904666-9

307646

No.

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

STEVEN M. SWINFORD,

Defendant/Appellant.

PETITION FOR REVIEW
RE: APPELLANT'S STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW
RAP 13.4 / RAP 10.10

Steven M. Swinford
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

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A. IDENTITY OF PETITIONER

Steven M. Swinford, asks this Court to accept review of the Court of Appeals Decision referred to in section B.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4 and related to his pro se Statement of Additional Grounds For Review (RAP 10.10), Swinford seeks review of the unpublished Court of Appeals decision in State v. Swinford, No. 30764-6-III, filed March 18, 2014. A copy of the court's unpublished opinion is attached with counsel's petition for review.

C. ISSUES PRESENTED FOR REVIEW

1. THE TERM "GREAT PERSONAL INJURY" IS A TECHNICAL TERM THAT MUST BE DEFINED TO ENSURE JURY INSTRUCTIONS, AS A WHOLE, MAKE THE RELEVANT LEGAL STANDARD FOR SELF-DEFENSE MANIFESTLY APPARENT TO THE AVERAGE JUROR.

2. BECAUSE "GREAT PERSONAL INJURY" IS A TECHNICAL TERM THAT MUST BE DEFINED WHEN SELF-DEFENSE INSTRUCTIONS ARE GIVEN, THE COURT OF APPEALS ERRED WHEN IT FAILED TO ENTERTAIN THE ISSUE BECAUSE AN OBJECTION WAS NOT MADE (RAP 2.5(a) and CrR 6.15(c)), BECAUSE NO OBJECTION IS NECESSARY WHEN (i) THE STATE MISLEADS THE COURT AND DEFENSE COUNSEL ABOUT THE ABSENCE OF THE INSTRUCTION, AND (ii) WHEN A MANIFEST ERROR OF A CONSTITUTIONAL MAGNITUDE HAS A PRACTICAL AND IDENTIFIABLE CONSEQUENCE AT TRIAL, AND THE TECHNICAL RULE COMPLIMENTS THE CONSTITUTIONAL REQUIREMENT THAT THE JURY BE INFORMED OF ALL THE ELEMENTS OF THE CRIME CHARGED.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT RECOGNIZING AND OBJECTING TO THE ABSENCE OF THE DEFINITION OF GREAT PERSONAL INJURY IN SWINFORD'S SELF-DEFENSE INSTRUCTIONS, EVEN AFTER BEING MISLED BY THE STATE ABOUT ITS PRESENCE AND INCLUSION FROM THE FIRST TRIAL.

4. MR. SWINFORD'D DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE FAILED TO PROVE THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.

D. STATEMENT OF THE CASE

The State charged Swinford with second degree intentional murder based on the shooting death of his friend, Paul Raney. CP 1-4. Swinford asserted he shot Raney in self-defense. 2RP 226, 4RP 611.

Swinford's first trial ended in a mistrial after the jury could not reach a verdict. CP 150-155. At Swinford's first trial, the court's instructions to the jury on self-defense included the 'technical term' (definition) "great personal injury." CP 150 (Court's Instruction No. 18); WPIC 2.04.01.

A second jury convicted Swinford as charged. CP 70-71. At Swinford's second trial, the court's instructions to the jury on self-defense failed to include the technical term "great personal injury." CP 223 (Court's Instructions Nos. 17-19).

The record indicates the same self-defense instructions given at Swinford's first trial were proposed and given for his second trial. 3RP 531-32; RP 583 & 591 (The prosecuting attorney told the court and defense counsel that the instructions being proposed were the same one's from the first trial). Defense counsel took no exceptions to the court's instructions and the record is silent as to why the definition of "great personal injury" was given at Swinford's first trial, but not his second, and why the State mysteriously removed it and misled the court and defense counsel by indicating the instructions were the same. 4RP 590-91.

Trial Testimony. Steven Flick testified that it was common at their home "to have handguns wedged in between the cushions of ... the arm of the chair." 2RP 259. According to Flick, Swinford and Raney sat downstairs where Flick watched a movie. 2RP 62. Swinford and Raney were drinking alcohol and playing a drinking game. 2RP 261-62. They were all "joking around" and having a good time. 2RP 263. The mood changed when Raney got mad because Swinford decided to plug an ipod into the stereo system. Raney wanted to charge the ipod and listen to music later, but Swinford wanted to plug it into the stereo system. 2RP 264. Flick said there discussion was not aggressive and appeared to be an ordinary "talking match (about) who was going to be correct or not." 2RP 265. Just prior to the shooting, Flick heard Raney advise Swinford to "stop being a fucking badass." 2RP 266, 281. At this time, Raney was leaning forward in the chair. 2RP 266.

After the "stop being a fucking badass" statement was made by Raney, Flick reached to grab his beer and heard a gun cocking and shots being fired. 2RP 266, 281 & 284. Flick said he didn't see Raney's hands at this point because his back was turned. 2RP 284. At one point, Flick said Raney's hands were up and then fell as he was being shot, but that they were not up in a defensive position. 2RP 268, 307. Flick never testified that he heard Swinford's gun cock, only that he heard a gun cock. 2RP 266, 281 & 284. Directly after the shooting, Swinford put his gun

down and called 911. RP 268.

Detectives found Raney's .40 caliber pistol tucked between the right armrest of the seat cushion of the chair he had been sitting in when shot by Swinford. 2RP 380, 384-85; 3RP 415-17, 425. The back sights, hammer, and grip of the gun were visible. 2RP 385, 386-87; Ex. 5; 3RP 423; Ex. 11. The gun was fully loaded with a round in the chamber, cocked, and ready to fire if the trigger were pulled. 3RP 425, 456-57, 462-63, 521-24, 590.

Microscopic examination of the gun revealed blood spatter on the rear sights, hammer, and firing pin. 3RP 468, 479. Forensic Pathologist, Gina Fino, testified that she had "no idea" whether Raney was holding the gun prior to being shot by Swinford. 2RP 359, 372. Blood stain pattern and trajectory analyst Mitchell A. Nessan testified that Raney's exits wounds, when lined up with the seam in the seat material in the chair he was sitting in, showed that he may have been leaning to the his right side at the time of the shooting. 3RP 482. Nessan confirmed that the .40 caliber pistol was tucked into the right side of the chair, in the direction Raney was leaning. 3RP 490-92, 500. Nessan testified that he could not determine which one of Raney's wounds caused blood spatter to his hands or the gun. He admitted that it could have been the first or the last shot. 3RP 497.

