71518-6

No. 71518-6-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

STEVEN KAYSER, Appellant.

BRIEF OF RESPONDENT

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2. Whether Kayser can demonstrate his trial attorney was constitutionally ineffective when the record reflects he strategically choose to present a self-defense of persons and to withdraw any reliance on defense of property when the thrust of Kayser and his wife's testimony and evidence was that the Kayser's were scared for their personal safety, not from harm to their property.

3. Whether Kayser can object for the first time on appeal to the court's 'to convict' and a definition instruction when these instructions accurately state the law, set forth all of the essential elements of the charged offense and do not otherwise relieve the state of its burden of proof.

4. Whether the trial court acted within its discretion to admit relevant evidence that had a tendency to show Kayser intended to create the required oppression of bodily harm in Adams when he pointed and fired his weapon at Adams.

5. Whether the trial court erred permitting detective Allgire to sit at counsel table with the deputy prosecutor under ER 615 where the deputy was to assist the prosecutor with the trial and whether allowing the detective to sit with the prosecutor during trial constitutes impermissible vouching/commenting on the credibility of the detective as a witness where the detective did not witness the shooting and was not central to the state's case.

C. FACTS

1. Procedural facts

Steven Kayser was charged with assault in the second degree with a deadly weapon. RCW 9A.36.021(1)(c). CP 3-4. Prior to trial, Kayser moved in limine to exclude all witnesses, including investigating officers from being in the courtroom or sitting at counsel table during testimony. RP 23-24. The prosecutor responded that he was requesting one officer, detective Allgire be permitted to sit with the prosecutor at counsel table to assist in the prosecution of Kayser pursuant to ER 615. After determining the detective had no personal knowledge regarding the alleged incident and considering ER 615, the trial court denied Kayser's request and permitted detective Allgire to sit with the prosecutor to assist with the trial.

At trial Kayser's defense theorized primarily Kayser acted in self-defense and defense of others in light of Adam's alleged trespassing or remaining on Kayser's property after he was asked to leave. Kayser's trial attorney proposed two versions of the instruction defining the use of lawful force. One that covered self-defense, defense of others and defense of property and another that addressed only self-defense and defense of others. RP 940.

The trial court indicated initially it was not included to instruct the jury on the defense of property/malicious trespasser defense, based on the testimony presented at trial. RP 940, 943. Kayser's trial attorney however, argued and the trial court eventually agreed, to give the third paragraph and instruct the jury fully on the defense of property theory. RP 947-949. See also, RP 961, RP 964, RP 1044, RP 1040. Kayser's attorney also requested the trial court also give defense proposed instructions 10 and 11 defining a 'trespasser' and the phrase, 'remaining unlawfully' as it related to Kayser's theory of the case RP 1049. Kayser's attorney explained the defense was theorizing Adams trespassed by unlawfully staying on the Kayser property after Adams had served legal process and was asked to leave. RP 1050. Based on Kayser's representations, the trial court agreed to give these additional proposed defense definition instructions. RP 1051, CP___(instructions 17, 18).

Thereafter, prior to giving the jury instructions, the parties again discussed instruction 13 and whether, because the court was going to give third paragraph explaining lawful force in the context of lawfully protecting Kayser from malicious interference with his property, the court also needed to give an instruction defining 'malicious trespass or interference' with property. RP 1056. After the trial court decided and Kayser's attorney conceded the trial court would need to further

instruct/define the jury on the definition of 'malicious' to provide context to the third paragraph of the unlawful force instruction, Kayser's attorney decided to withdraw his request to include the defense of malicious interference with property defense. RP 1057. By withdrawing his request to include the third paragraph pertaining to lawful force in context of defense of malicious interference with property, Kayser effectively removed the trial court's need to include the definition of malicious. RP 1057. Kayser's attorney explained he did submit a 'unlawful force' instruction that did not include the third paragraph pertaining to defense of malicious trespass or interference of property and that it would be fine to substitute and use that instruction instead. RP 1057.

While going through the remainder of the other proposed jury instructions, Kayser did not object to the 'to convict' or assault in the second degree definition instruction, proposed and ultimately used, by the trial court. RP 1042--1060, Supp CP 20-53 (instruction 5, 6).

After deliberations, the jury convicted Kayser of assault in the second degree by assaulting Adams with a deadly weapon. CP 10-19. The jury also found, by special verdict that Kayser was armed with a firearm during the commission of the crime. CP 6. Kayser was sentenced to the low end of the standard range of 39 months incarceration. CP 10-19. Kayser timely appeals. CP 7-9.

Following Kayser's notice of appeal, the parties determined the trial court's jury instructions were missing from the court record. The parties and the trial court subsequently re-constructed the jury instructions given by the trial court. Supp CP 2--53.

On appeal, Kayser impermissibly asserts he believed his acts were justified and therefore he declined to agree to a beneficial plea bargain. Br. of App. at 14. What was or was not offered to Kayser in an effort to resolve this matter pre-trial is irrelevant to the fairness of Kayser's trial or the sufficiency of the evidence, constitutes matters outside the record inappropriately referred to and not appropriately verified. Therefore, Kayser's reference and effort to appeal to the emotions of the appellate court that somehow his alleged errors should be viewed differently presumably from 'regular' defendants because of his alleged innocence and willingness to forego a beneficial plea bargain should be stricken from the record. See, State v. McFarland, 127 Wash. 2d 322, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995), .

2. Substantive facts

Mark Adams is a process server who worked with 4th Corner Network, a legal messenger/service company, out of Whatcom County

since 2007. RP 244. On February 10th 2010 at approximately 4 p.m., Adams went to 7251 Everett Road to serve papers on Kayser and his wife. RP 248, 254, 306, 324, 384. Adams did not know either Kayser or his wife, Gloria Young but knew he needed to serve the registered agent of two companies, designated as Kayser, and Kayser's wife, Gloria Young (herein referenced as Young) as Jane Doe. RP 249.

