No. 44135-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Crystal Luttrell,

Appellant.

Cowlitz County Superior Court Cause No. 11-1-01134-5

The Honorable Judge Stephen M. Warning

Appellant's Opening Brief

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2. The court's instructions failed to make the self-defense standards manifestly clear to the average juror.

3. The trial court erred by failing to instruct jurors that Ms. Luttrell's self-defense claim was to be evaluated from the standpoint of a reasonably prudent person, taking into consideration facts and circumstances known to the person prior to the alleged assault.

4. The trial court erred by giving Instruction No.17.

5. The trial court deprived Ms. Luttrell of her Fourteenth Amendment right to due process by refusing to hold a hearing after a juror heard outside information about the case.

6. Ms. Luttrell's conviction was obtained in violation of her right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.

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18. Ms. Luttrell was denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel.

19. Defense counsel was ineffective for failing to object to improper opinion testimony on Ms. Luttrell's guilt and on Baldwin's credibility.

20. Defense counsel was ineffective for failing to object to the omission of critical language from the court's instructions defining self-defense.

21. Defense counsel was ineffective for failing to propose proper self-defense instructions.

22. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing argument.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Self-defense is to be evaluated from the standpoint of a reasonably prudent person, taking into consideration the facts and circumstances known to the person prior to the alleged assault. The court's instructions in this case failed to make that standard manifestly clear. Did the court's instructions relieve the prosecution of its burden to disprove self-defense and violate Ms. Luttrell's Fourteenth Amendment right to due process?

2. Due process guarantees an accused person an impartial jury free from outside influences. In this case, the trial court refused to hold a hearing after a juror heard outside information about Ms. Luttrell's case. Did the trial judge's refusal to hold a hearing violate Ms. Luttrell's Fourteenth Amendment right to due process?

3. The improper admission of opinion testimony on an accused person's guilt or the credibility of a witness violates due process and the jury trial right. In this case, two witnesses improperly provided prejudicial opinions on Ms. Luttrell's guilt and the credibility of witnesses. Did the improper admission of opinion testimony violate Ms. Luttrell's Fourteenth Amendment right to due process and her state and federal jury trial right?

4. Prosecutorial misconduct can deny an accused person a fair trial. Here, the prosecutor improperly asked Ms. Luttrell to comment on another witness's credibility, "testified" to facts not in evidence, suggested that facts not in evidence supported Ms. Luttrell's guilt, misstated the law of self-defense, and shifted the burden of proof. Did the prosecutor's misconduct infringe Ms. Luttrell's Fourteenth Amendment right to due process?

5. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to object to improper opinion testimony, failed to object to prosecutorial misconduct, failed to object to the omission of critical language from the court's self-defense instructions, and failed to propose proper self-defense instructions. Was Ms. Luttrell denied her Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In October of 2011, Summer Baldwin was fired on her first day of work as a dancer at Bottoms Up in Portland. RP 30, 53. She had become intoxicated, and assaulted another employee named Crystal Luttrell. RP 53; RP 136-137.

Baldwin and Ms. Luttrell didn't see each other again for a month. In November, they ran into each other at a bar in Longview. RP 30-33, 36. Both women were with groups of their friends. One of Ms. Luttrell's friends believed that Baldwin had used a racial slur, and the two groups argued. RP 42-43, 56, 66; 127, 130-132.

The argument became physical. The bouncer at the bar, Brock Mudge, saw Baldwin and Ms. Luttrell yelling at each other. RP 66-67, 81. Baldwin, who was obviously intoxicated, accused Ms. Luttrell of getting her fired from Bottoms Up. RP 134-136. Mudge saw Baldwin shove Ms. Luttrell. RP 66-67, 81. Upon being pushed, Ms Luttrell struck Baldwin with a beer bottle. Glass became embedded in Baldwin's face. RP 45, 69; 136-138.

When police responded, Ms. Luttrell and her friends had left the bar. RP 72-73. Baldwin remained. She admitted to Officer Maini that she had assaulted Ms. Luttrell.[1] RP 124.

The state charged Ms. Luttrell with Assault in the Second Degree, with Assault in the Third Degree as an alternative charge. CP 1-2; RP 3. At trial, Ms. Luttrell claimed self-defense.

Before trial started, Ms. Luttrell moved for an order prohibiting state witnesses from referring to Baldwin as the "victim". Defense Motions in Limine, Supp. CP. The court granted the motion. RP 1. Despite this, the prosecutor and law enforcement witnesses referred to Baldwin as the "victim." This occurred five times in the jury's presence. RP 13, 21, 24, 112. Defense counsel objected only once; the objection was sustained. RP 112-113.