Swinford's version of events was very similar to that of Raney's. 4RP 439-42. After returning from target shooting,

Swinford disassembled his .45 cal. pistol and Raney his .40 cal. pistol, intending to clean them. Instead of cleaning the pistols, Swinford and Raney Reassembled and loaded them. 4RP 453. Swinford knew Raney loaded the .40 cal. pistol to maximum capacity, putting 14 rounds in the magazine and one in the chamber. 4RP 543-44. Swinford knew Raney could competently handle and fire the pistol. 4RP 541, 542-43. Swinford also knew Raney had tucked the pistol in the cushion of the right side of the chair. 4RP 547.

While Swinford and Raney reassembled and loaded the pistols, Flick watched a movie. 4RP 544. After the movie was over, Flick, Swinford, and Raney decided to listen to music. 4RP 545. Swinford retrieved his ipod and plugged it in so it could play and charge at the same time. 4RP 545. Raney became annoyed and angrily told Swinford to "quit being a fucking badass." Swinford attributed the comment to Raney's drunkenness. 4RP 547. After hearing Raney make this comment, Swinford turned and saw Raney's hand wrap around the grip of the .40 cal. pistol tucked in his chair. Swinford feared he was about to be shot and, with only a split second to make his decision, reached for the pistol on the coffee table, closed his eyes, and shot Raney. 4RP 547, 549, 551, 557-58. After shooting Raney, Swinford put the gun down and immediately called 911. 4RP 549.

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E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

ISSUES 1 & 2: THE TERM "GREAT PERSONAL INJURY" IS A TECHNICAL TERM THAT MUST BE DEFINED TO ENSURE JURY INSTRUCTIONS, AS A WHOLE, MAKE THE RELEVANT LEGAL STANDARD FOR SELF-DEFENSE MANIFESTLY APPARENT TO THE AVERAGE JUROR; AND THE COURT OF APPEALS ERRED WHEN IT FAILED TO ENTERTAIN THE ISSUE.

The Court of Appeals declined to address Swinford's argument that "great personal injury" is a technical term that must be defined (given) in a self-defense case. The court agreed that it was given at his first trial, which resulted in a mistrial, but concluded that his failure to make a "timely and well stated objection" barred review because he failed demonstrated any basis for an exception to the objection rule. Slip Opinion, pgs. 16-17.

One "exception" the court obviously did not consider is the fact that "great personal injury" is a technical term that must be given -- and its an error to fail to give it even when no objection is made. The WPIC notes on use for WPIC 2.04.01 & 16.02 affirmatively state "use" the definition "with". The language clearly implies the definition should always be used with WPIC 16.02. As such, whether Swinford objected or not, the definition of great persona injury is a technical term that should have been given. State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997) (A term is technical if its legal definition differs from the common understanding of the word).

Because this Court subjects self-defense instructions to a more rigorous scrutiny, and they must more than adequately convey the law and make the relevant legal standard "manifestly apparent to the average juror," this Court should grant review and decide whether "great personal injury" (WPIC 2.04.01) is a technical term that must be given in a self-defense case. State v. LaFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984).

The technical term rule attempts to ensure that criminal defendants are not convicted by a jury that misunderstands the applicable law. Thus, the rule complements the constitutional requirement articulated in State v. Davis, 27 Wn.App. 498, 618 P.2d 1034 (1980), and later recognized in State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), that the jury be informed of all the elements of the crime charged. Here, Swinford contends the failure to define great personal injury in his self-defense case, deprived him of a fair trial and relieved the state of the burden of proof related to the subjective element "all the facts and circumstances known to him at the time" of the shooting. U.S. Const. Amends 6 & 14; Wash. Const. Art. 1, Sections 3 & 22 (Amend. 10); (State v. Kronich, 160 Wn.2d 893, 899, 161 P.3d 982 (2007)(describing manifest error as one that is truly constitutional and had a practical and identifiable consequence at trial); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25

L.Ed.2d 368 (1970).

The Court of Appeals implies that the subjective element of WPIC 2.04.01 "in light of all the facts and circumstances known at the time" was adequately addressed by another of the court's instructions, which advised the jury that "A person is entitled to act on appearances in defending himself ... Actual danger is not necessary for a homicide to be justifiable." Slip Opinion, pgs. 17-18 (citing CP 63). From this, the court concludes that the failure to give the instruction in a case where the victim threatening harm is armed, was not error, because "any reasonable juror would conclude that a risk of great bodily injury (automatically) exists." Slip Opinion, pg. 17. From this, the court states "Mr. Swinford offers no explanation how the jury — if it believed him (i.e., that Raney reached for the .40 cal pistol) — could have misconstrued "great personal injury" to have a meaning that did not included being shot at close range by a handgun." Id.

The problem with this reasoning, is it discounts the subjective element of great personal injury; an instruction telling the jury that the evidence must be viewed "in light of all the facts and circumstances known (to the slayer) at the time." When you say "actual danger is not necessary for a homicide to be justifiable," but conclude the risk of great bodily injury automatically exists because the victim threatening harm is armed,

you eliminate an element the jury is required to consider. In other words, the definition of great personal injury requires the jury to evaluate the harm Swinford faced in light of "all the facts and circumstances known" to him, and whether or not he was in actual danger of great personal injury because Raney was "armed with a handgun" is irrelevant, because actual danger is not necessary for the homicide to be justifiable.