The Kayser home/ office area at 7151 consisted of a compound that included a large gravel parking area adjacent to Everett road, a large, long pole building that ran along one side of the large gravel 'shipping' parking area and a residence set further back from the pole building beyond/furthest away from the parking area and Everett Road. RP 251, CP__ exhibits 71-78. Adams explained that as a process server he understood he had the right to go onto private property to serve papers and would not be considered a trespasser. RP 250. Adams also understood that if any problems or issues arose with a party he was trying to serve, the best practice was to be safe and leave the property. RP 249.

Adams parked in the large gravel parking area just off Everett Road on Kayser's property. RP 251. Adams then went looking to find Kayser in the pole building first checking and knocking on a door closest to Everett Road and getting no answer. RP 257. Adams went to the pole building first because he figured Kayser was likely still working and not at

his residence set further inland from the road, given the time of day. RP 324. Upon hearing his cell phone ring from his car, then parked in the gravel parking area, Adams momentarily stopped looking for Kayser and went back to his car and answered his phone. RP 258. After fielding his phone call, Adams returned to the pole building and tried a second door. RP 259.

Adams then noticed a woman walking down a sidewalk from the main residence further away from the pole building toward the parking lot and pole building. RP 260. Adams redirected his attention and walked toward her as she walked toward him. RP 261. According to Adams, he said hello and asked if Mr. Kayser was there. RP 260-61. Young responded "no" RP 261. Adams then asked if she resided there and if she was his wife. RP 261. The woman responded "yes" and Adams then presented personal copies of papers he needed to serve on her. RP 262. Young took the paper work. Id.

About this same time, Kayser exited the pole building from an area behind Adams that Adam's then noticed was marked 'office.' Adams asked Young if the man walking toward them was Kayser and she nodded it was. RP 264. Kayser stridently walked toward Adams and asked if he could help him. RP 341. Adams then handed and served Kayser with paper work relating to two corporations he was listed as the registered

agent for. RP 264-5. Kayser took the papers from Adams but appeared angry in his demeanor. RP 265-66. When Adams asked for Kayser's signature, Kayser appeared to become angrier and responded by advising Adams, "No, you have 5 seconds to get off my property" or "I'll shoot you." RP 268, 343.

Adams explained at trial that getting a signature was not necessary to effect service but that it was policy to make the request in the event the individual being served later claims they were never served. RP 334. Adams confirmed that at the time of the shooting he did have a metal clip board designed to hold and protect papers but it was already open when he handed Kayser the paper work. RP 337, 342. Adams testified that after Kayser asked him to leave, he started walking back towards his vehicle parked a distance away from where he had met up with Young, while Kayser jogged quickly back to his office and retrieved a shotgun. RP 268-69. Young stayed standing in the same spot she and Adams had met between the house walkway and the office pole building furthest away from where Adams parked his car. RP 269.

Kayser retrieved his shot gun very quickly, counted to five and shot into the air as he walked closer toward Adams –who was then walking toward his car approximately 20 yards away. RP 270. Adams

began moving even faster but did not run toward his car because he feared tripping in the gravel parking lot. RP 271.

After the first shot, Kayser immediately began counting again while Adams fumbled to get into his car. RP 272. Adams testified he "saw a man with a shotgun and you know, it was, had come down and he pointed it at the car and me." RP 272. According to Adams, Kayser then lifted the weapon about 20 degrees and took another shot toward Adams and his car. RP 273, see also RP 348. After crouching under the dashboard of his car, Adams was surprised to see the shot had not shattered his windshield. RP 273. Adam's car was parked at an angle, in the gravel parking lot facing Kayser who, standing in the gravel parking area, had the pole building and residence behind him during the shooting. RP 274. Adams explained he was scared, his hands were shaking and he was just trying to get his keys in his ignition whilst staying under the protection of the dashboard as he tried to safely drive away. RP 278. As Adams was backing the car up, Kayser fired a third shot over the car at a slightly higher angle than the second shot. RP 275. Adams explained there were three shots. The first was in the air, the second was directed at him while he was then inside his vehicle and then a third time in Adams direction but at a higher angle. RP 348. Adam's believed Kayser was

shooting at him and having not suffered any injury remained convinced Kayser's bullet must have hit his vehicle.

Once down the road from Kayser's property, Adams pulled over and called 911. RP 278. When Deputy arrived, neither Adams nor the deputy could find any evidence Adams car was hit by a shotgun. RP 287. When Deputy King arrived he noticed Adams was shaking and talking rapidly. RP 392. Adams told Deputy King Kayser took three shots; two were in the air and one shot was taken at him. RP 467. Adams advised Kayser pointed the shotgun at him and pulled the trigger. RP 59, 467. Adams thought he was dead. RP 468. Deputy Kind reported that Adams reported Adams was in fear for his life. RP 468.Adams was subsequently confused that neither he nor his car were hit by gunshot. RP 467.

According to Kayser's investigator, Adams subsequently told him during a defense interview that Kayser only momentarily pointed the shotgun in Adam's direction and that he did not believe it was intentional. RP 993. At trial, Adams contended Kayser's investigator mischaracterized his defense interview answers. RP 350. Adams clarified Kayser did shoot at him, all of the shots were into the air and he didn't know if it was intentional or not but he was so scared he was in his car ducking under the dash between the second and third shots while he was trying to start his car and leave. RP 351, 994. Adams also confirmed with investigator

Robinson he was carrying at metal clip binder with paper work the day of the shooting that was approximately an inch and a half thick. RP 995.

A neighbor, Dawneeeta Demmer and her twenty-one year old son, Jason testified they were walking down Everett road, near Kayser's property, on the day of this shooting. RP 368. Dawneeta recalled seeing Adams car pull into Kayser's property through an open gate. RP 369. Subsequently, they both reported hearing loud counting and then gunshots. RP 371. The Demmer's confirmed they heard several shots of gunfire and then a car squeal out of Kayser's driveway. RP 373. Jason recalled looking toward Kayser's property and seeing Kayser with his weapon pointed to the sky at some point during the incident. RP 377.

Another neighbor, Brad Benard, who lived off Everett road just a property away from Kayser's place, reported hearing a bullet graze by him and a buddy on the same day, February 10th 2010. RP 656. Benard reported he could hear the whistling sound of the bullet above his head, in addition to hearing other gunshots. RP 542. He and his friend, Randy, immediately took cover off to the side of a barn building for fear of being hit. RP 540 551. Benard did not call 911 but did call a neighbor, who happened to be deputy sheriff, to ask him if he or his kids had been shooting any weapons in the area. RP 547, 543. Crisp confirmed Benard

did in fact call him on the same day as the shooting with this concern. RP 606-7.

