NO. 97691-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DEAN MICHAEL O'NEAL,

Respondent.

Appeal from Court of Appeals Cause No. 50796-0-II
The Honorable Garold E. Johnson
No. 16-1-01803-5

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Rules

Other Authorities

I. INTRODUCTION

In his opening brief in the Court of Appeals, Dean O'Neal did not challenge the first aggressor instruction. After the parties submitted briefing, the Court of Appeals issued *State v. Grott*, No. 50415-4-II, 2019 WL 1040681 (Wash. Ct. App. March 5, 2019) (unpublished), which reversed Grott's convictions and held that the court erred in giving the first aggressor instruction because the provoking act cannot be the charged assault. One month after *Grott*, O'Neal requested and was granted permission to file a supplemental brief "challenging the first aggressor instruction as in *Grott*." On September 4, 2019, this Court granted the State's petition for review in *Grott* on the first aggressor issue. *State v. Grott*, No. 97183-8, 447 P.3d 161 (Sep. 4, 2019).[1]

This Court should also accept review in O'Neal's case, which presents the same issue but is based on different facts. Similar to *Grott*, O'Neal did not object to the first aggressor instruction below, thereby agreeing that the evidence and the State's theory of the case supported giving the instruction. And O'Neal was able to argue his theory of the case that he acted in self-defense. The decision of the Court of Appeals that

[1] This Court also accepted review of the issue raised in Grott's response involving ineffective assistance of counsel for not objecting to the instruction.

O'Neal may challenge a first aggressor instruction for the first time on appeal as a manifest constitutional error conflicts with a published decision of the Court of Appeals and raises a significant issue of constitutional law that has not previously been addressed by this Court.

This Court should also accept review because whether a defendant's provoking act can be part of the charged assault justifying a first aggressor instruction is an issue of substantial public interest that has not been decided by this Court. The instruction was properly given in O'Neal's case because there was credible evidence that he provoked the incident by drawing a gun and firing the first shot. The instruction was also properly given because O'Neal testified that he acted in self-defense, thereby presenting conflicting evidence as to who provoked the incident. This Court should accept review and consolidate O'Neal's case with *Grott*.

II. IDENTITY OF PETITIONER

The Petitioner, State of Washington, Respondent below, seeks review as outlined below.

III. COURT OF APPEALS DECISION

The Petitioner, State of Washington, seeks review of the decision of the Court of Appeals in *State v. O'Neal*, No. 50796-0-II, 2019 WL 4187616 (Wash. Ct. App. Sep. 4, 2019) (unpublished), which reversed O'Neal's three convictions for assault in the first degree and held that the trial court

erred in giving the first aggressor instruction and that this error was not harmless. Appendix A. This petition for review follows.

IV. ISSUES PRESENTED FOR REVIEW

A. Should this Court accept review where the Court of Appeals decision that a challenge to a first aggressor instruction may be raised for the first time on appeal conflicts with a published decision of the Court of Appeals and is a significant constitutional issue?

B. Should this Court accept review because the Court of Appeals decision that a first aggressor instruction is improper where the defendant's provoking act is part of the charged assault is an issue of substantial public interest?

V. STATEMENT OF THE CASE

A. The Shooting Incident

On April 4, 2016, Tacoma Police Officer Leslie Jacobsen responded just before midnight to a report of multiple gunshots fired at a gas station in Tacoma. RP 108-12.[2] When Officer Jacobsen responded, a resident of a nearby home told her that a bullet struck his neighbor's gas meter. RP 115-16. Officer Jacobsen observed damage to the gas meter and noted an odor of gas in the air. RP 116, 127. She also noted bullet holes in two homes and damage to several gas pumps. RP 117, 122-28, 132. Officers located four shell casings in the gas station parking lot and one on the roadway outside of the parking lot. RP 118, 122.

[2] The verbatim report of proceedings from the trial are consecutively paginated and will be referred to as "RP."

A detective retrieved security video from the gas station of the shooting incident. RP 137-42. The video of the shooting was played for the jury at trial. RP 146-47; Ex. 8. The video shows a blue car pull into a crowded gas station and stop at a gas pump. Ex. 8. As three people exit the blue car and start to walk toward the store, a white car pulls into the gas station and stops at a gas pump on the opposite side of the blue car. *Id.* The three people notice the white car and return to their car instead of entering the store. *Id.* A white male, later identified as Dean O'Neal, exits the rear passenger side of the white car as the three people are getting back inside the blue car. *Id.* As the blue car starts to slowly pull away, O'Neal leans into the window of the white car. *Id.* A female passenger in the blue car raises her upper body out of the back window and appears to yell something at O'Neal while waiving her hand. *Id.* None of the people at the gas station appear to react to anything done by this female. *See id.*

Drake Ackley was at the gas station the night of the shooting and testified at trial. *See* RP 354-55. He heard the female yelling in a hostile manner and thought "something was about to happen, like I figured someone was about to get beat up or something." RP 357-58. He described her accent as "like a hood rat tone," meaning a "street, ethnic tone" that is used before a fight. RP 357-58.