After jury selection, a juror said that she overheard Ms. Luttrell talking as she left the courthouse. RP 7-9. Apparently, Ms. Luttrell was talking about "stripping". The defense attorney asked the judge to inquire regarding what exactly had been heard and its possible impact on the juror. Judge Warning declined, stating: "if there is a problem, it's one that

[1] During cross-examination, Officer Maini said that Baldwin did not say that she had pushed Ms. Luttrell. RP 128.

Ms. Luttrell brought on herself, so she's going to have to live with it."[2] RP 9.

At trial, Mudge, the bouncer, opined that Baldwin acted dizzy and punch-drunk, and that this resulted from being hit with the bottle rather than from intoxication. RP 82-83. Ms. Luttrell's foundation objection was overruled. RP 83.

The state's last witness, Detective Ralph Webb, testified that he'd spoken with Ms. Luttrell, who told him she'd been attacked by Baldwin at the bar. RP 115. He testified that Ms. Lutrell did not appear as if she'd been attacked. Defense counsel did not object to this testimony. RP 115. Detective Webb also testified that Baldwin *did* appear as though she'd been attacked.[3] RP 115.

Ms. Luttrell took the stand and told the jury that she acted in self defense. She confirmed that Baldwin had drunkenly assaulted her on the day Baldwin was let go from Bottoms Up. RP 136-137. She testified that her friends argued with Baldwin, but that she did not. RP 131-134. She described Baldwin pushing another person, and then coming "nose to

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[2] The record does not indicate that Ms. Luttrell had previously been warned that jurors would be in public areas of the courthouse where they could overhear conversations. *See* RP 1-9.

[3] Although the question posed was about Ms. Luttrell, Detective Webb quickly clarified that he'd been speaking about Baldwin.

nose" with her. RP 135-136. She told the jury that Baldwin "said we had unfinished business, and she pushed me." RP 136. She described the push as a 'shove,' and testified that she was terrified, in part because of the prior assault.[4] RP 136-137.

On cross-examination, the prosecutor asked if she'd heard Mudge's testimony, and asked her to comment on the differences, describing the testimony as "incredibly different." RP 141-142.

Defense counsel did not file a set of proposed instructions. The court's instructions included a self-defense instruction that read as follows:

> It is a defense to a charge of assault in the second degree, and assault in the third degree, as well as the lesser included offense of assault in the fourth degree that the force used was lawful is defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was

[4] In the prior assault, Baldwin had pushed her, hit her in the face, and caused her to fall. RP 137.

> not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.
> Instruction No. 17, Supp. CP.

In his closing argument, the prosecutor repeatedly argued that Ms. Luttrell could have avoided the conflict by leaving. He told the jury that she could have left the situation with Baldwin before it escalated into a physical fight, and that she did not. RP 161. He argued that her failure to leave was not reasonable. RP 161. He argued that if Ms. Luttrell really hadn't been involved in the argument with Baldwin, she should have left. He urged jurors to infer guilt from Ms. Luttrell's failure to use the "quick alternative" to exit. RP 165. Defense counsel did not object to any of these arguments. RP 161, 165.

Counsel did object when the prosecutor told jurors that Ms. Luttrell had stabbed Baldwin with the beer bottle. RP 159. The objection—facts not in evidence—was overruled when the judge said "[T]he jury will recall what the facts are." RP 159.

The jury returned two verdicts of guilty. RP 18. The court vacated the Assault Three conviction. CP 3-4. After sentencing, Ms. Luttrell timely appealed. CP 3-14, 15-29.

ARGUMENT

I. THE COURT'S SELF-DEFENSE INSTRUCTIONS DID NOT MAKE THE LEGAL STANDARD MANIFESTLY APPARENT TO THE AVERAGE JUROR.

A. Standard of Review.

Jury instructions are reviewed *de novo* in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 378 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). Instructions that misstate the law of self-defense create an error of constitutional magnitude that may be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); RAP 2.5(a)(3).[5]

B. The trial court erroneously failed to instruct jurors to take into consideration all of the facts known to Ms. Luttrell prior to the alleged assault.

An accused person is entitled to have the jury instructed on the defense theory of the case. U.S. Const. Amend XIV;[6] *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 116 (2010). Failure to so instruct is reversible error. *Id.*

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[5] In the alternative, if this issue is waived because of defense counsel's failure to propose proper instructions, that failure deprived Ms. Luttrell of the effective assistance of counsel. The invited error doctrine does not preclude review of an instructional error that is the result of ineffective assistance of counsel. *Kyllo*, 166 Wn.2d at 862.