After Kayser was safely detained following Adam's report to police of the incident, he told Deputy King he saw a man talking to his wife in his driveway and that he thought the man was too close to his wife because Adams appeared to be about five feet from Young, so he came out of his office. RP 397. Kayser reported that Adams gave him some paper work when he came out and he in response, then asked Adams to leave. RP 397. According to Kayser, Adams refused to leave. So Kayser retrieved his shotgun from behind his office door and fired two shots in the air and a third with when Adams was driving away. RP 297. Kayser acknowledged using live ammunition during this incident. RP 423.

Officer's subsequently determined Kayser's shotgun was in working order on the day of this incident and that Kayser shot using 12 gauge shotgun slugs. RP 424, 426, 682. Detective Allgire explained to the jury the shot gun slugs Kayser used tend to travel further as a projectile in contrast to when bird shot is used; bird shot fans/spreads out of from the shotgun when fired. RRP 632. Based on the composition of Kayser's weapon and use of a projectile slug, Kayser's shots could have traveled up to 900 feet depending on gravity, altitude, wind and angle of each shot. RP

637. Benard's property was determined to be approximately 500 feet from Kayser's property. RP 678.

When detained later that afternoon, Kayser did not want to write out a statement after speaking to officers because he had already prepared and printed out a typed statement titled "memorandum of trespassing incident" that was left on the ground in the gravel parking area when deputies detained him. RP 400, 420, CP __Plaintiff's exhibit 105.

In his memoranda, Kayser characterized Adams as a trespasser who refused to leave his property. CP ___ (plaintiff's exhibit 105). Nothing in Kayser's memoranda or comments to law enforcement stated Kayser or his wife were in fear for their person or their property or that Adams was doing anything other than allegedly refusing to leave the property. RP 459. When contacted after the shooting, Kayser's wife, Young appeared calm, articulate and concerned for Kayser but not afraid. RP 455, 585. Young is a well-educated person who prior to marrying and moving to Ferndale with Kayser, chaired and directed accredited nutritional programs for teaching hospitals. RP 745-748. Neither Kayser nor Young called the police or 911 while Adams was on their property or after Adams fled. RP 459.

Inside Kayser's office, where his shotgun was located, officer's found a mock up of a sign that stated "stop" "do not" "this with

permission from owner" "and appt" "this is a very dangerous place" RP 457, see also Supp CP ___ (exhibit 90-91). On the bottom of the mocked up sign, another sticky attached to it said "armed response." RP 457-459.

Kayser's wife Young, reported she first saw Adams looking around the Pole building from a window within the Kayser residence. RP 527. Young first called Kayser's office to ask him if he was expecting anyone and then when, Kayser didn't come out, Young decided to go out and see what the man wanted. RP 527. She reported Adams made contact with her, handed her some papers and asked where Kayser was. RP 527. At this point, Kayser exited his officer from the Pole building. RP 528. Young reported that after Adams gave Kayser papers, Kayser told Adams he needed to get off their property. Id. Young reported that Kayser got a gun and warned Adams he would shoot. RP 528. Young then stated and physically demonstrated to deputy King that Kayser pointed and shot into the ground during the incident, as opposed to the air. RP 528.

At trial, Young testified for the first time that Adams scared her. RP 758. She claimed initially that upon seeing Adams she locked herself in the basement of her home. RP 755. On cross examination, Young acknowledged going into her basement but denied locking herself in. RP 794. She instead explained that after going to the basement, she went back upstairs to the main room to call Kayser. RP 794. Young got Kayser on

the phone and asked if he was expecting anyone. RP 757. After learning Kayser was not, Kayser assured Young he would check out Adams. RP 794. Young, despite being told Kayser would take care of it and allegedly being "really scared" nonetheless went outside and approached Adams on her own upon seeing that Adams appeared to be walking towards Kayser's office. RP 759, 796. Young explained she was trying to distract Adams to give Kayser more time. RP 777, 796.

Prior to coming out, Young testified she observed Adams walking along the pole/office building trying doors and peeking into a boarded window. RP 784. Young acknowledged during trial however, this gravel parking area was used as a business shipping area and, that she and Kayser often received goods from UPS via this lot. Young also confirmed that most days Kayser worked in the pole building/warehouse in his office at the end of this same building. RP 788. Young did testify she worried about third parties getting access to their property because the Kayser's kept trade secrets on the property. RP 820. Young also confirmed her and Kayser had previously been involved in lawsuits. RP 803.

Young then testified consistent with her statements immediately following the shooting, that when she exited her residence and walked toward Adams, Adams also turned and toward her. As the two approached each other Adams asked her if she was Gloria Young and then handed her

papers. Adams then asked her where Kayser was. RP 760. In contrast to Young's consistent testimony, Young also testified for the first time, Adams had something shiny in his hand during this encounter and she was petrified when Adam's allegedly reached into this container. RP 762. Young testified it was at this point Kayser told Adams he had five seconds to get off "my property." RP 763.

According to Young, Kayser counted twice to five, took a shot and then Adams started to move slowly toward his car that was parked on the far side of the gravel parking lot near Everett road. RP 783, 764. When Adams got to his car, Adams car tires squealed as he backed up and drove away. RP 764-766.

Arguably to explain some of Young's inconsistent testimony, Young testified she was confused when she talked to officers after the shooting. And that she didn't tell anybody that Kayser shot into the ground. RP 768-69. She instead insisted she told them Kayser shot into the air. RP 768-6, 808. Young also testified, again for the first time, that she was afraid that Adams might do harm to "property or person." RP 792.

Similarly to Young's trial testimony, Kayser's trial testimony varied from his statements and written memorandum of the 'trespassing incident' made immediately following the shooting. RP 875. In Kayser's memo and statements, he focused on the fact he considered Adams a

trespasser and as such Kayser had the right to remove him. RP 875, Supp CP __ (Ex.105). After Kayser was arrested, deputies explained to Kayser that his 'no trespassing' signs did not preclude a process server from coming onto his property to serve papers. RP 892. When informed of this Kayser stated that information was news to him but did not add any new details. RP 892.

