found Stokes not guilty of the assault charge related to the shotgun incident. Therefore, much of the evidence at trial related to that incident is not mentioned further.

At trial, Brown testified that the incident arose after Stokes confronted her about alleged infidelity and she did not respond to his questions. When she did not respond, Stokes became increasingly upset, and at one point, got "in [her] face." Report of Proceedings (RP) (Jan. 9, 2018) at 118. Brown then went into a different room.

With permission, Stokes then took Brown's cell phone off the dining room table and began looking through it. She then told Stokes to stop. Brown asked Stokes for her phone, but he refused to give it to her. Brown then tried to grab the phone out of Stokes's hand, and Stokes grabbed her shirt by the collar "to really get the answers out of [her]." RP (Jan. 9, 2018) at 120. Brown put her hands up and told Stokes to back off. Stokes let her go and went into a bedroom.

Stokes disputed a portion of Brown's version of events. Stokes admitted that he refused to return Brown's phone but said he grabbed Brown to hold her away because she attacked him while he held her cell phone. Stokes testified that on the night of the incident, Brown arrived home and he took her phone. He said: "When I grabbed [the phone], she told me to give it back to her, but then she told me also to go ahead and go through it." RP (Jan. 10, 2018) at 225.

He said that, at first, Brown did not try to stop him but eventually she tried to get the phone back. He described the incident:

> So when [Brown] was trying to get the phone back from me, she was grabbing on my shirt and like scratching on my arm where the phone was, and so I had the phone up here and I kind of just extended my arm right here. That way she could stop grabbing onto me and scratching on my arm.

RP (Jan. 10, 2018) at 226. Stokes admitted that he held off Brown but denied grabbing Brown's shirt. After Brown tried but failed to get the phone, she left the room.

At the conclusion of the evidence, Stokes proposed a self-defense instruction, which the court gave.

The State then proposed a first aggressor instruction. Stokes objected. The State argued that the instruction should be given because the evidence showed that Stokes kept Brown's property away from her and refused to give it back and that this act provoked Brown to assault Stokes to get her phone back.

The court gave the first aggressor 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 force upon 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.

Clerk's Papers (CP) at 98.

In its closing argument, the State argued that Stokes should not prevail on self-defense because he was the first aggressor. The prosecutor discussed the first aggressor instruction:

> It indicates that no person can basically provoke a response where somebody is naturally going to create a physical altercation between the two of them. So the prototypical example of this is if you get up into somebody's face in a bar and start cussing them out, when a fight ensues, you don't get to say self-defense when you punched them because you provoked that fight with your language and your demeanor.
>
> This case is an even better example. You don't get to take somebody's cell phone, refuse to give it back, and then claim self-defense when a fight ensues. [Brown] has a right to that phone and a right to get it back. You don't get to do that.

RP (Jan. 10, 2018) at 270-71.

The jury found Stokes guilty of assault in the fourth degree. Stokes appeals.

ANALYSIS

I. FIRST AGGRESSOR JURY INSTRUCTION

Stokes argues that the trial court improperly gave the first aggressor jury instruction because the evidence did not support it. He contends that Brown could not lawfully use force to recover her phone so he could not be the first aggressor.[2] We disagree.

A. Legal Principles

Due process requires that the State prove every element of the charged offense beyond a reasonable doubt. *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). Once raised by a defendant in an assault case, the State has the burden of proving the absence of self-defense beyond a reasonable doubt. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). A first aggressor instruction informs the jury that if it determined Stokes was the first aggressor, then his self-defense claim is unavailable, and the jury does not have to consider whether the State has proved beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Bea*, 162 Wn. App. 570, 575-76, 254 P.3d 948 (2011).

We review first aggressor instructions, utilizing the same standards we use to review other jury instructions. *State v. Grott*, ___Wn.2d___, 458 P.3d 750, 757 (2020). We review de novo

[2] Additionally, Stokes argues that the instruction "was constitutionally infirm" because it allowed the jury to find that Stokes was the first aggressor based on words alone. Br. of Appellant at 13. We do not decide the constitutional issue. Stokes has not cited with particularity which constitutional provisions he alleges have been violated nor does he make argument on the constitutional issue. He merely alleges the instruction "was constitutionally infirm." We do not review issues for which inadequate argument or passing treatment has been made. *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004). In addition, Stokes relies on *State v. Riley*, 137 Wn.2d 904, 976 P.2d 624 (1999); however, *Riley* rested on grounds completely aside from any constitutional issue. *See* 137 Wn.2d at 911.

whether sufficient evidence supported giving the first aggressor instruction. *Bea*, 162 Wn. App. 577.

> "[W]hen determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." While we have cautioned that "courts should use care in giving an aggressor instruction," we have also recognized that "an aggressor instruction should be given where called for by the evidence."

Grott, 458 P.3d at 757 (alteration in original) (citation omitted) (quoting *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005), and *State v Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999)).

In *Grott*, the court clarified that "an act of first aggression is an 'intentional act reasonably likely to provoke a belligerent response' *by* the victim, while lawful self-defense requires a 'subjective, reasonable belief of imminent harm *from* the victim.'" 458 P.3d at 758 (quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.04, at 256 (4th ed. 2016), and *State v. LeFarber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009)).

"[T]he reason one generally cannot claim self-defense when one is an aggressor is because 'the aggressor's victim, defending [her]self against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense.'" *Riley*, 137 Wn.2d at 911 (quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 657-58 (1986)). "[T]he [first] aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force." *Riley*, 137 Wn.2d at 912.

Where words alone constitute the asserted provocation, it is error to give a first aggressor instruction. *Riley*, 137 Wn.2d at 910-11.