In light of what Swinford knew at the time, that Raney was sitting with a fully loaded .40 cal. pistol, if Raney made a threatening statement and leaned toward the gun as if to grab it, whether he actually grabbed it and intended harm or not (like the evidence clearly shows), Swinford was justified in defending himself against a perceived threat of "great personal injury" and the Court of Appeals completely missed this point. Its not necessary that the jury believe "Mr. Swinford's belief that Mr. Raney '<u>intended</u>' to inflict death or great personal injury," only that based on "all the facts and circumstances known" to Swinford, that he perceived "actual danger of great personal injury," even if "afterwards" he was "mistaken as to the extent of the danger." CP 63; Slip Opinion, pg. 18. Eliminating the definition of great personal injury eliminated a necessary element the jury needed to avoid confusion and to make the law of self-defense manifestly apparent. An average juror may understand that death or "great personal injury" may be inflicted with a handgun, but when a

technical term includes a subjective element requiring all the facts and circumstances to be viewed in light of what the slayer knew at the time, the threat of a perceived danger cannot be eliminated by concluded the danger of personal injury automatically "existed" because the victim threatening harm is armed. The danger of great personal injury existed not because Raney was armed with a handgun, but because of what Swinford knew and perceived under all the circumstances. This subjective analysis (element) was taken away from the jury when the definition of great personal injury was not given.

Here, read as a whole, the absence of the technical term "great personal injury" (WPIC 2.04.01), rendered Swinford's self-defense trial unfair and failed to make the legal standard manifestly apparent, rendering the self-defense instructions incomplete as a matter of law. This Court should grant review because this is an important constitutional issue with a high degree of public importance -- because the self-defense laws in Washington need to be clearly defined for its citizens.

ISSUE 3: DEFENSE COUNSEL WAS INEFFECTIVE FOR NOT RECOGNIZING AND OBJECTING TO THE ABSENCE OF THE DEFINITION OF GREAT PERSONAL INJURY, EVEN AFTER BEING MISLED BY THE STATE ABOUT ITS PRESENCE AND INCLUSION FROM THE FIRST TRIAL.

Related to Issue Numbers 1 & 2 above, the Court of Appeals concluded that "Even if Mr. Swinford could demonstrate deficient performance, he cannot show how the deficient performance

prejudiced him." Slip Opinion, pg. 18.

The accused have a State and Federal constitutional right to effective assistance of counsel. U.S. Const. Amend. 6 & 14; Wash. Const. Art. 1, Sections 3 & 22 (amend. 10); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defense. Id. Failing to object may amount to ineffectiveness if the failure goes to the heart of the state's case. State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662 (1989).

Here, there is no tactical reason for not knowing the law and applying it in the correct context to ensure the legal standard for self-defense was made manifestly apparent to the jury. The failure to include the WPIC 2.04.01 definition was a manifest error because it truly had a practical and identifiable consequence at Swinford's trial (as set forth above). This was a close case and the absence of self-defense was the heart of the State's case. As such, counsel's failure to object to the missing instruction was prejudicial. Had the subjective element been given, there is a reasonable probability that but for counsel's deficient performance the outcome of the proceeding would have been different. The jury would have considered the case from Swinford's perspective knowing all that he knew at the time and likely found

the shooting to be in self-defense, like the majority of juror's believed at his first trial. Although the State advised defense counsel and the trial court that the instructions being given were the same one's from the first trial, and the State was not forthcoming with the fact that it removed the definition, Swinford's counsel was still deficient for relying on the State's word. Counsel, should have examined the instructions to ensure they were all there and that they correctly conveyed the law to the jury. His failure was deficient and the obvious prejudice flowing from his deficient performance was that Swinford was deprived of a fair trial.

ISSUE 4: MR. SWINFORD'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE STATE FAILED TO PROVE THE ABSENCE OF SELF-FDEFENSE BEYOND A REASONABLE DOUBT. U.S. Const. Amend. 14; Wash. Const. Art. 1, Sections 3 & 22 (Amend 10).

As part of the due process rights guaranteed under both the State and Federal constitution's, the State must prove every element of the crime charged beyond a reasonable doubt. State v. Beeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. at 364. In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61

L.Ed.2d 560 (1979). When a criminal defendant raises the issue of self-defense, the absence of self-defense becomes an element of the offense that due process requires the State to prove. State v. L.B., 132 Wn.App. 948, 952, 135 P.3d 508 (2006).

The Court of Appeals analysis of the evidence supporting Mr. Swinford's conviction does not show the State proved the absence of self-defense beyond a reasonable doubt. Contrary to the Court of Appeals statement that there was evidence that Raney's hands were up against his torso in a defensive position, and that he was leaning to the right and could not have been reaching for a gun (Slip Opinion, pg. 19), the record establishes that Raney's hands were not up in a defensive position (2RP 268, 307), and Raney was in fact leaning in the direction of the gun (3RP 490-92, 500). In fact, the State's own expert could not say where Raney's hands were prior to the shooting or whether or not he actually grabbed for the gun. 2RP 372 & 377. There is no question that Raney's gun was found tucked into the cushion of the chair, that it was fully loaded, cocked and contained a bullet in the chamber — essentially ready to fire. 3RP 425, 456-57, 462-63, 521-24, 590. The experts admitted their conclusions were, at best, just speculation. RP 353. As such, absolutely none of the evidence relied upon and cited by the Court of Appeals establishes the absence of self-defense. Instead, the evidence shows Swinford clearly acted with a reasonable belief that he

was in imminent danger of death or great personal injury, and no reasonable juror could, from the evidence, infer otherwise. RCW 9A.16.050.

In closing argument the state conceded that Raney did, in fact, grab the gun. The State argued that Swinford did "not shoot a round into the ceiling. He's not holding the gun saying, stop. He's not trying to get him to stop." 4RP 596. Stop what? The only fact that could be reasonably inferred from this reference is that Raney reached for or grabbed the gun and Swinford acted only to defend himself from imminent death or great personal injury. Moreover, in making this argument, the State further conceded the fact that Raney posed an imminent threat to Swinford; othewise, why would it be necessary for Swinford to fire a warning shot or order Raney to stop (reaching for or grabbing the gun). As such, once Raney threatened Swinford and reached for the gun, Swinford had the right to defend himself with lethal force. Had Swinford hesitated for even a moment, there is a potential the inebriated Raney may have killed him or caused great personal injury. Surely, the .40 cal. pistol at Raney's side was easily accessible and readily capable of producing death in an instant. Nevertheless, the strongest point against intentional murder, and for self-defense, is the lack of probability that Swinford would murder his friend without cause, put the gun down, and immediately dial 911.