[6] *See also* Wash. Const. art. I, § 3.

Jury instructions on self-defense must do more than adequately set forth the law, they "must make the relevant legal standard manifestly apparent to the average juror." *McCreven*, 170 Wn. App. at 462 (internal citations omitted).

The self-defense standard involves both a subjective and an objective component. *State v. George*, 161 Wn. App. 86, 97, 249 P.3d 202 (2011). All facts and circumstances known to the accused are relevant to the subjective prong of the self-defense standard. *Id.* This includes events that occurred prior to the alleged assault, as reflected in the pattern instruction:

> The person [using][or][offering to use] the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of [*and prior to*] the incident.

WPIC 17.02 (emphasis added).

In this case, Ms. Luttrell's self-defense theory turned on the fact that Baldwin had assaulted her in the past. RP 124, 136-37, 169, 171, 173-74. Defense counsel argued at length in closing that the prior assault had impacted Ms. Luttrell's understanding of the events surrounding the current incident, including her perception of the events leading up to the alleged assault. RP 173-74.

The jury was not instructed, however, that the prior assault was relevant to Ms. Luttrell's self-defense claim. The court instructed the jury, using the language of WPIC 17.02, that the subjective prong for self-defense relied on "all of the facts and circumstances" known to Ms. Luttrell "at the time of the incident." Instruction No. 17, Supp CP. The court did not include the language of the WPIC indicating that facts and circumstances arising *prior to* the incident were, likewise, legally relevant. Instruction No. 17, Supp CP.

Under the court's instructions, the legal standard for self-defense was not "manifestly apparent to the average juror." *McCreven*, 170 Wn. App. at 462. Ms. Luttrell's conviction must be reversed. *Id.* at 467.

II. THE COURT DEPRIVED MS. LUTTRELL OF HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY REFUSING TO HOLD A HEARING AFTER A JUROR OVERHEARD OUTSIDE INFORMATION ABOUT THE CASE.

A. Standard of Review

Constitutional errors are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Issues of law, as well as mixed questions of law and fact, are both reviewed *de novo*. *State v. Guevara*, 172 Wn. App. 184, 187, 288 P.3d 1167 (2012).[7]

[7] Although a trial court's decision regarding whether to dismiss a juror is reviewed for abuse of discretion, that standard applies only after the trial court has held the necessary

B. Due process requires the court to hold a hearing whenever there is a reasonable possibility that a juror has been impermissibly exposed to outside influences.

Due process requires that an accused person receive a trial by an impartial jury free from outside influences. U.S. Const. Amend XIV;[8] *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Furthermore, a trial judge has the duty

> to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention, or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.110. This provision places "a continuous obligation on the trial court to excuse any juror who is unfit to perform the duties of a juror." *State v. Jorden*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000).[9]

A hearing in the trial court is the only appropriate forum for determining whether a juror has been impermissibly exposed to outside influence. Courts from other jurisdictions have explicitly held that a factual inquiry is required when there is a suspicion of outside influence.

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hearing. *See e.g. State v. Hopkins*, 156 Wn. App. 468, 232 P.3d 597 (2010). Here, the trial court's failure to hold a hearing presents a mixed question of law and fact.

[8] Wash. Const. art. I, § 3.

[9] Although the *Jorden* court upheld the trial court's refusal to *voir dire* a juror who had been sleeping during trial, the trial judge's decision was made only after an evidentiary hearing. *Jorden*, 103 Wn. App. at 228.

See e.g. State v. Loftin, 191 N.J. 172, 193-94, 922 A.2d 1210 (2007) ("...our courts have not hesitated to make inquiry of the jurors to ensure that they have not been fatally tainted"); *Tolbert v. United States*, 905 A.2d 186, 191 (D.C. 2006) ("In order to determine whether extraneous information has a prejudicial impact on the jury, the trial court should conduct a hearing"); *State v. Valcourt*, 792 A.2d 732, 735 (R.I. 2002) ("To determine a juror's impartiality, an appropriate *in camera* inquiry of the juror is necessary"); *State v. R.D.*, 169 N.J. 551, 558, 781 A.2d 37 (2001) ("The court is obliged to interrogate the juror, in the presence of counsel, to determine if there is a taint; if so, the inquiry must expand to determine whether any other jurors have been tainted thereby.").