At trial however, Kayser testified for the first time not only that Adams refused to leave and was thereby trespassing but that he was also "threatening us." RP 875. When pressed on cross examination, Kayser insisted his last shot was over an open field but that he was "a little fuzzy" on what direction he took the second shot. RP 890-91. Kayser, similar to Young, also testified for the first time that he was very concerned about the metal container Adams was carrying and thought, when Adams opened it as he neared his car, that Adams had a gun. RP 835. Kayser also testified to the jury that he told officers he thought Adams had a gun even though none of the responding deputies recalled hearing such a statement and Kayser mentioned nothing about a gun in his memorandum of trespassing incident. RP 850. During his testimony Kayser explained to the jury, based on these circumstances, he felt it was reasonably necessary to get his shotgun to protect his property given how scared he and Young

were. RP 895. The jury rejected Kayser's version of events and convicted him as charged.

D. ARGUMENT

1. When viewed in the light most favorable to the state, the evidence presented below supports the jury's verdict.

Kayser asserts that the evidence is insufficient to support his conviction for assault in the second degree because there was conflicting testimony from the complaining witness. Br. of App. at 30. Kayser also contends there is insufficient evidence to prove that Kayser did not act in self-defense because there was some testimony that suggested Kayser did not fire his shotgun with the requisite intent. Br. of App. at 30. Kayser's arguments are not predicated on the appropriate legal standard or otherwise of merit and should be rejected.

RCW 9A.36.021(1)(c) provides a person is guilty of assault in the second degree if he assaults another with a deadly weapon. The statute does not define assault so the common law definitions are used. State v. Elmi, 166 Wash. 2d 209, 215, 207 P.3d 439 (2009). In this case, the state charged Kayser with committing assault by putting another, Adams, in fear of apprehension of bodily harm. Under common law, "specific intent either to create apprehension of bodily harm or to cause bodily harm is an

essential element of this alternative of assault in the second degree. State v. Byrd, 125 Wash. 2d 707, 712, 887 P.2d 396 (1995). A firearm is a deadly weapon.

Under a sufficiency of the evidence analysis, the test is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Joy, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993). In applying the test, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Joy, 121 Wash. 2d at 339. Such a challenge admits the truth of the State's evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. State v. Hernandez, 85 Wash. App. 672, 675, 935 P.2d 623 (1997). The [trier of fact] "is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference." State v. Bencivenga, 137 Wash. 2d 703, 707, 974 P.2d 832 (1999), (*quoting* State v. Jackson, 112 Wash. 2d 867, 875, 774 P.2d 1211 (1989)). This court may infer specific criminal intent of the defendant from conduct that plainly indicates such intent as a matter of logical probability. State v. Goodman, 150 Wash. 2d 774, 781, 83 P.3d 410 (2004). Additionally, the

reviewing court defers to the fact finder on issues of credibility, conflicting testimony and persuasiveness of the evidence. State v. Thomas, 150 Wash. 2d 821, 83 P.3d 970 (2004), *abrogated in part on other grounds*, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Here, the parties did not contest that Kayser was upset with Adams or that he retrieved his shotgun, that he intended to shoot or that he fired his shotgun three times. The jury was however, given different versions of whether Kayser pointed his shotgun at Adams or not and whether Kayser shot at Adams in a manner intending to cause apprehension of fear of bodily injury. Adam's testimony, coupled with his actions at the time of the shooting and the statements he made immediately following the shooting were sufficient for a jury to find Kayser acted or shot in a manner with the requisite intent, to cause in Adam Apprehension of fear of bodily injury.

The jury ultimately determined Adams was more credible than Kayser. Moreover, Adams testimony established he acted in a manner consistent with him believing Kayser was shooting at him. Adams quickly retreated to his vehicle, got in and hid and ducked under the dash board as he fumbled to get his keys in the ignition. When he looked out of his vehicle he saw Kayser lower the weapon toward him and shoot. Neighbors

also reported hearing a shot whiz by them about this same time further corroborating Kayser shot at least once horizontally toward Adams. After Adams peeled out of the Kayser property and pulled over, he fully expected to see his car had been shot up because he saw Kayser point his weapon at him and knew if he wasn't shot, his car certainly was. Apprehension of fear by a person at whom a firearm is pointed may be inferred, unless the person knows it is unloaded. State v. Miller, 71 Wash. 2d 143, 426 P.2d 986 (1967).

This testimony and the evidence below therefore sufficiently supports each element of the jury verdict beyond a reasonable doubt. It is for the jury to determine credibility and weed through conflicting testimony. The fact that Kayser's version of events conflicts or would not, when viewed in isolation, support the jury's verdict does not render the remaining evidence, that the jury determined was credible and reliable, insufficient. Kayser's characterization of the evidence is not the standard by which this court determines whether there is sufficient evidence to support a jury verdict.

Next, Kayser argues the evidence was insufficient to support the jury's determination that Kayser did not act in self-defense or defense of his wife. Br. of App. at 30. Kayser argues the facts demonstrate Kayser

was justified in shooting into the air to get Adams to leave and that such conduct does not constitute a crime under these circumstances.

Kayser wholly ignores the evidence and testimony that supports the state's position that Kayser shot at Adams and his car as Adams was trying to leave Kayser's property. During the trial, Kayser testified he got his weapon because he feared for his and Young's safety. Kayser also testified for the first time that he believed Adams had a gun and felt he had no choice to but to fire his shotgun multiple times to get Adams to leave. The jury was instructed that it was a complete defense if the force used, the shooting, was lawful. In other words, if the shotgun was fired by Kayser because he reasonably believed he or his wife Gloria Young was about to be injured and that the force used (shooting) was not more than necessary and by a means a reasonably prudent person would use under similar circumstances.