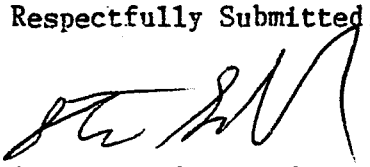
Viewing this evidence in the light most favorable to the State, the record supports the undeniable conclusion that Swinford acted with the reasonable belief of imminent harm from Raney. RCW 9A.16.050. As such, no juror could have reasonably concluded that Swinford was guilty of second degree intentional murder. The State failed to prove the absence of self-defense beyond a reasonable doubt and this Court should grant review and reverse and dismiss Swinford's conviction with prejudice.

F. CONCLUSION

Based on the foregoing reasons, Swinford respectfully asks this Court to grant review of his case and, accordingly, reverse his conviction, or dismiss it with prejudice for insufficient evidence.

Dated this 11 day of June, 2014.

Respectfully Submitted,



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RULES, STATUTES AND OTHER AUTHORITIES

A. SUPPLEMENTAL ISSUE PRESENTED FOR REVIEW

During jury selection, the parties made peremptory challenges passing a piece of paper back and forth. Because the trial court did not analyze the Bone-Club[1] factors before conducting this portion of voir dire in private, did the court violate the constitutional right to a public trial?

B. SUPPLEMENTAL REASONS RELIEF SHOULD BE GRANTED[2]

WHERE THE OPINION CONFLICTS WITH THIS COURT'S PUBLIC TRIAL DECISIONS AND DIVISION TWO'S DECISION IN *STATE v. WILSON*, THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4

Jury selection in this case occurred on February 3 and 6, 2012. After the parties finished asking potential jurors questions, the court announced the attorneys would be passing a piece of paper back and forth to exercise peremptory challenges. 1RP 203. Afterward, certain jurors were excused and others seated in their places. 1RP 204. Although the transcripts list which party exercised each peremptory challenge, this information was not announced in open court. 1RP 203-04.

Rejecting Swinford's argument that this practice violated public trial rights, Division Three relied on its decision in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013).[3] Opinion at 12-13 (Appendix).

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[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

[2] This petition refers to the pertinent verbatim report as follows: 1RP – 2/3 and 2/6/12.

Contrary to the decision in Love, however, this Court's decisions in Strode, State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), and Division Two's decision in State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013) support that peremptory challenges must be made in open court, not at a private bench conference or by passing a sheet of paper back and forth. This Court should accept review because the Court disregarded opinions by this Court and Division Two. RAP 13.4 (b)(1) and (2)

Jury selection in a criminal case is considered part of the public trial right and is typically open to the public. State v. Strode, 167 Wn.2d 222, 227, 217 P.3d 310 (2009). In State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), this Court adopted an "experience and logic" test for determining whether an event constitutes a courtroom closure. This Court examines (1) whether the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process. Id. at 73. It is well settled, however, that the right to a public trial extends to jury selection. In re Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring).

Other than Love, there are no Washington cases directly addressing this issue. This Court's decision in Strode, however, supports that the public trial right attaches to parties' challenges of jurors. There,

[3] A petition for review was filed in Love under case no. 89619-4. On April 4, 2014 this Court stayed consideration of the petition.

jurors were questioned, and "for-cause" challenges conducted, in chambers. This Court treated the "for-cause" challenges in the same manner as individual questioning and held exercise in chambers violated the public trial rights. Strode, 167 Wn.2d at 224, 227, 231.

Division Two's Wilson decision also supports that the public trial right attaches not only to "for-cause" but also to peremptory challenges. There, the court applied the experience and logic test to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. The court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, the Court expressly differentiated between those excusals and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches). Thus, Division Two correctly recognized that "for-cause" and peremptory challenges are part of voir dire, which must be conducted openly.

But the result of analysis under the experience and logic test is no different. The right of an accused to a public trial "keep[s] his triers keenly alive to a sense of their responsibility" and "encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104

S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of jury selection (including which side exercises which challenge) enhances core values of the public trial right – "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see In re Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (jury selection process "is itself a matter of importance, not simply to the adversaries but to the criminal justice system"). While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure no inappropriate discrimination occurs. Thus, it is just as important for the public to scrutinize peremptory challenges as for "for-cause" challenges.

Regarding the historic practice, Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private." Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. 16 Wn. App. at 13. Notably, Thomas predates

Bone-Club by nearly 20 years. Moreover, the fact that Thomas challenged the practice suggests it was atypical even at the time. Labeling Thomas "strong evidence" is an overstatement.

Finally, although the State did not make this argument below, the fact that the transcripts list the challenges does not remedy the public trial right violation with regard to the parties' exercise of peremptory challenges. Wise holds, for example, that individual questioning of jurors in chambers, even when recorded and transcribed, violates the public trial right. 176 Wn.2d 1.

Because the opinion conflicts with this Court's decisions as well as Wilson, this Court should accept review. RAP 13.4 (b)(1) and (2).

C. SUPPLEMENTAL CONCLUSION

The trial court violated Mr. Swinford's right to a public trial by taking peremptory challenges privately by passing a sheet of paper back and forth. This Court should accept review and reverse his conviction.

DATED this 24 day of June, 2014.

Respectfully submitted,

STEVEN M. SWINFORD
Pro se Petitioner

APPENDIX

FILED

June 3, 2014

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,	)	No. 30764-6-III
	)	
v.	)	
	)	
STEVEN M. SWINFORD,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, C.J. — Steven Swinford was convicted of second degree murder for the shooting death of his friend after the jury rejected his claim of self-defense. He appeals, arguing that the prosecutor committed misconduct by referring to Mr. Swinford owing a "duty of care" to the victim and that the trial court erred in denying him a new trial on that account. He also challenges the trial court's order that he undertake substance abuse evaluation and treatment as a condition of community custody and, in a statement of additional grounds, raises several additional issues.

After the conclusion of the usual briefing, Mr. Swinford moved for leave to raise an additional issue, contending that the procedure by which the parties exercised peremptory challenges to potential jurors had violated his right to a public trial. We granted his motion and address that supplemental issue as well.

The prosecutor's reference to a "duty of care" strayed from the language of the legal elements and from the court's instructions. But the gist of his argument was that Mr. Swinford's actions were not "reasonable" conduct qualifying as self-defense. If improper, the argument was not ill intentioned and, if prejudicial, could have been cured by a timely objection and instruction. The trial court did not err in denying a new trial.

