Supreme Court No. 91258-1
(COA No. 44887-4-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEFFAN GALE,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

United States Constitution

Washington Constitution

Statutes

Court Rules

Other Authorities

A. IDENTITY OF PETITIONER

Steffan Gale, petitioner here and appellant below, asks this Court to review the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Gale seeks review of the Court of Appeals decision dated October 28, 2014, for which reconsideration was denied on December 29, 2014. Copies are attached as Appendix A and B, respectively.

C. ISSUES PRESENTED FOR REVIEW

1. The prosecution may not obtain an instruction on an uncharged inferior degree offense unless evidence affirmatively shows that only the lesser was committed. The prosecution claimed Mr. Gale intentionally assaulted and seriously injured another person while Mr. Gale said he acted in self-defense. The State never explained how Mr. Gale could only have been guilty of the third degree assault. As an apparent compromise, the jury found Mr. Gale not guilty of first and second degree assault, convicting him only of this lesser offense. Where there is no affirmative evidence showing the accused committed only a lesser offense, does the court lack authority to instruct the jury on this

uncharged crime based on principles of due process and should this Court grant review to court confusion over the relevant legal standard?

2. Self-defense contains equally important objective and subjective standards that must be clearly communicated to the jury. Based on an outdated Court of Appeals decision,[1] the court refused to provide a pattern jury instruction explaining Mr. Gale's right to act on appearances as they reasonably appeared to him. Without this instruction, the State argued to the jury that the law did not let Mr. Gale use a weapon even if he thought he was defending himself. Did the court fail to accurately instruct the jury on the law of self-defense from the accused person's perspective? Does *Kidd* conflict with later decisions from this Court requiring that the subjective component of self-defense be contained in clear jury instructions?

3. Mr. Gale objected to the State's misrepresentations of the law in closing argument orally and in writing even though the court had directed Mr. Gale not to object during closing argument. The Court of Appeals refused to address whether the prosecution's misrepresentations of the law of self-defense were harmful because Mr.

---

[1] *State v. Kidd*, 57 Wn.App. 95, 99, 786 P.2d 847 (1990).

Gale had not objected sufficiently during the closing argument. Did Mr. Gale's repeated objections, coupled with the court's command that he refrain from objecting, sufficiently preserve for appeal the issue of misconduct by the Pierce County prosecutor?

D. STATEMENT OF THE CASE

Timothy Andrews was a drug dealer and gang member who, after being arrested for unlawful possession of a firearm and facing up to 212 months in prison, agreed to arrange drug sales for the police. RP 110-12, 195.[2] Even though his agreement with the police required him to obey the law unless acting in a police-approved drug transaction, the police let him "bend and break rules" and he remained involved in using and selling drugs of his own accord. RP 112.

On May 16, 2011, Steffan Gale called Mr. Andrews, asking if he knew where he could find methamphetamine. RP 114, 118, 235. Mr. Andrews said no. RP 118. Later that day, Mr. Andrews was ripped off by a person called Louisiana, also known as Mack. RP 121, 470-71. Mack grabbed Mr. Andrews' money and keys. RP 124-25.

[2] The trial transcripts consist of consecutively paginated volumes of proceedings referred to as "RP" followed by the page number. The sentencing transcript is referred to by the date of proceeding (May 17, 2013).

Mr. Andrews thought Mr. Gale knew where Mack lived. RP 127, 131. To get Mr. Gale to help him find Mack, Mr. Andrews called and told him he would sell him methamphetamine. RP 478. They arranged to meet at the Safeway because Mr. Gale needed groceries. RP 128, 478.

In the Safeway parking lot, Mr. Andrews admitted he did not have drugs to sell, but wanted Mr. Gale to take him to Mack's house. RP 130-31, 483. Mr. Gale refused and went into the store for groceries. RP 133, 483, 486. He thought Mr. Andrews was under the influence of drugs; Mr. Andrews admitted he had used PCP. RP 128-29; 485-86.

While Mr. Gale stood in the milk aisle, he heard Mr. Andrews behind him, telling someone on the telephone that he was going to do something to Mr. Gale if Mr. Gale did not help him. RP 486-87. Mr. Gale turned and said, "you're not going to do shit." RP 487.

According to Mr. Gale, Mr. Andrews punched him in the face. RP 489. Mr. Gale knew Mr. Andrews was a boxer and feared injury in a fight. RP 489-90, 493. Mr. Gale tried to get Mr. Andrews off of him. RP 491. Mr. Gale had a knife in his hand from a small multi-tool that he carried with him and he was holding this knife when Mr. Andrews approached him. RP 491-92. Holding his knife uring the scuffle, Mr.