Understandably, the jury rejected Kayser's argument because it ignores the credible evidence that suggested Kayser's actions were not reasonable, nor necessary to protect him or his wife from harm. The overwhelming evidence reflects Adam's did not act in a threatening manner. Kayser himself acknowledged that he was mad at Adams for coming onto his property to serve him legal papers. Kayser's memoranda of trespassing incident revealed Kayser believed Adams was trespassing

and that he, as the land owner had the right to remove him in the manner he did. Nothing Kayser said or wrote immediately following this incident reflected he feared for his or Young's safety.

Moreover, Kayser's new testimony that he believed Adams had a gun, was incredible given that he never mentioned a gun to police immediately after his encounter with Adams. Under these circumstances, it was reasonable for the jury to reject Kayser's version of events and based on the evidence find Adam's testimony credible in determining Kayser's actions were not lawful under the circumstances. The evidence when viewed in the light most favorable to the state therefore supports Kayser's conviction for assault in the second degree with a deadly weapon beyond a reasonable doubt.

2. Kayser's attorney reasonably, strategically decided to not seek a defense of property instruction and instead chose to focus on Kayser's self-defense and defense of others legal theory to demonstrate Kayser acted lawfully when he fired his shotgun three times during his encounter with Adams.

Next, Kayser argues his trial attorney was constitutionally ineffective by withdrawing his request to include the defense of property from the jury and using another proposed defense instruction that defined

the use of lawful force only in the context of self-defense and defense of others. Br. of App. at 31.

Where instructional error is the result of alleged ineffective assistance of counsel, the invited error doctrine does not preclude review. State v. Kyllo, 166 Wash. 2d 856, 215 P.3d 177 (2009). However, in order to warrant reversal, it is Kayser's burden to demonstrate from the record that his attorney's performance fell below an objective standard of reasonableness and that the alleged deficient performance prejudiced his ability to obtain a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), McFarland, 127 Wash. 2d, 334-35.

Performance is deficient if it falls "below an objective standard of reasonableness." Strickland, 466 U.S. at 688. The threshold for finding deficient performance is high in light of the deference afforded to decisions of defense counsel in the course of representation. Therefore, to meet the standard, Kayser must overcome "a strong presumption that counsel's performance was reasonable.' Kyllo, 166 Wash. 2d, 862. When counsel's conduct can be characterized as legitimate strategy or tactics, performance is not deficient. Id at 863.

The prejudice prong requires Kayser to demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the

outcome of the proceedings would have been different had the error not occurred. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland at 694. If either element of deficient performance or prejudice are not met, the inquiry ends. An ineffective assistance of counsel claim is reviewed on appeal de novo. Kyllo, 166 Wash. 2d 856.

Kayser argues, relying on State v. Bland, 128 Wash. App. 511, 517-518, 116 P.3d 428 (2005) and State v. Redwine, 72 Wash. App. 625, 865 P.2d 552 (1994), he was entitled to a defense of property jury instruction to support his theory of the case. Br. of App. 33. Bland is not on point. In Bland, the reviewing court reversed after determining the unlawful force instruction was erroneous and did not sufficiently delineate the distinction between self-defense and defense of property. Bland did not challenge his right to have the jury instructed on the defense of property. Moreover, nothing in the record reflected the issue Bland asserted on appeal was predicated on a strategic unreasonable choice made by his trial counsel.

Similarly, Redwind is of no assistance to Kayser. In Redwine the court reversed because the jury was given an incomplete instruction on self-defense. Specifically, the instructions impermissibly failed to instruct the jury that the state had the burden to prove self-defense beyond a

reasonable doubt. Kayser's reliance on Bland and Redwine are therefore misplaced.

In contrast to Kayser's representations, the trial court in this case did not find that the evidence was insufficient to support a defense of property instruction. See, Br. of App. at 35. The record reflects instead that Kayser's trial attorney strategically chose to proceed only on a self-defense/defense of other strategy after the trial court determined it would also instruct the jury on the definition of the term "malicious" if it was giving the lawful defense of property defense within the unlawful force instruction. This decision was reasonable.

The evidence while sufficient to support a defense of property lawful force defense based on Kayser and his wife's testimony that they feared for "person or property" was not particularly persuasive and by Kayser's attorney's own admission below, did not constitute the thrust of Kayser's defense theory. The stronger theory on defense, as conceded below, was a self-defense, defense of others theory. Kayser and Young repeatedly testified they were scared to death of Adams throughout this encounter. Neither really expressed concern Adams was maliciously damaging or threatening to damage their property. While Kayser asserted Adams had been trespassing nothing in Kayser's memorandum of trespassing indicated Kayser thought Adams was maliciously interfering

or threatening to damage his property. Under these circumstances, it was reasonable for Kayser to choose not to pursue the defense of property theory and ensure he could argue his theory of self-defense/defense of other defense based on trespass without also adding the complication of adding another term, 'malicious' trespass for the jury's consideration in the context of either defense of property or self-defense and person. This Court has approved of an all or nothing strategy where trial counsel strategically chooses not to pursue a lesser included jury instruction. State v. Grier, 171 Wash. 2d 17, 246 P.3d 1260 (2011), State v. Hassan, 151 Wash. App. 209, 221, 211 P.3d 441 (2009). In those cases, deference is given to trial attorneys and the strategic decisions they may have to make during the course of a trial.

As in Grier and Hassan, Kayser cannot overcome the strong presumption of reasonableness of his trial attorney's decision to focus at closing on a self-defense defense of others theory. Early on Kayser's trial attorney revealed the defense of property theory was not the primary theory Kayser was pursuing. Moreover, it is clear from the record Kayser's attorney did not want the jury to be instructed on the term malicious in the context of giving a defense of property instruction. When given a choice, Kayser's attorney determined Kayser was better off pursing his strongest self-defense/defense of others theory and not

confusing the jury with an alternative, inconsistent defense that required more than proving simple trespass and fear of injury of himself or his wife. Kayser's strategic choice was reasonable.

Even if considered deficient performance however, Kayser cannot demonstrate the requisite prejudice to prevail on his ineffective assistance of counsel claim. Nothing in the record suggests Kayser's trial attorney's strategic choice undermines the confidence in the jury verdict. The verdict would not be any different if the jury had been given the defense of property lawful defense instruction in light of the lack of evidence to suggest Adams trespassed maliciously or threatened damage to any of Kayser's property. At most, the evidence suggested, if you believed Kayser's version of events, Kayser was acting to defend himself and Young.