Mr. Swinford correctly argues that the court's order requiring substance abuse treatment was not supported by a necessary finding that he has a chemical dependency that contributed to his offense. But since evidence from the record could support such a finding and the sentencing court appears to have viewed alcohol abuse as contributing to the offense, the appropriate remedy is to remand so that the trial court can determine whether to strike the condition or make the required finding.

Mr. Swinford's challenge to the peremptory challenge procedure followed in the trial court fails in light of *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209, *petition for review filed*, No. 89619-4 (Wash. Dec. 9, 2013), in which we held that neither prong of the experience and logic test suggests that the exercise of peremptory challenges must take place in public. The issues raised in the statement of additional grounds are without merit. We therefore affirm the conviction and remand for the limited purpose of addressing the inadequate support for the community custody condition.

FACTS AND PROCEDURAL BACKGROUND

After a day of target shooting, Mr. Swinford, his roommate Jessy Juarez, and their

friend Paul Raney returned to the home where Mr. Swinford lived with Mr. Juarez and Steven Flick. There, Mr. Swinford, Mr. Raney, and Mr. Flick watched a movie, drank mixed drinks, and played drinking games, while Mr. Juarez went upstairs to bed. Eventually, Mr. Swinford and Mr. Raney began arguing over a portable media player on which the three had been playing music and whose battery was depleted. Specifically, they debated whether to plug the media player into the stereo and continue listening to music, or to plug it into a game console to be recharged. Mr. Flick would later testify that both Mr. Raney and Mr. Swinford liked to be right and that they would often quarrel over such matters.

At some point in the argument, Mr. Swinford turned off the game console in order to move the media player to the stereo. Mr. Raney then leaned forward in the chair in which he was sitting, reaching for the remote control for the game console in order to turn it back on. At the same time, he told Mr. Swinford to "[s]top being a fucking badass" all the time. Report of Proceedings (RP) at 281, 266. Mr. Swinford then shot Mr. Raney seven times, using a .45 caliber gun that had been left lying on the coffee table. Mr. Raney sustained gunshots to his chest, abdomen, pelvis, right arm, and left hand. A bullet that went through his heart and the spinal cord proved fatal.

After the shooting, Mr. Swinford and Mr. Flick called 911. The dispatcher told

Mr. Flick to move Mr. Raney to the floor and start CPR.[1] Mr. Juarez, a volunteer firefighter who had been trained in emergency medicine, had by that time come downstairs, awakened by the gunshots. He checked for Mr. Raney's pulse several times but could not find it and quickly concluded that he was dead.

Mr. Swinford was charged with second degree murder and defended on the basis that he shot Mr. Raney in self-defense. He testified that as Mr. Raney angrily made his "badass" comment, Mr. Swinford saw Mr. Raney's hand wrap around the grip of a pistol that was tucked in his chair. Fearing that he was going to be shot and with only a split second to make a decision, Mr. Swinford claimed he reached for a pistol on the coffee table, closed his eyes, and shot. Detectives who searched the living room following the shooting observed a .40 caliber pistol tucked between the right armrest and seat cushion of the chair Mr. Raney had been sitting in.

Mr. Flick, the only witness to the shooting other than Mr. Swinford, testified at trial that just before the shooting, Mr. Raney was leaning forward, apparently to reach the controller for the video game console. He testified that Mr. Raney was not acting angry at the time he called Mr. Swinford a "badass," that he did not raise the tone of his voice, and that "[h]e was just talking at [Mr. Swinford]." RP at 281. Anticipating further bickering between the two, Mr. Flick turned away to pick up and drink from a glass of beer when he heard a cocking noise, followed by shots. After the shooting, Mr. Flick

[1] Cardiopulmonary resuscitation.

heard Mr. Swinford tell the 911 operator that "he had shot his friend and that he was going away for a long time." RP at 270.

Mr. Juarez also testified that as they attempted to treat Mr. Raney following the shooting, Mr. Swinford told him that he did not know why he shot Mr. Raney, and was going to jail.

Mr. Swinford's first trial ended in a mistrial after the jury was unable to reach a verdict. In the trial below, a second jury rejected his theory of self-defense and found him guilty as charged. Mr. Swinford moved for a new trial, claiming that the prosecutor committed misconduct by misstating the law during closing argument. The motion was denied. Mr. Swinford was sentenced to 22 years' imprisonment and 36 months of community custody, with a condition to the community custody being that he undergo an evaluation for treatment for substance abuse. He appeals.

ANALYSIS

Mr. Swinford makes three assignments of error on appeal: first, that prosecutorial misconduct denied him a fair trial; second, that the trial court erred in denying his motion for a new trial based on the alleged misconduct; and third, that the trial court erred in ordering him to participate in a substance abuse evaluation and undergo treatment as a condition of community custody. Supplementally, he contends that the procedure followed for exercising peremptory challenges to potential jurors violated his public trial right.

We first address the two assignments related to the alleged prosecutorial misconduct and then turn to the community custody condition and the public trial issue.

I. Prosecutorial Misconduct

At issue as alleged misconduct are the italicized statements made by the prosecutor during a portion of closing argument:

> But Instruction Number 17 is in his defense, it says, it's a defense to the murder or manslaughter if the homicide was justifiable. And you need to determine this. The State has the burden to prove it wasn't justifiable. But there's three different parts to that and the third part, it says, the slayer employed such force and means as a reasonably prudent person would use under the same or similar circumstances—or conditions as they reasonably appeared to the slayer, taking into consideration all facts and circumstances as they appeared to him at the time of and prior to the incident. *Certainly, he owes a duty of care to his best friend inside this house. And when he pulls the trigger, he ignores that.* The State only has to disprove one of those three.

RP at 599 (emphasis added). Mr. Swinford contends that the harm of the argument was aggravated because the prosecutor had earlier referred to a "duty of care" when questioning him, asking if he had "us[ed] care" before shooting Raney. *Id.* at 558. The prosecutor also asked, "You didn't owe your friend a duty of care?" to which Mr. Swinford responded, "I don't know." *Id.* at 572. No objection was made in the trial court to the argument or questioning about a duty of care.