Gale swung and cut Mr. Andrews twice, once the right bicep and also in his left side, hitting his spleen. RP 501. The bicep wound was ten centimeters long and four or five centimeters deep, while the spleen wound was deeper. RP 306, 309, 322.

Mr. Andrews described it differently. He said he walked into the grocery store alongside Mr. Gale and Mr. Gale started swinging his hands at him. RP 135-36. Mr. Gale immediately put his knife into Mr. Andrews's arm and sliced his bicep. RP 137-38. He said Mr. Gale ran away but came back and stabbed him again in the side. RP 139-40.

Mr. Andrews screamed for someone to call 911. RP 280. He ordered a store clerk "tie off" his wound like a tourniquet. RP 282. Rather than wait for aid to arrive, Mr. Andrews drove himself to the hospital. RP 153, 285. He refused to tell the police what happened or who did it for over one week. RP 246, 409-10, 579-80.

The prosecution charged Mr. Gale with one count of first degree assault while armed with a deadly weapon. CP 1. Over Mr. Gale's objection, the court also instructed the jury on the lesser degree offenses of second and third degree assault. RP 549-51, 589-91; CP 79, 83. The jury acquitted Mr. Gale of both first and second degree assault but convicted him of third degree assault. CP 93-95.

Before the prosecutor began his closing argument, the prosecutor made "a motion for no objections during closing." 5RP 593. The judge responded,

> I always have a lot of respect for lawyers that don't do that. I'm serious. I can count on two hands my favorite lawyers who, regardless of how extreme a statement it, you do not object during closing argument. And I have a lot of respect for them. In my experience, jurors see through that, but there is always exceptions.

5RP 593. When defense counsel objected at the start of the prosecutor's rebuttal to a comment that appeared to be attacking defense counsel, the judge told defense counsel, in front of the jury, "that's a totally inappropriate objection." 5RP 667.

The judge discouraged defense counsel from objecting:

> I really don't want you to interrupt him. He didn't interrupt you during the time frame of your argument. Your objection is overruled.

5RP 667. At the end of closing arguments, defense counsel moved for a mistrial, based on numerous objections to the State's mischaracterizations of the facts and the law. 5RP 696-98. The court denied the oral motion and a later written motion. 5RP 698; 5/17/13RP 12-13. The Court of Appeals concluded that "even if the prosecutor had misstated the law on self-defense, such a misstatement

could have been cured by a jury instruction had defense counsel objected at trial. Therefore, this challenge it waived." Slip op. at 12.

The facts are further set forth in the Court of Appeals opinion, pages 1-4, Appellant's Opening Brief, pages 3-7 and in the relevant argument sections. The facts as outlined in these pleadings are incorporated by reference herein.

E. ARGUMENT

1. **The prosecution is not entitled to a jury instruction on an uncharged inferior degree offense without affirmative evidence showing that only the lesser was committed**

a. *The evidence must support a conviction on the lesser offense alone to instruct the jury on the lesser crime*

To obtain an instruction on an uncharged inferior degree offense, the moving party must show: (1) legally the lesser offense is a necessary element of the offense charged, and (2) factually the evidence supports an inference that only the lesser crime was committed. *State v. Workman,* 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); RCW 10.61.003; U.S. Const. amend. 14; Wash. Const. art. I, §§ 3, 22.

This factual test is "more particularized . . . than that required for other jury instructions." *State v. Fernandez-Medina,* 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). "[T]he evidence must raise an inference

that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." *Id.*

The court views the evidence in the light most favorable to the party requesting the instruction. *Id.* at 455-56. This evidence must "permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.'" *Id.* at 456 (quoting *State v. Warden,* 133 Wn.2d 559, 563, 947 P.2d 708 (1997) and citing *Beck v. Alabama,* 447 U.S. 625, 635, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

"Our case law is clear, however, that the evidence must affirmatively establish the [proponent]'s theory of the case - it is not enough that the jury might disbelieve the evidence pointing to guilt." *Fernandez-Medina,* 141 Wn.2d at 456. The court "may not" give an inferior degree instruction when the factual basis for the instruction is that the jury disbelieves the witnesses. *State v. Wright,* 152 Wn.App. 64, 71-72, 214 P.3d 968 (2009).