3. The trial court's instructions, taken in their entirety, did not relieve the state of its burden of proof and properly instructed the jury on all of the essential elements of the charged offense, including, self-defense.

Jury instruction challenges are reviewed in the context of the instructions as a whole. State v. Pirtle, 127 Wash. 2d 628, 656, 904 P.2d 245 (1995). "Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a

criminal offense beyond a reasonable doubt." Id. It is reversible error for the court's instructions to relieve the state of its burden of proof. Byrd, 125 Wash. 2d 707. The sufficiency of a challenged to the "to convict" instruction is reviewed on appeal de novo. State v. Mills, 154 Wash. 2d 1, 7, 109 P.3d 415 (2005). The reviewing court must "review the instruction in the same manner as a reasonable juror." State v. Mills at 7.

Here the trial court gave the following 'to convict' instruction:

> To convict the defendant of the crime of assault in the second degree while armed with a deadly weapon, as charged in count I, each of the following elements of the crime must be proven beyond a reasonable doubt:
>
> (1) That on or about 18th day of February, 2010, the defendant assaulted Mark Adams, with a deadly weapon; and
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return of verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

Supp. CP 20-53, ___. Kayser agreed to the use of this instruction. RP 1042-1060. In further defining this crime the jury was also instructed:

> An assault in an act, with unlawful force, done with intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent

> fear of bodily harm even though the actor did not actually intend to inflict harm.

And:

> A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

And;

> It is a defense to a charge of Assault in the Second degree that the force used or attempted was lawful as defined in this instruction.
>
> The use or the attempt to use 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, or by someone lawfully aiding a person who he reasonably believes 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 similarly conditions as they appeared to the person, taking into considerations of all 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 not lawful. If you fine 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 20-53, 59-61

Kayser contends for the first time on appeal, that the trial court failed to instruct the jury on the general intent required for criminal assault in the 'to convict' or assault definition instruction. Br. of App.at 45.

Kayser is precluded from objecting to the 'to convict' or the definitional instructions in this case because he failed to object below. RAP 2.5(a)(3), State v. O'Hara, 167 Wash. 2d 91, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010), . Therefore, short of Kayser demonstrating the alleged jury instruction error is an manifest error of constitutional magnitude, Kayser may not assert this error for the first time on appeal.

An Error is 'manifest' pursuant to RAP 2.5 if Kayser can demonstrate the error resulted in 'actual' prejudice, meaning that the defendant has made a plausible showing that the alleged error "had practical and identifiable consequences in the trial below. O'Hara, 167 Wash. 2d at 108. If Kayser cannot demonstrate how the alleged error actually affected his fundamental rights at trial, his challenge is barred. State v. Scott, 110 Wash. 2d 682, 688, 757 P.2d 492 (1988). Furthermore, even if this court determines the error alleged is manifest, it may still be subject to harmless error analysis. McFarland, 127 Wash. 2d, 333.

Here, the 'to convict' instruction included all of the essential elements of the charged crime. When a defendant asserts self-defense and meets his burden by a preponderance of the evidence to put forth such a defense, the state then has the burden to prove beyond a reasonable doubt

that the defendant did not act in self-defense. State v. Walden, 131 Wash. 2d 469, 473-74, 932 P.2d 1237 (1997).

Self-defense negates the 'intent' element of the charged crime. See, State v. Acosta, 101 Wash. 2d 612, 615, 683 P.2d 1069 (1984). Thus, the 'to convict' jury instructions are sufficient if the 'to convict' instruction sets forth the elements of the charged crime, in this case assault in the second degree so long as a separate instruction defining self-defense explains the defense, including that the state has the burden to prove beyond a reasonable doubt that Kayser did not acted with intent to commit a crime and not in self-defense. State v. Hoffman, 116 Wash. 2d 51, 109, 804 P.2d 577 (1991), State v. Ng, 110 Wash. 2d 32, 750 P.2d 632 (1988). In Acosta, 101 Wash. 2d at 615, the appellate court confirmed that a separate instruction stating that the state has the burden of proving the absence of self-defense beyond a reasonable doubt is the preferable practice to ensure the jury understands the state has the burden of proving the absence of such defense beyond a reasonable doubt. Id. at 622.

In addition to setting forth the required essential elements in the 'to convict' instruction, the instructions in this case as a whole, correctly define and explain the requisite mens rea applicable to the charged offense in the context of a self-defense claim. Therefore, the state was not relieved

of its burden of proving all of the elements of the charged offense. Under these circumstances, the defendant cannot show that the error Kayser alleges had any practical or identifiable consequences. Therefore, pursuant to O'Hara, RAP 2.5, Kayser should be precluded from challenging the 'to convict' and definitional instructions for the first time on appeal.

Even if reviewable, contrary to Kayser's argument, the 'to convict' instruction in this case did not omit an essential element of the charge by not stating the assault must be intentional when the term 'assault' itself encapsulates the element of intent. Scott, 110 Wash. 2d 682. Moreover, the jury was given the definition of assault in the context of an assault in the second degree and appropriately instructed the jury on the law regarding self-defense such that a reasonable jury would understand that the state had the burden to prove beyond a reasonable doubt Kayser assaulted Adams, *without lawful force,* and that simply proving Kayser acted with intent to create apprehension and fear of bodily harm would not be enough to find Kayser guilty.

An assault, by its inherent definition is an intentional act. Assault "is not commonly understood as referring to an unknowing or accidental act." State v. Davis, 119 Wash. 2d 657, 835 P.2d 1039 (1992). Thus, the Davis court held the term assault "adequately conveys the notion of

intent," necessarily "includes the element of intent." Id at 663, *citing* State v. Hopper, 118 Wash. 2d 151, 158-59, 822 P.2d 775 (1992).

In a footnote, Kayser contends that the common understanding and definition of assault as inherently encapsulating that the act must be intentional, does not work in the context of reviewing the sufficiency of a jury instruction using the term "assault." Br. of App. at 46. However, our State Supreme Court in State v. Taylor rejected this argument:

> Application of a strict standard of review does not alter the plain meaning of "assault." This Court has held that the word "assault" conveys and intentional or knowing act. Applying the different standards of construction requires the court to judge the sufficiency of the charging documents as a whole with different levels of scrutiny, but the standards to not require the court to give words different meanings depending on the standard of construction applied.