An appellant bears the burden of demonstrating prosecutorial misconduct on appeal. He or she must demonstrate that the prosecutor's conduct was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). To

demonstrate prejudice one must show that there is a substantial likelihood the prosecutorial misconduct affected the jury's verdict. *State v. Ish*, 170 Wn.2d 189, 200, 241 P.3d 389 (2010).

Where, as here, a defendant fails to object in the trial court to a prosecutor's statements, he waives his right to raise a challenge on appeal 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. *Stenson*, 132 Wn.2d at 719. Under this stringent standard of review 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. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Mr. Swinford argues that in the context of a criminal case there is no "duty of care." Rather, a duty of care is relevant in the context of a civil claim for negligence, where the existence of a duty owed and a breach of that duty are elements of the cause of action. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). He contends that in suggesting to the jury that Mr. Swinford owed a "duty of care"—which is not an element to be proved in a criminal trial—the prosecutor misstated the law.

The proper standard for a jury to find Mr. Swinford not guilty by reason of self-defense was set forth in the court's jury instructions, which provided in relevant part:

> Homicide is justifiable when committed in the lawful defense of the slayer or any person in the slayer's presence or company when:
> 1. the slayer reasonably believed that the person slain intended to inflict death or great personal injury;
> 2. the slayer reasonably believed that there was imminent danger of such harm being accomplished; and
> 3. the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident.

Clerk's Papers (CP) at 27.

A prosecutor's argument must be confined to the law stated in the trial court's instructions. *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). A prosecutor's misstatement of the law can be a serious irregularity having the grave potential to mislead the jury. *See State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) (in which a prosecutor, in rebuttal, argued that a defendant could be found guilty as an accomplice, where accomplice liability was not before the jury). A prosecutor's remarks during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

The prosecutor's reference to a duty of care strayed from the language of the legal elements and the jury instructions. Nonetheless, the prosecutor was clearly entitled to

argue that Mr. Swinford could not claim self-defense if he did not *reasonably* apprehend felonious intent and imminent danger and did not use force and means that were *reasonable* under the circumstances. The jury was required, then, to determine whether Mr. Swinford's conduct was "reasonable." To say that the defendant must have acted reasonably is to ascribe some duty of care.

The Washington Supreme Court stated in *State v. Griffith*, 91 Wn.2d 572, 575, 589 P.2d 799 (1979) that the defense of excusable homicide was unavailable to a defendant who, "even if he could be said to have been acting lawfully, failed to exercise ordinary caution in the discharge of a firearm." Relying on *Griffith*, the State's proposed jury instructions in the trial below included a proposed instruction that "[t]he exercise of ordinary caution is essential to a claim of excusable homicide." CP at 106. The trial court questioned the need to give the instruction, asking the prosecutor, "[W]hy . . . is that not really covered under the pattern instruction which requires the slayer to reasonably believe and to use such force and means as a reasonably prudent person would use[?]" RP at 585. The prosecutor agreed that it was. It withdrew its proposed instruction based on *Griffith*.

While straying from the verbiage of the instructions, then, the prosecutor evidently believed, and the trial court had agreed, that a duty of ordinary care was implicit in Mr. Swinford's obligation to act reasonably. Mr. Swinford fails to explain why that was wrong, or at least misleading as argued to the jury. Even if there is a problem that Mr.

Swinford fails to explain to us, the argument cannot be said to have been inherently flagrant and ill intentioned or as causing incurable prejudice. Contrary to Mr. Swinford's assertion that a reference to a duty of care improperly shifted the burden of proof, the prosecutor was clear that the State bore the burden of proof, telling the jury that "[t]he State has the burden to prove it wasn't justifiable." RP at 599. At worst (and again, Mr. Swinford fails to demonstrate impropriety), the prosecutor characterized the State's burden as proving that Mr. Swinford failed to "satisfy a duty of care" rather than proving that he failed to act "reasonably."

Finally, the trial court's instructions to the jury set forth the standard of conduct required for self-defense and the jury was instructed to "[d]isregard any remark, statement or argument that is not supported by the . . . law as stated by the court." CP at 45. We presume that the jury follows the court's instructions. *Stenson*, 132 Wn.2d at 729-30.

It is questionable whether the prosecutor's statements were improper and Mr. Swinford fails to demonstrate prejudice. It is clear that the statements were not ill intentioned and that any conceivable prejudice could have been addressed by a curative instruction. Because Mr. Swinford fails to demonstrate misconduct requiring a new trial, the trial court did not err in refusing to order one.

II. Community Custody Condition

Mr. Swinford next argues that the trial court exceeded its statutory authority by

ordering him to "undergo an evaluation for treatment for . . . substance abuse" as a condition for community custody when no finding was entered by the court to support this requirement. CP at 111. A trial court lacks the authority to impose a community custody condition unless authorized by the legislature. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008). An unlawful sentence may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

RCW 9.94A.607(1) provides that "[w]here the court finds that the offender has a chemical dependency that has contributed to his or her offense" it may order the offender to "participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender." "If the court fails to make the required finding, it lacks statutory authority to impose the condition." *State v. Warnock*, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013).

The parties disagree as to the proper remedy for the court's failure to enter the required finding. Mr. Swinford asks that we order the trial court to strike the condition. The State asks that we remand for the court to either make the required finding or strike the condition, pointing out that the court commented during sentencing that alcohol contributed to the offense, even though it then failed to make the required finding. Under these circumstances, the appropriate remedy is to remand with the direction that the

evaluation and treatment condition be stricken unless the court determines that it can presently and lawfully comply with the statutory requirement for a finding that Mr. Swinford has a chemical dependency that contributed to his offense. *See State v. Jones*, 118 Wn. App. 199, 212 n.33, 76 P.3d 258 (2003).

III. Right to Public Trial

Finally, Mr. Swinford contends that the court violated his Washington Constitution article I, section 22 public trial rights by having the parties exercise their peremptory challenges privately. Specifically, following voir dire the court announced that the parties would exercise their peremptory challenges on a jury selection document that would be passed back and forth between the lawyers. No objection was made to the procedure. The report of proceedings includes a record of which jurors were challenged by each party but that information was not announced contemporaneously in open court.