The prosecution charged Mr. Gale with first degree assault, claiming he intentionally assaulted Mr. Andrews by a deadly weapon or by any force likely to produce great bodily harm or death. RCW 9A.36.011. After the prosecution rested its case, it sought additional instructions on second and third degree assault over Mr. Gale's

objection. RP 551, 589. The court granted the request with little analysis and the jury found Mr. Gale not guilty of either first or second degree assault, but convicted him of third degree assault. RP 591, 712.

b. *There was no reasonable view of the evidence showing Gale was not guilty of the greater offenses but instead guilty of only the lesser.*

In *State v. Jackson*, 70 Wn.2d 498, 499, 424 P.2d 313 (1967), a store owner confronted the defendant on the street about a theft. The store owner said the defendant pulled his hand out of his pocket with an open knife and "kept stabbing at me." *Id.* at 500. The defendant said he was merely holding a pen knife because he had a sliver in his nail when confronted. *Id.* He said the store owner "started pounding on me, and I held up my hand to hold him off," denying he knowingly used his knife. *Id.* at 500-01.

Mr. Jackson was charged with assault in the second degree, defined as an intentional assault by use of a deadly weapon or the infliction of grievous bodily harm.[3] He argued that the court should have instructed the jury on the lesser offense of third degree assault.[4]

---

[3] Second degree assault was then defined, in pertinent part, as occurring when:

> under circumstances not amounting to assault in the first degree[, a person]

This Court held that the trial judge correctly denied the defendant's request for a third degree assault instruction. *Id.* at 503. '[T]he evidence showed that at all times during the affray and pursuit, defendant carried the knife in his hand" and repeatedly injured the store owner's face. *Id.* Because the defendant knew he held the knife, he purposefully inflicted injuries with the knife, and consequently there was no evidence for the court to "authorize the jury to find third-degree assault as a lesser included offense." *Id.*

Likewise, in *State v. Walther*, 114 Wn.App. 189, 193, 56 P.3d 1001 (2002), the defendant was charged with second degree assault and he sought a lesser included offense instruction for third degree assault. Mr. Walther fired three gunshots at his car to stop his friend who had borrowed it without permission. *Id.* at 191. He said he aimed at the windshield, not the driver, but bullet fragments injured the driver. *Id.*

---

(3) Shall wilfully inflict grievous bodily harm upon another with or without a weapon; or

(4) Shall wilfully assault another with a weapon or other instrument or thing likely to produce bodily harm . . . .

Former RCW 9.11.020(3), (4).

[4] Third degree assault was then defined as "an assault or an assault and battery not amounting to assault in either the first or second degrees." Former RCW 9.11.030; *see State v. Stationak*, 73 Wn.2d 647, 651, 440 P.2d 457 (1968). Although the definition of third degree assault was different than the current definition, the principles governing when a person is entitled to an instruction on an inferior degree were the same. *See, e.g., Stationak*, 73 Wn.2d at 650.

Mr. Walther claimed was negligent in how he fired his shots and should receive a third degree assault instruction. *Id.* The Court of Appeals held that by using a deadly weapon against the driver, he "was not entitled" to a third degree assault instruction because "[a]ny assault with a deadly weapon is at least a second degree assault." *Id.* at 192.

Mr. Gale was accused of first degree assault for using a deadly weapon with the intent to cause great bodily harm; and the jury was instructed on second degree assault for either intentionally assaulting and recklessly inflicting substantial bodily harm or an assaulting Mr. Andrews with a deadly weapon. CP 74, 79 (Instructions 12, 17). For third degree assault, the prosecution had to prove Mr. Gale "caused bodily harm" by a weapon or instrument "likely to produce bodily harm" and acted with criminal negligence. CP 83 (Instruction 21).

There was no dispute at trial that the knife was a deadly weapon, readily capable of causing death or substantial bodily harm. CP 73; RCW 9A.04.110(6); RP 298, 304-05, 307-09. Nor was there any dispute that Mr. Andrews suffered serious injuries. The two separate wounds penetrated deeply and caused substantial blood loss. RP 300, 306, 309, 322.

If Mr. Andrews's testimony is believed, Mr. Gale intentionally stabbed him once, walked away, then returned and stabbed him again despite the serious injury. RP 137-40. If Mr. Gale's testimony is believed, he struggled with Mr. Andrews after Mr. Andrews punched him in the face. He knew he held a knife in his hand but was trying to defend himself. RP 488-90, 493.