State v. Taylor, 140 Wash. 2d 229, 242, 996 P.2d 571 (2000).

Kayser next contends, that even if the 'to convict' instruction was adequate, the definition instruction further defining the term 'assault' is not sufficient in the context of a self-defense case because it did not require the jury to find Kayser acted with intent to use unlawful force . Br. of App. at 47.

In contrast to Kayser's argument however, the jury was fully instructed that that an *Assault* is an act, done with *unlawful force* done

with *intent to create in another apprehension and fear of bodily injury which in fact creates in another reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily harm.* CP 20-53. This definitional instruction sufficiently sets forth all of the essential elements of this offense such that Kayser cannot challenge it for the first time on appeal. Scott, 110 Wash. 2d 682. In Scott, the reviewing court held the failure of a trial court to *further define* an element is not within the scope of the constitutional rule provided pursuant to RAP 2.5(a). Thus, Kayser's failure to object below precludes further review because the instructions given accurately set forth all of the essential elements of the crime.

The term assault, by its common understanding connotes an intentional, purposeful act. This is consistsstent with other assault statutes and the WPIC "to convict" instructions. For example, first-degree assault requires intent to inflict great bodily harm but neither the statute or the "to convict" instruction uses or requires the phrase "intentionally assaults." See. Wash. Rev. Code Ann. § 9A.36.011(a) (b) (West), WPIC 35.02, 35.04, See also, RCW 9A.36.021(e)(third degree assault), WPIC 35.21, RCW 9A.36.031 (fourth degree assault), WPIC 35.26. In fact, the only subsection of RCW 9A.36.021 that mentions 'intentionally' is subsection

(1)(a) and (b), subsections not applicable here. The inclusion of 'intentionally' in those sections, absent from the applicable section (1)(c), is to make apparent the different mens rea required for the act versus the mens rea for the harm inflicted, that the defendant "recklessly inflicts substantial bodily harm. RCW 9A.36.011. In this case the mens rea for the act, inherent in the use of the term 'assault' is the same as the mens rea required for the intended harm, that the assault was made with unlawful force done with intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily harm even though the actor did not actually intend to inflict harm.

The use of the 'unlawful force' term in the assault definitional jury instruction relates directly to the complete self-defense instruction wherein the jury was instructed that the state had the burden of proving beyond a reasonable doubt that the force used by Kayser in assaulting Adams by pointing and shooting a weapon at Mark Adams was not lawful. This instruction in conjunction with the 'to convict' and remaining instructions precludes any risk that a reasonable juror could find Kayser guilty of assault in the second degree had the jury determined Kayser assaulted Adams with 'lawful force" to protect him or his wife from being injured

even if the jury also determined Kayser intended the requisite harm –so long as the jury determined the force Kayser used was not more than necessary and reasonable under the circumstances known to Kayser at that time. Thus, the use of the term "assault" and "unlawful force" in the definitional instruction ensures a reasonable jury would have to find Kayser intentionally pointed and shot a weapon at Adams *without lawful force*, not just that Kayser acted with specific intent to create in another apprehension and fear of bodily harm by pointing and firing his shotgun, as suggested by Kayser.

Where the "to convict" instruction sufficiently set forth the essential elements of assault in the second degree, and the instructions as a whole are a correct statement of the law and Kayser did not object or propose alternative instructions, Kayser cannot demonstrate the issue he asserts constitutes a manifest error of constitutional magnitude warranting further review. RAP 2.5(a)(3). And even if Kayser's challenges to these definitional instructions were reviewable, his challenge fails. Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading and permit the defendant to argue his theory of the case. State v. Long, 19 Wash. App. 900, 902, 578 P.2d 871 (1978). Jurors are presumed to follow their instructions. State v. Lord, 117 Wash. 2d 829, 861, 822 P.2d 177 (1991).

4. The trial court acted within its discretion to admit relevant evidence, a picture of a mock up sign found in Kayser's office that tended to demonstrate Kayser' intentions in dealing with trespassers where the state had the burden of proving Kayser fired his shotgun the requisite intent to create an apprehension and fear of bodily injury in Adams beyond a reasonable doubt.

Next, Kayser challenges the admissibility pursuant to ER 404 (b), of a mock up of a sign found taped to the inside of Kayser's office where Kayser was working at the time of the event and where Kayser kept his shotgun. Br. of App. at 48. The trial court acted within its discretion in admitting this evidence where it could be helpful to the jury in determining Kayser's intentions at the time of the shooting and where this evidence does not constitute and was not introduced as impermissible character evidence pursuant to ER 404(b).

Evidence of other bad acts or crimes is not generally admissible to prove character and action in conformity with that character. ER 404(b) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith.
> It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan knowledge, identity or absence of mistake or accident.

To admit evidence pursuant to ER 404(b), the court must identify the purpose for which the evidence is admitted, determine the evidence is relevant to a material issue and its probative value must outweigh any prejudicial effect. State v. Everybodytalksabout, 145 Wash. 2d 456, 466, 39 P.3d 294 (2002), State v. Thang, 145 Wash. 2d 630, 642, 41 P.3d 1159 (2002).

In Everybodytalksabout the court held that the evidence of the defendant's character trait for being a leader was impermissible under ER 404(b), even though it was not misconduct evidence, because it was evidence of the defendant's character and was being used to prove that he acted in conformity with that character trait at the time of the murder to convict him as an accomplice to the murder. Id. at 468. Prior to Everybodytalksabout, the case law suggested impermissible ER 404(b) evidence was limited to evidence of other crimes or specific 'acts' of misconduct. *See*, State v. Brown, 132 Wash. 2d 529, 940 P.2d 546 (1997), as amended (Aug. 13, 1997), (evidence of defendant's contacts with two other women did not fall within purview of ER 404(b) because it did not involve a crime or misconduct); State v. Lough, 125 Wash. 2d 847, 889 P.2d 487 (1995)("purpose of ER 404(b) is to prohibit admission of evidence designed simply to prove bad character"). Following *Everybodytalksabout*, if the evidence in question was not characterized as

evidence of another crime or act of misconduct or such evidence is not impermissibly used to argue a defendant acted in comformity with alleged character evidence, such evidence did not fall within the scope of ER 404(b). Its admissibility is instead determined by its relevance.