The Washington cases addressing similar issues assume that a hearing will be conducted. *See e.g. Hopkins*, 156 Wn. App. 468 (court did not abuse its discretion by dismissing a juror who allegedly refused to deliberate and stated upon *voir dire* that she could not be impartial); *State v. Depaz*, 165 Wn.2d 842, 204 P.3d 217 (2009) (court did not err by dismissing a juror for misconduct during deliberation after questioning three jurors on the issue); *State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2005) (court applied the wrong standard in dismissing juror for misconduct after conducting *voir dire* of several jurors on the issue).

Here, one of the jurors was exposed to outside information regarding the alleged assault and Ms. Luttrell's history as a stripper:

> COURT: ... one of our jurors indicated that as she was leaving, she didn't realize she was as close as she was to the defendant, and overheard the defendant talking, apparently raising some issue about why did they bring up the issue about strippers.
> RP 7-8.

When defense counsel requested that the judge ask the juror whether the outside information affected her opinion of the case, the judge refused. RP 9. No record was made about whether the information would impact the juror's impartiality. RP 7-9. Instead, the court noted "if there's a problem, it's one that Ms. Luttrell brought on herself, so she's going to have to live with it." RP 9.[10]

It is the judge, however, and not the accused, who is responsible for ensuring that outside influences have not tainted the jury. *Sheppard*, 384 U.S. 333 ("The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside influences. Neither prosecutors, counsel for the defense, the accused, witnesses, court staff nor enforcement officers coming under jurisdiction of the court should be permitted to frustrate its function.")

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[10] It is not clear whether the trial court relied on the invited error doctrine in making this determination. If so, that reliance was error. The invited error doctrine only applies when a party induces the *court* to err. *State v. Jones*, 144 Wn. App. 284, 298-99, 183 P.3d 207 (2008) (an accused person cannot invite the error of an unfair trial).

Prejudice is presumed when jurors overhear outside information that "besmirches the defendant's character." *United States v. Hall*, 85 F.3d 367, 371 (8th Cir. 1996). Once such a presumption is established, the prosecution bears the burden of establishing that extraneous juror contact was harmless. *Id.*

In Ms. Luttrell's case, no hearing was held. As a result, the state is unable to overcome the presumption of prejudice. Ms. Luttrell's conviction must be reversed and the case remanded for a new trial. *Id.*

III. MS. LUTTRELL WAS DENIED HER SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND TO A JURY TRIAL BY THE ADMISSION OF IMPROPER OPINION TESTIMONY.

A. Standard of Review

Constitutional issues are reviewed *de novo*. *E.S.*, 171 Wn.2d at 702. A manifest error affecting a constitutional right can be raised for the first time on appeal. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009); RAP 2.5(a)(3). Opinion testimony on the accused person's guilt or the credibility of a witness can create a manifest error affecting the constitutional right to a jury trial. U.S. Const. amends VI, XIV; *Johnson*, 152 Wn. App. at 934.

B. Improper opinion testimony invades the exclusive province of the jury and violates due process.

Opinion testimony on the accused person's guilt or the credibility of a witness violates the right to trial by jury and the due process right to a fair trial. U.S. Const. amends VI, XIV; art I, § 21; *State v. Sutherby*, 138 Wn. App. 609, 617, 158 P.3d 91 (2007) aff'd on other grounds, 165 Wn.2d 870, 205 P.3d 916 (2009). Neither a lay nor an expert witness may provide an opinion on the guilt of the accused "whether by statement or inference." *State v. King*, 167 Wn. 2d 324, 331, 219 P.3d 642 (2009).

Whether testimony constitutes an impermissible opinion of guilt depends on the circumstances of the case, including: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009).

C. Mudge, the bouncer, improperly opined that Baldwin's dizziness resulted from a blow rather than intoxication.

The admissibility of expert testimony is governed by ER 702, which provides that:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skills, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Under this rule, expert opinion testimony is admissible if (1) the witness is a qualified expert, (2) the opinion is based on a theory generally accepted by the scientific community, and (3) the testimony is helpful to the trier of fact. *State v. Black,* 109 Wn.2d 336, 341, 745 P.2d 12 (1987).

In this case, Mudge was permitted to testify over Ms. Luttrell's objection that Baldwin was dizzy as a result of being hit, rather than because she'd been drinking. RP 83. This testimony was purportedly "based on his training and experience." RP 83.