Under *Jackson* and *Walter*, when a person knows he is using a deadly weapon against a person in a manner readily capable of causing serious injury, he cannot be merely negligent. Mr. Gale knew he held a knife in his hand throughout the incident and said "I just stabbed him" even if the incident was so quick that he did not recall how he did it. RP 491. The court was not authorized to permit a conviction for this uncharged inferior degree offense without the required affirmative showing that only this offense was committed.

c. *The court misapplied the law when considering the State's request for a lesser offense instruction.*

In order for the court to give an inferior degree instruction, the evidence must do more than merely cast doubt on the prosecution's theory regarding the charged offense; instead, the evidence must affirmatively establish the prosecution's theory regarding the lesser

offense. *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991); *Fernandez–Medina*, 141 Wn.2d at 455-56.

The prosecution did not offer any theory under which Mr. Gale could be acquitted of the greater offenses but found guilty only of third degree assault. RP 550-52. The prosecutor merely said he wanted those instructions. RP 549-551. Defense counsel objected and argued there was no evidence that Mr. Gale had been reckless or acting with criminal negligence. RP 589-90. The court summarily stated that based on Mr. Gale's testimony, the jury "could conclude" he acted with criminal negligence. RP 590-91. The court did not acknowledge the requirement that the prosecution was required to affirmatively show that the evidence would show that Mr. Gale was guilty of only the lesser offense. *Id.*

In his closing argument, the prosecutor said almost nothing about the lesser offenses. The prosecutor said nothing in his initial argument and in rebuttal, merely said, "real quick," the lesser offenses are "tools available to you." RP 686. He did not indicate Mr. Gale's acts could have been criminally negligent or even reckless. He never presented a factual basis to convict Mr. Gale solely of the lesser third

degree assault. The court overlooked this requirement and improperly offered the jury the compromise verdict of third degree assault over defense objection. This Court should review the court's refusal to apply the threshold showing necessary to obtain a lesser included offense instruction.

2. **The court failed to accurately and completely instruct the jury on the elements of self-defense, over Mr. Gale's objection**

a. *The right to act in self-defense is constitutionally guaranteed.*

The right to present a defense includes the right to have the jury instructed on the accused person's theory of defense, provided the instruction is supported by the evidence and accurately states the law. U.S. Const. amends. 5, 14; *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. *State v. Agers*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

Additionally, it is constitutionally mandated that, "The right of the individual citizen to bear arms in defense of himself, or the state,

shall not be impaired." Art. I, § 24.[5] This "quite explicit language about the 'right of the individual citizen to bear arms in defense of himself'" set forth in article I, section 24 "means what it says." *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 99 (2010).

The federal constitution likewise guarantees the right to act in self-defense; "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." *McDonald v. City of Chicago, Ill.*, 561 U.S. _, 130 S. Ct. 3020, 3036, 177 L. Ed. 2d 894 (2010); U.S. Const. amends. 2, 14. The right to bear arms in self-defense is "deeply rooted" and "fundamental" to our concept of liberty. *McDonald*, 130 S. Ct. at 3036-37; *Sieyes*, 168 Wn.2d at 292.

b. *The Court of Appeals decision in Kidd is contrary to LeFaber and Walden*

The jury instructions on self-defense must make the legal standard manifestly apparent to the average juror. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); *see State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). If a self-defense instruction "permits"

[5] Article I, section 24 states in full, "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men."

an incorrect understanding of the law, it is deficient. *LeFaber*, 128 Wn.2d at 902-03.

The jury must view self-defense from the conditions as they appeared to the defendant. *Walden*, 131 Wn.2d at 474. A defendant may reasonably fear injury even when the complainant is unarmed and the defendant has a knife. *See Id.* at 472, 475. A person is entitled to use self-defense even though he is not in actual danger so long as he reasonably, but mistakenly, believes he is in danger. *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980).

Mr. Gale asked that the jury receive WPIC 17.04:

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

CP 50; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 17.04 (3d Ed 2008). The court refused because the instruction was not mandatory.

Instead, it gave a general instruction that included the right to use a reasonable amount of force. CP 85 (Instruction 23).[6]

In *LeFaber*, the court parsed a similar self-defense instruction directing the jury to consider whether "the defendant reasonably believe[d]" he was faced with death or great personal injury and there was imminent danger of such harm. 128 Wn.2d at 899. The instruction further stated, just as in Mr. Gale's case, that a person "may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the defendant taking into consideration all the facts and circumstances known to the defendant at the time and prior to the incident. The force employed may not be more than is necessary." *Id.* This Court held that the instruction could confuse the jurors, because an average lay person could believe that there was a requirement of actual imminent harm.