The office sign admitted at trial does not constitute misconduct or a bad act under ER 404(b). Nor does it constitute impermissible character evidence. The sign in of itself, suggests nothing bad about Kayser's character. It simply is a mock up of a warning to persons entering Kayser's property or office without an appointment. Moreover, the state did not introduce this evidence or rely on its admission to show Kayser had bad character and acted accordingly. Particularly where the evidence is undisputed that Kayser responded to the alleged trespass situation by retrieving his shotgun from his office and firing it three times.

The sign was relevant. The sign was an indication from Kayser that he intended to deal with uninvited trespassers with an armed response. ER 404 (b), even if marginally applicable, permits admission of evidence such as the sign because it tends to demonstrate Kayser's intentions, his motive preparation and plan. State v. Dennison, 115 Wash. 2d 609, 628, 801 P.2d 193 (1990). Relevant evidence is "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence. State v. Stenson, 132 Wash. 2d 668, 701, 940 P.2d 1239 (1997). Proof that Kayser responded with a shotgun did not itself conclusively establish the requisite intent for the charged crime. Thus, Kayser's intent was squarely an issue for the trier of fact. Under these circumstances, the trial court did not abuse its discretion admitting photographs of Kayser's mock up office sign.

Kayser relies on State v. Hanson, 46 Wash. App. 656, 662, 731 P.2d 1140 (1987), to support his assertion the trial court erred admitting picture of this sign found in Kayser's office. In Hanson the trial court erred permitting the state to cross examine the defendant about writings that depicted incidents of violence. The reviewing court found where there was no connection between the charged crime and the fiction and where such evidence was highly prejudicial, the trial court erred admitting the evidence.

Here, unlike in Hansen, there was a connection between the mock up sign and the alleged assault. The sign was posted in Kayser's office where he kept his shot gun behind the entry way door to Kayser's office. The language on the face of the sign appeared to be warning trespassers or uninvited persons of the intended response they should expect if they came onto Kayser's property without an appointment. This evidence was

therefore highly probative to Kayser's plans to respond to trespassers in an armed manner.

Moreover, the sign itself, unlike the fictional writings in Hanson, were not by themselves prejudicial. Thus, even if error, this isolated error should be construed as harmless beyond a reasonable doubt. Erroneous admission of ER 404(b) evidence requires reversal "only if the error, within reasonable probability, materially affected the outcome." Everybodytalksabout, 145 Wash. 2d at 469-70; State v. Smith, 106 Wash. 2d 772, 780, 725 P.2d 951 (1986). The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole. State v. Bourgeois, 133 Wash. 2d 389, 945 P.2d 1120 (1997).

The admission of this photo did not materially affect the outcome of Kayser's trial. Kayser admitted to responding with an armed response to Mark Adams after Adams served he and his wife, Young, with legal papers. The crux of the issue before the jury was not whether Kayser responded to the situation with a shotgun, but whether Kayser was legally justified in doing so. Specifically, whether Kayser used the shotgun in an unlawful manner that reflected Kayser intended and acted in a manner to cause the required apprehension of harm. Under these circumstances, any error in the admission of this one photo was harmless and does not warrant reversal.

5. The trial court did not comment on the evidence or vouch for a witness by telling the jury during introductions, the detective, who sat at counsel table with the deputy prosecutor trying this case, was a representative of the state of Washington.

Next, Kayser contends the trial court erred advising the jury during introductions at the beginning of trial that the detective sitting at counsel table was a representative of the state of Washington. Kayser argues these introductions and the prosecutor's decision to have the detective sit at counsel table with the prosecutor was a comment on the evidence and essentially amounted to impermissible vouching. Br. of App. at 52, *citing* Moore v. State, 299 Ark. 532, 773 S.W.2d 834 (1989).

In contrast to the facts in the Moore case on which Kayser relies, nothing in this record evidences the trial court was either commenting or vouching for any particular party before or during trial. In fact, Kayser's counsel also requested assistance from his office staff during voir dire. The record reflects the trial court then introduced all of the parties and permissibly stated the fact that the detective would be sitting with the prosecutor as a representative of the state.

. Following Kayser's motion in limine to exclude all officers including, detective Allgire, the deputy prosecutor requested Allgire sit at counsel table as a representative of the state who would be assisting the

state with Kayser's prosecution pursuant to ER 615. After discerning detective Allgire was not a witness to the events at issue, the trial court permitted detective Allgire to sit at counsel table having determined detective Allgire's presence was reasonably necessary to assist the state pursuant to ER 615and his presence would not otherwise prejudice Kayser. Moreover, the jury was subsequently instructed they were the sole judges of the witness's credibility and to base their decisions on the evidence presented at trial. Jurors are presumed to follow their instructions. Lord, 117 Wash. 2d, 861. Therefore, the trial court did not err permitting Detective Allgire to sit at counsel table and assist the prosecutor and the court's introductions should not be construed as impermissible vouching by the court for a state witness.

Nor did the trial court impermissibly comment on the evidence by its introduction of the witnesses. Particularly where the court subsequently instructed jurors that the Constitution prohibits judges from commenting on the evidence, that it is the jury's responsibility to evaluate evidence and to disregard any comments that could be construed as indicating a personal opinion or an improper comment. RP 212, 213. Given the presumption that jurors follow the law as given to them, Kayser cannot demonstrate the trial court impermissibly vouched for a witness or commented on the evidence. Kayser's arguments should be rejected.

E. CONCLUSION

Based on the foregoing, the state respectfully requests this Court affirm Kayser's conviction for assault in the second degree with a deadly weapon.

Respectfully submitted this 3rd day of June, 2015.

Kimberly Thulin, WSBA #21210
Appellate Deputy Prosecutor
Attorney for Respondent
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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Lenell Rae Nussbaum
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TDAStavik _____ 6/3/15

Legal Assistant Date