At the end of the challenge process, the jurors who were excused by peremptory challenges were asked to leave the jury box and were replaced by other jurors. The trial court then asked the parties' lawyers if the jury as constituted conformed with their records and both answered that it did.

Whether or not a particular portion of a proceeding is required to be held in public is determined by use of the "experience and logic" test. *State v. Sublett*, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012). This court applied the "experience and logic" test to the exercise of peremptory challenges in *Love*, 176 Wn. App. at 920, a decision published

after Mr. Swinford's briefing of this issue, and concluded that "[n]either prong of the experience and logic test suggests that the exercise of . . . peremptory challenges must take place in public." The procedure for exercising peremptory challenges in *Love* was identical in all material respects to the procedure followed here. For the reasons explained in *Love*, the exercise of peremptory challenges is not required to take place in public. Mr. Swinford's right to a public trial was not violated.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Swinford raises four. We address them in turn.

Prosecutorial Misconduct. Mr. Swinford raises several instances of alleged prosecutorial misconduct apart from the prosecutor's references to a duty of care. He claims the prosecutor made several statements during closing argument that were not supported by the evidence. He points, first, to the prosecutor's having characterized Mr. Raney as *asking*, "'[W]hy do you have to be a badass[?]'" which the prosecutor suggested were not fighting words, allegedly "diminish[ing] the threat Mr. Swinford faced." SAG at 13. He complains, second, of the prosecutor's argument that Mr. Flick saw Mr. Swinford pick up the .45 with which he shot Mr. Raney; third, that the prosecutor argued that Mr. Raney's hands were up prior to being shot by Mr. Swinford; fourth, that the prosecutor argued that Mr. Flick could have heard Mr. Swinford "[r]acking a round" as opposed to what Mr. Flick had described as a "cocking" noise,

SAG at 14; and fifth, that the prosecutor argued that Mr. Swinford only called 911 because Mr. Flick was dialing 911 himself. He also complains that it was misconduct for the prosecutor to argue, "'[T]his is a case where a person (Mr. Swinford) shoots first and asks for you to excuse him later.'" SAG at 20. While Mr. Swinford objected in the trial court to two of these matters—the prosecutor's argument that Mr. Flick saw Mr. Swinford pick up the .45 and his argument that Mr. Raney's hands were up when he was shot—those objections were overruled by the court, which characterized the prosecutor's statements as argument.

It is prosecutorial misconduct for the State to refer to evidence outside the record. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Here, however, Mr. Swinford is complaining of the prosecutor's characterization of testimony the jury had heard. Where there is conflicting evidence, lawyers for the State and the defense can be expected to legitimately disagree over which evidence should be given the greatest weight by the jury and the inferences that may reasonably be drawn from the evidence. In closing argument, the prosecutor has wide latitude in making arguments to the jury and drawing reasonable inferences from admitted evidence. *State v. Anderson*, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009).

The Washington pattern instructions recognize that the lawyers cannot reasonably be expected to have a perfect recollection of all of the evidence presented at trial. The introductory instruction given by the trial court at the conclusion of trial contemplated the

possibility of mistakes being made during argument, advising the jury that

> [t]he attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

CP at 45 (based on 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL § 1.02, at 14 (3d ed. 2008) (WPIC)).

Where the jury is given this cautionary instruction and the prosecutor does not misstate or exceed the evidence in any significant respect, his or her comments will fall within the latitude permitted counsel in closing argument. *United States v. Parker*, 549 F.2d 1217, 1222 (9th Cir. 1977); *and see State v. Gregory*, 158 Wn.2d 759, 843-44 & n.40, 147 P.3d 1201 (2006) (prosecutor misstated probabilities of one DNA (deoxyribonucleic acid) test as 1 in 325 million rather than 1 in 235 million and another as 1 in 180 billion rather than 1 in 190 billion; no prejudice from this or from unsupported representations as to the population of the United States and the world). Here again, the jury is presumed to follow the trial court's instructions. *Stenson*, 132 Wn.2d at 729-30 (jury is presumed to abide by instruction that counsel's arguments are not evidence); *and see United States v. Mares*, 940 F.2d 455, 461 (9th Cir. 1991) (holding that jury instruction cautioning jurors that closing arguments are not evidence mitigates prejudice from mistakes made in closing argument).

Here, the prosecutor's argument that Mr. Flick saw Mr. Swinford pick up the .45

was unsupported by Mr. Flick's testimony. There was no other evidence that would support this statement as to what Mr. Flick saw. But Mr. Swinford's lawyer promptly objected that Mr. Flick never testified to seeing Mr. Swinford *pick up* the .45, drawing an immediate correction from the prosecutor, who stated, "Whether he saw him do it, he sees him with the gun." RP at 595. Mr. Swinford's lawyer reminded the jury during his own closing argument that the prosecutor was mistaken on this point.[2]

All of the other statements challenged by Mr. Swinford's SAG were permissible inferences from the evidence and argument. Here, too, Mr. Swinford's lawyer responded to them in his own closing argument.[3]

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[2] He reminded the jury that "Mr. Flick . . . said, well, you know, I'm going to look down at my beer. He didn't see what happened." RP at 604. Being corrected in this manner on testimony that jurors likely listened to attentively (Mr. Flick was a key witness) reflects on the prosecutor's credibility with the jury. It is a strong disincentive for any prosecutor to misstate evidence the jury has seen.

Mr. Swinford's lawyer also reminded the jurors that they were the judges of the evidence, stating, "You people all heard the testimony when it came down to the facts. And you guys are ultimately the ones that get to evaluate the evidence, and I'm grateful for that." RP at 603.

[3] He told the jury, "I know counsel here said that [Mr. Swinford] racked a round. There's absolutely no evidence of that whatsoever, none presented in any testimony"; "Dr. [Gina] Fino testified that she couldn't tell whether Mr. Raney was armed prior to this shooting. She actually couldn't say whether his arm was up or down. That's what she testified to, not that his arm was up here, which wouldn't make any sense"; "Now, the State also wants you to believe some of what Mr. Flick said but not all of it, which I find interesting. Mr. Flick testified at one point that he saw Mr. Raney's hands up, but Mr. Flick wasn't looking when the shooting started. He wasn't looking right prior to the shooting. He testified to that. He looked down at his beer for three or four seconds because he said Paul was arguing and he said, here we go. . . . Mr. Swinford also told the police less than a week later that he didn't see Mr. Raney's hands up. But now the State

As earlier discussed, a defendant complaining of prosecutorial misconduct in closing argument bears the burden of showing that the prosecutor's conduct was both improper and prejudicial. Because he shows no prejudice, we need not address further whether the prosecutor's one factual misstatement amounted to improper argument.