In a case that predates *LeFaber*, the Court of Appeals ruled the court did not need to separately instruct the jury on the defendant's right to act on appearances because the other instructions were accurate.

---

[6] The court also instructed the jury that a person has "no duty to retreat" and defined when force is necessary for self-defense. CP 86-87. Neither instruction explained that force may be lawful when the defendant acts on a reasonable but mistaken belief about the degree of force he faced.

State v. Kidd, 57 Wn.App. 95, 99, 786 P.2d 847 (1990). *Kidd* was decided the without the benefit of *LeFaber* and its progeny, which required that the subjective element of lawful self-defense be included in all instructions.

c. *The instructional ambiguity was exacerbated by the State's closing argument misrepresenting the law.*

The opinion in *Kidd* was premised on defense counsel's unrestricted ability to argue that the jury should view the case based on the defendant's perception even if he was mistaken about the degree of force he faced. *Kidd*, 57 Wn.App. at 99. Unlike *Kidd*, the prosecutor misrepresented Mr. Gale's right to act on appearances and the court overruled Mr. Gale's objections.

Defense counsel argued that Mr. Gale had the "right to fight back" including using a weapon, because he did not know what weapon Mr. Andrews had. RP 654-55. The prosecution responded that Mr. Gale misrepresented the law and emphasized that the instructions did not let Mr. Gale use whatever was in his hand. RP 690-91. The court overruled the defense objection and told the jury that the prosecutor's argument was correct. RP 690. The prosecutor then emphasized that the self-

defense instruction shows that, "You don't get to stab an unarmed man," and the jury should not "let him get away with it." RP 691.

By refusing to give the jury Mr. Gale's requested instruction explaining his right to act on how the situation appeared to him, Mr. Gale was not permitted to effectively argue self-defense. The court's instructions did not plainly state the legal standard governing the accused's reasonable but mistaken belief that he faced bodily injury.

A person is entitled to act in self-defense when he reasonably apprehends that he is about to be *injured*, even if he is mistaken about the nature of the threat. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). The act on appearances instruction Mr. Gale proposed would have clearly explained this principle, and it was not unambiguously set forth in the court's remaining instructions.

Mr. Gale moved for a mistrial based on critical mischaracterizations of the legal standard and evidence. 5RP 696-98. He filed a motion for a mistrial after he was convicted. CP 100-02. Even though his timely oral and written motions pressed the same claims as those raised on appeal, the Court of Appeals treated his objection as unpreserved, contrary to *State v. Lindsay*, 180 Wn.2d 423, 441, 326 P.3d 125 (2014). This Court should grant review.

F. CONCLUSION

Petitioner Steffan Gale respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 28th day of January 2015.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEFFAN D. GALE, Appellant.	No. 44887-4-II UNPUBLISHED OPINION

BJORGEN, A.C.J. — A jury found Steffan Gale not guilty of first degree assault and not guilty of second degree assault, but found Gale guilty of the inferior-degree offense of third degree assault. Gale appeals his conviction, asserting that the trial court erred by (1) granting the State's request to instruct the jury on the inferior-degree offense of third degree assault and (2) failing to accurately instruct the jury on the law of self-defense. Gale also asserts that the prosecutor committed misconduct at closing argument by misstating the law of self-defense. We affirm.

FACTS

On May 16, 2012, Gale called Timothy Andrews, an admitted drug dealer, to ask if Andrews knew where to obtain methamphetamine, and Andrews told Gale to call him back later.

A short time later Gale's friend, Louisiana,[1] called Andrews and asked Andrews to sell him some crack cocaine. After Andrews told Louisiana that he did not have any crack cocaine, Louisiana asked Andrews to lend him some money. Andrews agreed and the two men met at a gas station. Andrews took approximately $1,500 from out of his pocket and handed Louisiana $20. Louisiana then grabbed all of Andrews's cash as well as Andrews's keys and fled the gas station.

Later that evening, Andrews called Gale and asked him to meet in the parking lot of a Tacoma Safeway grocery store. When the two met at the Safeway, Andrews told Gale that Louisiana had stolen his money and a set of keys, and he asked Gale to tell him where Louisiana lived. Gale refused and went inside the Safeway to purchase groceries. Andrews followed Gale into the store and the two men had a verbal confrontation. Andrews punched Gale and then Gale stabbed Andrews once in the bicep and once in the abdomen. Gale left the store and threw his knife away in an alley. Andrews screamed for someone to call 911. A Safeway employee wrapped a shirt around Andrews's arm to help control the bleeding. Andrews drove himself to a nearby hospital and was later transferred to a second hospital for surgery to treat his wounds. The State charged Gale with first degree assault and further alleged that Gale was armed with a deadly weapon when he assaulted Andrews.