Mudge was not an expert qualified to testify about the effects of a blow to the head. He did not provide any details regarding his "training and experience," and there is no indication he had any medical training or scientific knowledge. RP 63-84. Instead, Mudge simply testified that he had "seen people hit." Without further elaboration, this experience did not qualify him as an expert. RP 82.[11] Accordingly, his testimony was not admissible under ER 702.

Mudge's testimony was also an impermissible opinion of Ms. Luttrell's guilt and of Baldwin's credibility. *Hudson*, 150 Wn. App. at

[11] Even if Mudge's opinion regarding the source of Baldwin's dizziness was lay opinion testimony, it was still inadmissible. Lay opinion testimony must be based on personal knowledge. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). Here, there was no foundation demonstrating that Mudge had personal knowledge to provide the basis for this testimony.

653 (providing a five-factor test for determining whether testimony constitutes an impermissible opinion of guilt or credibility).

The first *Hudson* factor addresses the type of witness involved. *Id.* Here, Mudge was the only eyewitness to the alleged assault, and his testimony was likely given special weight by the jury.

Hudson next addresses the specific nature of the testimony. *Id.* In Ms. Luttrell's case, Baldwin's credibility was a primary factual issue for the jury and her level of intoxication was directly relevant to her credibility. Whether the beer bottle qualified as a deadly weapon was also a factual issue at trial and Mudge's improper opinion (that Baldwin was dizzy as a result of having been hit) was directly relevant to the level of harm the bottle was capable of causing.

The third and fourth *Hudson* factors address the nature of the charge and the defense. *Id.* In this assault case raising self-defense, testimony regarding Baldwin's level of intoxication and the level of harm she suffered was critical.

Finally, the fifth *Hudson* factor addresses the other evidence before the jury. *Id.* No other eyewitness to the incident testified at trial, lending further weight and importance to Mudge's testimony.

Mudge was not qualified as an expert and his opinion testimony on Ms. Luttrell's guilt and Baldwin's credibility invaded the exclusive

province of the jury. This violated Ms. Luttrell's right to a fair trial. *Hudson*, 150 Wn. App. at 653.

D. Detective Webb improperly opined that Baldwin appeared to have been attacked and that Ms. Luttrell did not.

A law enforcement officer's improper opinion testimony can be particularly prejudicial because it "carries a special aura of reliability." *King*, 167 Wn.2d at 331. Here, Detective Webb testified that Baldwin appeared to have been attacked and that Ms. Luttrell did not. RP 115-116.

In a self-defense case, an opinion regarding who has been attacked is an opinion of guilt. Application of the *Hudson* factors, listed above, demonstrates that Webb's testimony violated Ms. Luttrell's right to a jury trial. *Hudson*, 150 Wn. App. at 653. The first *Hudson* factor is the type of witness: as a law enforcement officer, Detective Webb's testimony was likely given special weight by the jury. *King*, 167 Wn.2d at 331. The second *Hudson* factor is the nature of the testimony: Webb's opinion was directly relevant to the primary factual issue, who had been attacked by whom. The third and fourth *Hudson* factors are the nature of the charge and the defense: the charge was assault and the defense was self-defense. The fifth *Hudson* factor is other evidence before the jury: it was contradictory on the issue of who attacked whom, inviting the jury to pay special attention to Webb's conclusion on the issue.

Under the *Hudson* factors, testimony from Detective Webb that Baldwin had been attacked (and that Ms. Luttrell had not been attacked) constituted an impermissible opinion of guilt. The testimony invaded the province of the jury and violated Ms. Luttrell's right to a fair trial. *Hudson*, 150 Wn. App. at 653.

E. Prosecution witnesses improperly opined that Baldwin was "the victim" in the altercation.

In a self-defense case, an opinion on who is "the victim" amounts to an opinion on guilt. *See, e.g. State v. Albino*, 130 Conn. App. 745, 766, 24 A.3d 602 (2011) (Where "the only question for the jury is whether the homicide was justified, the prosecutor's repeated reference to the 'victim,' the 'murder' and the 'murder weapon' amounts to an opinion on the ultimate issue of the case") (footnote omitted).[12] Recognizing this, the court granted Ms. Luttrell's motion *in limine* to prohibit witnesses from referring to Baldwin as "the victim." RP 1; Defense Motions in Limine, Supp. CP.

Despite this, the prosecutor, Officer Maini and Detective Webb referred to Baldwin as "the victim".[13] *See e.g.* RP 13, 24, 111, 112. This

[12] In *Albino*, the error was deemed harmless.