B. The Evidence Supported the Instruction

Stokes argues that the evidence did not support giving the instruction because Brown, in attempting to retrieve her phone, did not use lawful force. We disagree. Stokes's argument for the giving of the first aggressor instruction is predicated on an assumption that he used lawful force in preventing Brown from using unlawful force to regain possession of her phone.[3] However, Stokes is neither viewing the evidence in the light most favorable to the State nor looking at the evidence in light of the court's instruction.

The court instructed the jury as follows:

> 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 force upon 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.

CP at 98.

The State argued that that "[y]ou don't get to take somebody's cell phone, refuse to give it back, and then claim self-defense when a fight ensues. [Brown] has a right to that phone and a right to get it back. You don't get to do that." RP (Jan. 10, 2018) at 270-71.

In making this argument, the State argued what the courts have agreed upon. Cell phones contain vast amounts of intimate and personal details. *Riley v. California*, 573 U.S. 373, 395-97, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). Cell phones "are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Riley*, 573 U.S. at 393.

[3] We need not decide the issue of whether Brown could lawfully use force to regain possession of her phone. It is irrelevant to the analysis and resolution of this issue.

Contrary to Stokes's argument, the State did not solely rely on words to support the giving of the first aggressor instruction. The present case is similar to *State v. Hawkins*, 89 Wash. 449, 450, 154 P. 827 (1916), where the defendant dashed through a barn door, ran up to a group of men, and demanded to know what was wrong with them. He accused the victim of cutting his hog and then lying about it. *Hawkins*, 89 Wash. at 450. Although the defendant did not strike the first physical blow, "he manifestly was the aggressor in the sense that his actions brought on the affray." *Hawkins*, 89 Wash. at 455.

This situation is dissimilar from *State v. Kee*, 6 Wn. App. 2d 874, 876, 431 P.3d 1080 (2018), where the State charged the defendant with assault in the second degree after she punched a man in the face and broke his nose. The evidence at trial showed that the defendant walked up to the man, and a verbal argument ensued. *Kee*, 6 Wn. App. 2d at 876-77. The argument then became physical. *Kee*, 6 Wn. App. 2d at 877. Conflicting evidence existed as to who threw the first punch. *Kee*, 6 Wn. App. 2d at 879.

In reversing the conviction because the trial court erred in giving a first aggressor instruction, we noted that the "the evidence supported a finding that [the defendant's] words, rather than her physical acts, first provoked the physical altercation." *Kee*, 6 Wn. App. 2d at 880 (emphasis omitted). We also pointed out that the prosecutor's closing argument improperly encouraged the jury to find that the provoking act was the defendant's words alone. *Kee*, 6 Wn. App. 2d at 881.

In the present case, no reasonable juror could have found that Stokes's words alone provoked Brown's response. Instead, Brown's response resulted from Stokes refusing to give her the phone. Thus, Stokes's words, when he refused to give Brown her phone upon her request, were accompanied by another intentional act, holding onto her phone.

When reviewing the evidence in the light most favorable to the State, Stokes's act of retaining Brown's phone when he no longer had permission to do so constituted an intentional act reasonably likely to provoke a belligerent response, which created his need to act in self-defense and use force against Brown. Because the evidence supported it, the court did not err by giving the first aggressor instruction.

II. PROSECUTORIAL MISCONDUCT

Stokes argues that the prosecutor committed misconduct by misstating the law both when he argued that verbal aggression is enough to be a first aggressor and when he argued that you can use force to retrieve property. As to the former, Stokes waived this issue. As to the latter, the prosecutor properly argued the issue.

"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). To prevail on a claim of prosecutorial misconduct, a defendant must show that "in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." *Glasmann*, 175 Wn.2d at 704. A prosecutor "commits misconduct by misstating the law." *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

We review the prosecutor's conduct and whether prejudice resulted therefrom "by examining that conduct in the full trial context, including the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (internal quotation marks omitted) (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

In a prosecutorial misconduct claim, a defendant who fails to object to improper conduct may be deemed to have waived the issue on appeal unless the prosecutor's statements are so flagrant and ill-intentioned that the resulting prejudice could not be corrected by a jury instruction. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). The defendant must show that (1) no curative instruction would have eliminated the prejudicial effect and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 761. The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks. *Emery*, 174 Wn.2d at 762.

Stokes claims that the prosecutor misstated the law twice during closing argument. First, during closing argument, the prosecutor gave an example of a first aggressor.

> So the prototypical example of this is if you get up into somebody's face in a bar and start cussing them out, when a fight ensues, you don't get to say self-defense when you punched them because you provoked that fight with your language and your demeanor.

RP (Jan. 10, 2018) at 270. Although this example is similar to what *Kee* prohibited, Stokes failed to object. Little if any prejudice resulted, and a curative instruction could have cured any defect. Therefore, this argument is waived.

Second, the prosecutor stated:

> You don't get to take somebody's cell phone, refuse to give it back, and then claim self-defense when a fight ensues. [Brown] has a right to that phone and a right to get it back. You don't get to do that.

RP (Jan. 10, 2018) at 270-71. As explained above, the evidence supported the instruction from which the prosecutor made this argument. Therefore, the prosecutor did not err in making this argument.

We conclude that Stokes's prosecutorial misconduct claim fails.

III. LFOs

Stokes argues, and the State agrees, that because of the 2018 amendments to the LFO statutes we should strike the criminal filing fee and interest accrual provision that the trial court imposed on him.

We agree and remand for the trial court to reconsider the imposition of LFOs. On remand, the trial court should consider all of the LFOs in light of the 2018 amendments to the LFO provisions, Laws of 2018, ch. 269, and *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

We affirm the conviction but remand for the trial court to reconsider the LFOs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, J.

Lee, C.J.

RUSSELL SELK LAW OFFICE

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