At trial, Andrews testified that after Gale refused to tell him where Louisiana lived, he asked Gale if he could accompany him inside the Safeway to discuss the matter further and that Gale agreed. Andrews further testified that, once in the store, he confronted Gale and tried to convince Gale to tell him Louisiana's address. Andrews stated that Gale was "looking down at the food, but he was swinging back and forth . . . like he was going to hit me." Report of

[1] Gale testified that Louisiana's real name is Kevin Jones or Johnson, and that he also goes by the nickname Mack.

Proceedings (RP) at 136. Andrews continued, "So what I did was I kind of reached back with my chin like this so he wouldn't hit me, and I tried to hit him first." RP at 136-37. Andrews stated that after he hit Gale, Gale swung at him with a knife and stabbed him in the arm. Andrews said that Gale started running out of the store, but when he started yelling out Gale's name, Gale came back and stabbed him in the abdomen.

In contrast with Andrews's testimony, Gale testified that after he had refused to give Louisiana's address to Andrews, he was unaware that Andrews had followed him inside the Safeway. Gale stated that he was shopping when he heard Andrews behind him talking on the phone. Gale said he overheard Andrews tell the person on the phone, "[Gale] better take me over there, or I'm go[ing to] do something to him, too." RP at 487. Gale stated that he told Andrews, "You're not go[ing to] do [expletive]," and then Andrews hit him. RP at 489.

Gale also testified that, when Andrews hit him, he had been cleaning his nails with a knife contained within a small multi-purpose tool. Gale further testified that he did not intend to stab Andrews, but that he happened to have the knife in his hand when he swung at Andrews in self-defense. Gale stated, "I didn't know I was swinging the knife until it was over." RP at 516.

The trial court instructed the jury on the uncharged inferior-degree offenses of second degree assault and third degree assault over Gale's objection. Gale proposed the following self-defense jury instruction based on 11A *Washington Practice: Washington Pattern Jury Instructions: Criminal* (WPIC) 17.04 (3d ed. 2008):

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

Clerk's Papers (CP) at 50. The trial court declined to give Gale's proposed self-defense jury instruction, reasoning:

> And 17.04, the WPIC discussion of that is, that is generally not given unless it's a situation where someone thinks they are go[ing to] suffer injury from someone else; although, it's later shown to have been an erroneous belief. That's not really what we have here. Because we have here, your theory of the case is that Andrews swung and hit your client, and your client responded. So it's not really he thought there was an appearance that he was going to be injured.

RP at 567-68. The trial court instructed the jury on self-defense based on WPIC 17.02 as follows:

> It is a defense to a charge of assault that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured, in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The state has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP at 85. The jury returned verdicts finding Gale not guilty of first degree assault and the inferior-degree offense of second degree assault, and guilty of the inferior-degree offense of third degree assault. Gale timely appeals.

ANALYSIS

I. THIRD DEGREE ASSAULT JURY INSTRUCTION

Gale first contends that the trial court erred by instructing the jury on the uncharged inferior-degree offense of third degree assault absent affirmative evidence that he committed only that offense. We disagree.

"As a general rule, criminal defendants are entitled to notice of the charge they are to meet at trial and may be convicted only of those crimes charged in the information." *State v. Tamalini*, 134 Wn.2d 725, 731, 953 P.2d 450 (1998). However, RCW 10.61.003 provides an exception to this general rule for uncharged crimes of an inferior degree to a crime charged in the State's information. *State v. Fernandez-Medina*, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). RCW 10.61.003 provides:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

Before a trial court may instruct the jury on an uncharged inferior-degree offense, the following three factors must be met:

> "(1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense."

Fernandez-Medina, 141 Wn.2d at 454 (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). Gale challenges the third factor, contending that the evidence presented at trial was insufficient to support the jury finding that he committed only third degree assault.