[13] Despite having brought the motion *in limine*, defense counsel failed to object when the witnesses violated the court's ruling. This failure to object was ineffective, as argued elsewhere in this brief.

improper testimony from two law enforcement officers amounted to an improper opinion that Ms. Luttrell was guilty. The testimony established each officer's belief that Baldwin had been attacked, and that Luttrell had attacked her. The evidence was likely given special weight by the jury. *King*, 167 Wn.2d at 331. This is particularly true in light of the contradictory nature of much of the evidence. The references to Baldwin as "the victim" violated Ms. Luttrell's rights to due process and to trial by jury. *Hudson*, 150 Wn. App. at 653.

F. The erroneous admission of improper opinion testimony prejudiced Ms. Luttrell.

The impermissible opinions on guilt and witness credibility invaded the province of the jury and violated Ms. Luttrell's right to due process. *Hudson*, 150 Wn. App. at 653. Given the conflicting testimony and the importance of Baldwin's credibility, the error prejudiced Ms. Luttrell. Her conviction must be reversed and the case remanded for a new trial, with instructions to exclude the improper evidence. *Hudson*, 150 Wn. App. 656.

IV. PROSECUTORIAL MISCONDUCT DENIED MS. LUTTRELL A FAIR TRIAL.

A. Standard of Review

Prosecutorial misconduct requires reversal if it is both improper and prejudicial to the accused. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Misconduct that is flagrant and ill-intentioned requires reversal even in the absence of an objection at trial. *Id.* at 678.

B. The prosecutor committed misconduct when he asked Ms. Luttrell to comment on another witness's credibility.

Prosecutorial misconduct can deny the accused her right to a fair trial. U.S. Const. Amend. XIV;[14] *Glasmann*, 175 Wn.2d at 696 (quoting *State v. Monday*, 171 Wn.2d 667, 677, 257 P.2d 551 (2011) ("A fair trial certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office… and the expression of his own belief of guilt into the scales against the accused.") In determining whether prosecutorial misconduct prejudiced the accused, the inquiry turns not on the other evidence admitted, but on the misconduct and its impact. *Glasmann*, 175 Wn.2d at 711.

It is misconduct for a prosecutor to ask the accused to comment on the credibility of another witness. *State v. Ramos*, 164 Wn. App. 327, 334,

[14] *See also* Wash. const. art. I, § 3.

263 P.3d 1268 (2011) ("Requiring a defendant to testify about whether a witness is lying is prejudicial."). Asking a witness to comment on another witness's credibility is particularly prejudicial when credibility is central to the case. *State v. Boehning*, 127 Wn. App. 511, 525, 111 P.3d 899 (2005).

Here, the prosecutor asked Ms. Luttrell to comment on inconsistencies between her testimony and that of Mudge. RP 141-42. Despite two sustained objections, the prosecutor persisted in inducing Ms. Luttrell to comment on Mudge's credibility:

> Q: You heard the testimony of Mr. Mudge yesterday; did you not?
> A: I heard it.
> Q: And he described the situation incredibly different than what you just described.
> DEFENSE COUNSEL: Objection. Argumentative
> COURT: Sustained. Sustained. Counsel, just ask questions and don't comment, please.
> Q: You described the situation where you were right here; correct?
> DEFENSE COUNSEL: Your Honor, our objection to the relevance of what another witness testified to.
> COURT: I'll allow it at this point.
> Q: Mr. Mudge described in Exhibit 6 that you were positioned on the outside of Ms. Baldwin; correct?
> A: I wasn't.
> Q: You weren't. But Mr. Mudge did say that; didn't he?
> DEFENSE COUNSEL: Objection
> COURT: Sustained.
> Q: Summer Baldwin was sitting in the corner.
> A: No, she wasn't.
> RP 141-42.

Credibility was central to this case. Mudge was the only neutral eyewitness who testified at trial. By asking Ms. Luttrell to comment on Mudge's credibility, the prosecutor committed misconduct that likely influenced the outcome of the trial. *Boehning*, 127 Wn. App. at 525. Ms. Luttrell's conviction must be reversed and the case remanded for a new trial. *Id.*

C. The prosecutor committed misconduct by "testifying" during closing argument.

It is misconduct for a prosecutor to argue facts that have not been admitted into evidence. *Glasmann*, 175 Wn.2d at 696. It is a long-standing rule that "consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is reasonable ground to believe that the defendant may have been prejudiced." *Id.*

Here, the prosecutor argued during closing that the location of a cut on Mudge's arm demonstrated that Ms. Luttrell had been "stabbing" with a beer bottle when Mudge intervened. RP 159. No information was introduced into evidence regarding the location of Mudge's cut or any "stabbing" motion. When defense counsel objected to this improper argument, the court did not issue a ruling, stating only that "the jury will recall what the facts are." RP 159.