Ineffective Assistance of Counsel. With respect to the prosecutor's alleged misstatements of evidence to which Mr. Swinford's lawyer did *not* object, Mr. Swinford argues that by failing to object, his lawyer provided ineffective assistance of counsel. Mr. Flick's lawyer objected to the only misstatement of Mr. Flick's testimony by the prosecutor, so there was no deficient representation.

Failure to Define "Great Personal Injury." Mr. Swinford next argues that the trial court erred when it failed to define "great personal injury" within the jury instructions. He points out that it was defined for the jury in his first trial, which resulted in a mistrial. The jury in the first trial was given the pattern instruction defining the term, which states:

> "Great personal injury" means an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the slayer or another person.

CP at 30 (Instruction 18, based on WPIC § 2.04.01, at 30). He is correct in pointing out

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wants you to believe that Mr. Raney's hands were up and he puts them in different positions"; and, "Now, counsel wants you to believe that [Mr. Raney's hands] were up, but that's not a fact. There was nothing conclusive to say where his hands were." RP at 605, 609.

that this definition was not included in the court's instructions to the jury in the trial below.

Mr. Swinford raises this objection for the first time on appeal. "RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them." *State v. Guzman Nuñez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012). "As pointed out in *Scott*, the general rule has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c), requiring that timely and well stated objections be made to instructions given or refused 'in order that the trial court may have the opportunity to correct any error.'" *Id.* (internal quotation marks omitted) (quoting *Scott*, 110 Wn.2d at 686). Mr. Swinford fails to demonstrate any basis for an exception.

Ineffective Assistance of Counsel. Alternatively, Mr. Swinford couches his complaint about the failure to define "great bodily injury" for the jury as one for ineffective assistance of counsel, since his lawyer failed to request an instruction defining the term and failed to take exception to the court's instructions excluding a definition.

Even if Mr. Swinford could demonstrate deficient performance, he cannot show how the deficient performance prejudiced him. The only evidence offered to support Mr. Swinford's belief that Mr. Raney intended to inflict death or great personal injury was Mr. Swinford's own testimony that Mr. Raney was wrapping his hand around a loaded

handgun and preparing to shoot. Mr. Swinford offers no explanation how the jury—if it believed him—could have misconstrued "great personal injury" to have a meaning that did not include being shot at close range by a handgun.

The pattern instruction defining "great personal injury" also contains a subjective element that the comments to the Washington pattern instructions point out is important to include when instructions on self-defense are given "in a case involving the use of force against an *unarmed assailant.*" WPIC § 16.02, at 237-38 (emphasis added) (citing *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997)). The comments comport with our conclusion that where the victim threatening harm is *armed*, any reasonable jury would conclude that a risk of great bodily injury exists. Here, the subjective element was adequately addressed by another of the court's instructions, which advised the jury:

> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for a homicide to be justifiable.

CP at 63.

Even if Mr. Swinford could demonstrate deficient performance, he cannot show how the deficient performance prejudiced him.

Sufficiency Challenge. Mr. Swinford next argues that the State failed to prove the absence of self-defense beyond a reasonable doubt. When the defendant raises the issue of self-defense, the absence of self-defense becomes an element of the offense that due

process requires the State to prove. *State v. L.B.*, 132 Wn. App. 948, 952, 135 P.3d 508 (2006).

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A defendant challenging the sufficiency of the evidence in a criminal case admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Id.* (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

The evidence presented at trial included the testimony of the only independent eyewitness, Mr. Flick, that Mr. Raney was not acting angry in the moment before the shooting, but was "just talking." RP at 281. It included Mr. Swinford's testimony that he looked away, did not see Mr. Raney raise the gun, and instead shot him while continuing to look away, holding his own gun with both hands. He admitted that he and Mr. Raney were engaged in normal, friendly bickering moments before the shooting and that bickering was not unusual. He admitted he overreacted. There was evidence that he took time to cock the .45 and Mr. Flick testified that Mr. Swinford mumbled something before he emptied his gun at Mr. Raney.

As to Mr. Raney, there was evidence that his hands were up against his torso in a defensive position as he was shot and that he had nothing in his hands. There was forensic evidence that he was leaning to the right and could not have been reaching for a

gun. An expert testified that he found no blood on the trigger or barrel portions on the gun within the armchair. Instead, he found blood only on the back portion or the area around the rear sights and around the hammer and firing pin areas, which was consistent with the gun having been tucked into the chair between the seat cushion and the inside of the arm of the chair during an event that created blood spatter.

The State presented substantial evidence supporting the absence of self-defense.

Violation of Right to Jury Trial. Mr. Swinford finally contends that he was denied his constitutional right to a jury trial because the jury instructions misled the jury regarding its power to acquit. We, like both other divisions of the Court of Appeals, have rejected this precise argument. *State v. Wilson*, 176 Wn. App. 147, 151, 307 P.3d 823 (2013), *review denied*, 179 Wn.2d 1012 (2014); *State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319 (1998), *abrogated on other grounds by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), *rev'd*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *State v. Brown*, 130 Wn. App. 767, 124 P.3d 663 (2005); *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998). The instruction was proper.

We affirm the conviction but remand to the trial court for the limited purpose of striking the evaluation and treatment condition unless it determines that it can presently and lawfully comply with the statutory requirement for a finding that Mr. Swinford has a chemical dependency that contributed to his offense.

A majority of the panel has determined that 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.

Siddoway, C.J.

WE CONCUR:

Brown, J.

Fearing, J.

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State v. Steven Swinford

Supreme Court No. _____
COA No. 30764-6-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 30th day of June, 2014, I caused a true and correct copy of the **Petition for Review** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Douglas Shae
Chelan County Prosecuting Attorney
Prosecuting.attorney@co.chelan.wa.us

Signed in Seattle, Washington this 30th day of June, 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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