In reviewing whether evidence was sufficient to support a trial court's decision to instruct the jury on an uncharged inferior-degree offense, we view the evidence in a light most favorable to the instruction's proponent, here the State. *Fernandez-Medina*, 141 Wn.2d at 455-56. Evidence in support of an uncharged inferior-degree offense instruction must consist of more than the jury's disbelief that the defendant committed the superior-degree offense and, instead, "must affirmatively establish the defendant's theory of the case." *Fernandez-Medina*, 141

Wn.2d at 456. In other words, the trial court should instruct the jury on an uncharged inferior-degree offense only "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)). We review de novo a trial court's decision whether to instruct the jury on an uncharged inferior-degree offense. *State v. Corey*, 181 Wn. App. 272, 276, 325 P.3d 250, *review denied*, ___ P.3d ___ (2014).

Here, the State charged Gale with first degree assault under RCW 9A.36.011(1)(a), which statutory provision provides:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm.

Third degree assault is an inferior-degree offense to first degree assault. *State v. Walther*, 114 Wn. App. 189, 192, 56 P.3d 1001 (2002). RCW 9A.36.031 defines third degree assault in relevant part as follows:

> (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
> . . . .
> (d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.

Here, Gale's own testimony provided affirmative evidence to support the jury finding that he committed third degree assault to the exclusion of first degree assault. Gale testified that he did not intend to stab Andrews and that he did not realize that he was swinging a knife until after Andrews had been stabbed. If the jury believed Gale's testimony, it could rationally find that he acted with criminal negligence, rather than with intent, when causing bodily harm to

Andrews with a weapon or instrument likely to produce bodily harm. RCW 9A.36.011(1)(a); RCW 9A.36.031(1)(d); *Warden*, 133 Wn.2d at 563. Accordingly, affirmative evidence presented at trial permitted the jury to find Andrews guilty of third degree assault and, thus, the trial court did not err by instructing the jury on the inferior-degree offense of third degree assault.

II. SELF-DEFENSE

Next, Gale contends that the trial court erred by failing to accurately instruct the jury on the law of self-defense. Again, we disagree.

Jury instructions are sufficient where the instructions allow the parties to argue their theories of the case, are not misleading, and properly inform the jury of the applicable law when read as a whole. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015 (2013). Jury instructions on the law of self-defense "must make the relevant legal standard manifestly apparent to the average juror." *McCreven*, 170 Wn. App. at 462 (internal quotations omitted). Although a trial court commits reversible error by refusing to give a proposed instruction where the absence of the instruction prevents the defendant from presenting his theory of the case, a trial court does not err by refusing a proposed jury instruction where the subject matter of the proposed instruction is adequately covered in the other instructions. *State v. Kidd*, 57 Wn. App. 95, 99, 786 P.2d 847 (1990).

Gale argues that the trial court erred by refusing to provide the jury with WPIC 17.04's "act on appearances" self-defense instruction because, absent that instruction, the jury was not informed that it had to view the incident from Gale's perspective when evaluating whether his use of force was justified under the circumstances. Br. of Appellant at 22. In support of this argument, Gale relies on *State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996), *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009). In *LeFaber*, our

Supreme Court reversed the defendant's first degree manslaughter conviction, holding that the trial court's self-defense jury instruction erroneously required the jury to find actual danger of imminent harm to accept the defendant's self-defense claim. 128 Wn.2d at 898-903. There, the trial court instructed the jury on the law of self-defense as follows:

> It is a defense to a charge of Murder in the Second Degree, Manslaughter in the First Degree, and Manslaughter in the Second Degree that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable when committed in the lawful defense of the defendant or any person in the defendant's presence or company when the defendant reasonably believes that the person slain intends to inflict death or great personal injury *and there is imminent danger of such harm being accomplished.*
>
> The defendant may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the defendant taking into consideration all the facts and circumstances known to the defendant at the time and prior to the incident. The force employed may not be more than is necessary.
>
> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable.

LeFaber, 128 Wn.2d at 898-99 (emphasis added). The *LeFaber* court held that the structure of the italicized language above permitted an erroneous interpretation of the law of self-defense as requiring "actual danger" to justify the use of force, because the instruction did not clearly indicate a link between the "defendant['s] reasoanbl[e] belie[f]" and an "imminent danger" of harm. 128 Wn.2d at 901-03.

The trial court's self-defense jury instruction here contained no such infirmity and clearly indicated to the jury that it was to view the threat of injury from Gale's perspective when evaluating whether his use of force was justified, stating:

> 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 is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions *as they*

> *appeared to the person*, taking into consideration all of the facts and circumstances *known to the person* at the time of and prior to the incident.