The prosecutor's statement that Ms. Luttrell had been "stabbing" with a beer bottle was intended to make her appear more violent. The court's failure to rule on defense counsel's objection exacerbated the problem by making it appear to the jury that the prosecutor's statements were permissible. The prosecutor's improper argument prejudiced Ms. Luttrell. *Glasmann*, 175 Wn.2d at 708.

The prosecutor's improper reference to facts outside the record tended to paint Ms. Luttrell in a violent light. The misconduct prejudiced Ms. Luttrell and requires reversal of her conviction. *Id.*

D. The prosecutor committed misconduct by repeatedly misstating the law of self-defense in closing.

An accused person is denied a fair trial when the prosecutor mischaracterizes the law, if there is a substantial likelihood that the mischaracterization affected the jury verdict. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 164 Wn.2d 724, 295 P.3d 728 (2012)[15] ("A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury."). It is also misconduct for a

[15] In an unpublished decision, the Court of Appeals affirmed its prior decision on remand.

prosecutor to misstate the law in a way that lowers the state's burden of proof. *Glasmann*, 175 Wn.2d at 713.

In Washington, a person who believes she is being attacked has no duty to retreat. She is entitled to use force in self-defense. *State v. Jordan*, 158 Wn. App. 297, 301 n. 6, 241 P.3d 464 (2010). An accused person can claim self-defense if there is any evidence that the use of force was lawful; the burden is then shifted to the state to disprove self-defense beyond a reasonable doubt. *George*, 161 Wn. App. at 95-96.

In this case, the prosecutor repeatedly argued that Ms. Luttrell should have left rather than defending herself. *See e.g.* RP 165, 186. The prosecutor referred to Instruction No. 18, the standard definition of "necessary", and argued that leaving the situation would have been a reasonable alternative for Ms. Luttrell. Instruction No. 18, Supp CP. This argument contradicted the law and conflicted with the court's "no duty to retreat" instruction. *Jordan,* 158 Wn. App. at 301 n. 6; Instruction No. 20, Supp CP.

The prosecutor also argued that Ms. Luttrell "only gets to *claim* self-defense if the force is not more than is necessary." RP 184 (emphasis added). This argument mischaracterized the law of self-defense and shifted the burden of proof.

The court had already determined that instructions on self-defense were warranted. Instructions Nos. 17-20, Supp CP. The only issue for the jury was whether Ms. Luttrell had actually acted in self-defense. Because of this, the prosecutor's mischaracterization of the law of self-defense was flagrant and ill-intentioned and prejudiced Ms. Luttrell. *Id.* Her conviction must be reversed, and the prosecutor prohibited in any retrial from arguing that she had a duty to retreat (instead of using force in self-defense.) *Id.*

E. The cumulative effect of the prosecutor's misconduct requires reversal.

The cumulative effect of repeated instances prosecutorial misconduct can be "so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *Walker*, 164 Wn. App. at 737.

Here, numerous instances of prosecutorial misconduct require reversal. The prosecutor asked Ms. Luttrell to comment on Mudge's credibility, provided the jury prejudicial facts that were not in evidence, and misstated the law of self-defense in a way that lowered the state's burden of proof. All of these instances of misconduct, whether considered individually or in the aggregate, require reversal of Ms. Luttrell's conviction. *Id.*

V. MS. LUTTRELL WAS DENIED HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Defense counsel provided ineffective assistance by failing to object to improper opinion testimony and prosecutorial misconduct.

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend VI; *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*

Failure to object to inadmissible evidence can constitute deficient performance. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007) (failure to object to inadmissible evidence constitutes

ineffective assistance of counsel when there is not valid tactical reason for the failure).

Here, Ms. Luttrell's trial counsel failed to object to improper opinion testimony. Prior to trial, counsel won a ruling prohibiting witnesses from referring to Baldwin as "the victim," but failed to consistently object when the ruling was violated.[16] RP 13, 24, 111, 112, 113. Counsel likewise failed to object to Detective Webb's improper opinion that Baldwin appeared to have been attacked and Ms. Luttrell did not. RP 115-116.

There was no valid tactical reason for the failure to object. In fact, defense counsel recognized the prejudicial nature of the improperly admitted testimony. This can be seen from the motion *in limine,* the successful objection to testimony characterizing Baldwin as "the victim," and the successful objection (at sidebar) to Mudge's opinion that Baldwin had been attacked. Defense Motions in Limine, Supp. CP; RP 24, 74, 97.

Counsel did not strategically object in some instances and not others. Instead, defense counsel simply failed to protect his client from the impermissible opinion testimony introduced through prosecution

[16] Defense counsel objected on one occasion. RP 24.

witnesses, some of which violated the court's order *in limine*. These failures constitute deficient performance.

Counsel also failed to object to prosecutorial misconduct in closing. This allowed the prosecutor to refer to matters outside the record and to mischaracterize the law of self-defense. Again, defense counsel objected to *some* but not *all* of the relevant misconduct. RP 159 (objection); RP 165, 184, 186 (no objection). Counsel's failure to object cannot be characterized as a tactical decision.

Each failure to object allowed the prosecutor to put before the jury improper evidence and argument that was directly relevant to the primary issue in the case: whether Ms. Luttrell acted in self-defense. Ms. Luttrell was prejudiced by defense counsel's failures to object. Accordingly, her conviction must be reversed and the case remanded for a new trial. *Hendrickson*, 138 Wn. App. at 833.

C. Defense counsel provided ineffective assistance by failing to propose proper instructions on self-defense, and by failing to object to the omission of language from the court's self-defense instructions.

All circumstances known to the accused are relevant to the subject prong of the self-defense standard, including facts occurring prior to the alleged assault. *See e.g. George*, 161 Wn. App. at 97. This principle is

clearly communicated by the pattern self-defense instruction. *See* WPIC 17.02.

The *Kyllo* court found counsel ineffective based on the failure to object to improper jury instructions on self-defense. *Kyllo*, 166 Wn.2d at 868-69 (*quoting State v. Woods*, 138 Wn. App. 191, 201-02, 156 P.3d 309 (2007)) ("there was no strategic or tactical reason for counsel's proposal of an instruction that incorrectly stated the law and eased the state of it's burden of proof on self-defense.").

Here, defense counsel did not object to the omission of this standard language from the court's instructions. Nor did counsel propose an instruction that included this language. Instruction No. 17, Supp CP. Counsel's failure constituted deficient performance: the focus of the self-defense theory was Baldwin's prior assault on Ms. Luttrell.[17]

Defense counsel's arguments show that he understood that the prior assault was legally relevant. Despite this, counsel failed to seek an instruction making the legal standard clear for the jury. This failure constitutes deficient performance. As in *Kyllo*, self-defense was Ms. Luttrell's "entire case." *Kyllo*, 166 Wn.2d at 869. There is a reasonable probability that counsel's failure to object or to propose a proper

[17] *See e.g.* RP 124, 136-37, 169, 171, 173-74.

instruction affected the verdict. Accordingly, Ms. Luttrell was prejudiced by counsel's deficient performance. *Id.*

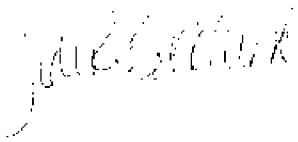
Ms. Luttrell was deprived of her Sixth and Fourteenth Amendment right to the effective assistance of counsel. Her attorney failed to object to improper opinion evidence, to prosecutorial misconduct, and to the omission of language in the self defense instructions that was critical to the defense theory of the case. Counsel also failed to propose an instruction containing the necessary language. Because Ms. Luttrell was prejudiced by her attorney's deficient performance, her conviction must be reversed and her case remanded for a new trial. *Kyllo*, 166 Wn.2d at 871.

CONCLUSION

Ms. Luttrell was denied a fair trial when the court failed to adequately instruct the jury on the law of self-defense, the court refused to hold a hearing regarding a juror's possible overhearing of outside information, numerous witnesses provided impermissible opinions of guilt and witness credibility, the prosecutor committed misconduct, and defense counsel provided ineffective assistance. Ms. Luttrell's conviction must be reversed.

Respectfully submitted on May 30, 2013,

BACKLUND AND MISTRY



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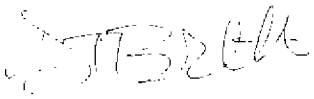

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Crystal Luttrell
2107 36th Ave
Longview, WA 98632

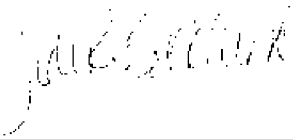
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecuting Attorney
baurs@co.cowlitz.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 30, 2013.



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