CP at 85 (emphasis added). Because the trial court's self-defense jury instruction adequately conveyed that the jury was to view any threat of injury to Gale from Gale's perspective under the circumstances as they appeared to him when evaluating whether his use of force was justified, the trial court did not err by refusing to further provide the jury with Gale's requested WPIC 17.04 "act on appearances" instruction. *Kidd*, 57 Wn. App. at 99.

Moreover, the evidence at trial did not support an "act on appearances" self-defense instruction because it was uncontested that Andrews struck Gale moments before Gale stabbed him. Thus, the question before the jury with regard to Gale's self-defense claim was not whether he acted on a reasonable yet mistaken belief that he was about to be injured, but rather, whether stabbing Andrews was a reasonable and proportionate response to the threat of injury posed by Andrews striking him. Because the trial court's self-defense jury instruction adequately conveyed the law of self-defense and because Gale's requested instruction was not supported by the evidence at trial, his claim of instructional error fails.

III. PROSECUTORIAL MISCONDUCT

Next, Gale argues that the State misstated the law at closing argument by telling the jury, "You don't get to stab an unarmed man. Don't let him get away with it." RP at 691. In raising this argument, Gale does not appear to assert that the prosecutor's statement, alone, constituted misconduct warranting a new trial. Instead, Gale contends that any error in the trial court's refusal to give his proposed self-defense instruction was "exacerbated" by the prosecutor's misstatement of the law. Br. of Appellant at 27. However, we have held that the trial court

properly instructed the jury on the law of self-defense and that Gale was not entitled to his proposed self-defense jury instruction.

Although it is not clear from his brief, to the extent that Gale claims that the prosecutor's statement constituted misconduct warranting a new trial, we reject that claim as well. A defendant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists when there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We review a prosecutor's statements at closing 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); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor has wide latitude in making arguments to the jury and may draw reasonable inferences from the evidence. *Fisher*, 165 Wn.2d at 747.

Defense counsel's failure to object to prosecutorial misconduct at trial constitutes waiver on appeal unless the misconduct is "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice'" and is incurable by a jury instruction. *Fisher*, 165 Wn.2d at 747 (quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)) (internal quotation marks omitted). In analyzing a prosecutorial misconduct claim, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). "'The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?'" *Emery*, 172 Wn.2d at 762 (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932)).

We discern nothing improper in the prosecutor's closing argument when viewed in context. At closing the prosecutor argued:

> [Defense counsel] told you that you could use whatever is in your hand. Does that mean if someone is in your face yelling at you and you got a gun, you can shoot him? I wouldn't advise that you do that.
>
> The instructions are there for a reason, so attorneys, prosecutors and defense, can't interject their own personal values into the case. Read the instructions. Don't let the defendant get away with this. No matter what happened, whether you believe that he got punched at first—let's say he did get punched and he stabbed him and he stabbed in the arm in self-defense. What about this part right here? What about the second attack? He pursued him. Don't let him get away with it.
>
> He told Mr. Andrews that he wasn't going to do [expletive], and on that day, he was right. Because he is the one who did it. He stabbed a man who was unarmed. When you read the self-defense instruction, you are going to see that you can't do that.
>
> They were at Safeway, and you are going to take into [account] all the factors that were involved that day, they were inside of Safeway. This wasn't a back alley. They were arguing, but it wasn't any shouting. Mr. Andrews wasn't in his face. *You don't get to stab an unarmed man. Don't let him get away with it.* Find him guilty. Thank you.

RP at 690-91 (emphasis added).

In stating that, "You don't get to stab an unarmed man," the prosecutor clearly referred to the self-defense jury instruction's requirement that the amount of force employed must not exceed that which a "reasonably prudent person would use under the same or similar conditions as they appeared to [Gale] person, taking into consideration all of the facts and circumstances known" "to [Gale] at the time of and prior to the incident," which argument simply rebutted defense counsel's argument that Gale's conduct in stabbing Andrews was a reasonable response to having been punched. RP at 691; CP at 85. Viewed in context, the prosecutor did not argue that it could never be justifiable to stab an unarmed assailant, but rather, that the facts and circumstances that were present to Gale did not justify his conduct in stabbing Andrews.

Moreover, even if the prosecutor had misstated the law on self-defense, such a misstatement could have been cured by a jury instruction had defense counsel objected at trial. Therefore, this challenge is waived. Accordingly, we affirm Gale's conviction.

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

Bjorgen, A.C.J.

BJORGEN, A.C.J.

We concur:

Maxa, J.

MAXA, J.

Melnick, J.

MELNICK, J.