The video then shows O'Neal walk purposely toward the blue car as it is driving away, draw a gun from his waistband, and fire a shot as he continues walking toward the exiting car. Ex. 8. The video shows a flash coming from O'Neal's gun, indicating it has been fired. *See id.* at 23:53:30. He then returns the gun to his waistband, turns his back on the blue car, and starts to slowly walk back to his car before eventually picking up the pace to a slow jog. *Id.* The blue car stops in the street, and O'Neal briefly takes cover as shots are fired from the blue car. *Id.* O'Neal then fires multiple shots at the blue car. *Id.* The video shows puffs of smoke coming from O'Neal's gun, indicating it has been fired multiple times. *See* Ex. 8 at 23:53:40 to 23:53:42. The video shows multiple people crouching down and taking cover during this exchange of gunfire. *Id.*; *see* RP 356-63. O'Neal then gets back in the white car, which quickly exits the gas station seemingly in pursuit of the blue car. *See* Ex. 8.

As a deputy booked O'Neal into jail on charges for unlawful possession of a firearm in the first degree and three counts of assault in the first degree, O'Neal was visibly upset and crying and stated that he was "going to be in prison for life over this." RP 193-95. During a subsequent interview with Detective Vicki Chittick, O'Neal denied knowing anything about the shooting. RP 294. He told her that even if he knew something, he would not say anything because he was not "a rat or a snitch." RP 294, 299.

Detective Chittick testified that not everyone who is shot at is willing to cooperate with an investigation. RP 321. She reviewed the surveillance video and identified Christopher Legg as one of its occupants. RP 314. She testified that she briefly interviewed Legg, who acknowledged being shot at that night, but claimed not to know who shot at him or why. RP 316-18.[3] The State obtained multiple material witness warrants for individuals believed to be present at the shooting, including occupants in the blue car. *See* RP 314-23, 331-34, 347-50, 383-95, 400-11, 429. But the State was only able to produce one of these witnesses at trial. *See* RP 150-61. Legg was not a cooperative witness and testified only after the State obtained a material witness warrant for his arrest. *See* RP 39-48, 146, 150-61, 314-22. Legg denied telling Detective Chittick he was shot at during this incident. RP 154-55. He testified that he was not at the gas station that night, that he was not involved in any shooting, and that he did not recognize himself or anyone else in the video. RP 152-54, 159-60. He testified that if he had been shot at that night, he "would have shot back." RP 157, 160.

B. Self-Defense Claim

O'Neal testified at trial and claimed self-defense. RP 430-61. He testified that he was in the white car that pulled up to the gas pump to get

[3] The court gave a limiting instruction that Legg's statements to the detective were admitted only for the limited purpose of determining his credibility. RP 319.

gas. RP 433-34. As he was walking towards the store, he heard a female yelling in a hostile manner. RP 435. Although he claimed not to know what she said, he testified that he thought he saw a gun while she was hanging out of the car. RP 435. He then heard a shot. RP 436. Unlike when O'Neal fired his gun, the video does not show any flash or puff of smoke coming from this alleged shot and no one in the video, including O'Neal, reacts as if a shot has been fired from the blue car. *See* Ex. 8 at 23:53:22 to 23:53:32.

O'Neal knew it was against the law for him to have a gun based on a prior robbery conviction. *See* RP 432, 436. Despite this, O'Neal testified that he carried a gun because he feared being shot again. RP 439-40; *see also* RP 436.[4] O'Neal testified that as soon as he heard the shot, he reached for his gun and fired one shot to protect himself because he "felt threatened and in fear of being shot again." RP 436, 460. He testified that he "turned around and walked back" towards his car. RP 436. He then heard more shots being fired from the blue car that was now on Sprague Avenue. RP 436-37. He ducked for cover and then returned fire "in fear of being shot again or shot at." RP 437. When asked how many shots he fired, O'Neal responded, "One shot at first. And then probably the second time around three or four shots, four shots probably." RP 437. He did not "necessarily" intend to hit

[4] O'Neal testified that he was shot in the stomach in 2015 and uses a colostomy bag. RP 432-33. He did not report this shooting to the police and claimed that he did not know who shot him or why. RP 438-41.

anybody while firing the gun, but claimed he was trying to protect himself and stop the shooting. RP 436-38, 458. O'Neal then got back in the car and drove away, denying any attempt to chase the blue car. RP 438.

On cross-examination, O'Neal claimed not to recall who was in the car with him that night, but acknowledged that such a fact would be important to remember to help his case. RP 443-44. He presumed the female shot at him because of the "hostility" of her words, although he could not recall what she said. RP 450-51. Despite testifying that his only reason for being at the gas station was to get gas, O'Neal admitted that the gas tank of the white car was on the opposite side of the car from the gas pump. RP 446-47; *see also* RP 261-62, 434.

The State did not object to O'Neal's requested jury instructions on self-defense, but proposed a first aggressor instruction based on WPIC 16.04 and the evidence produced at trial. *See* RP 477-80, 505; *see also* CP 22-24. O'Neal did not object to the first aggressor instruction, noting that he understood the State's theory of the case and that he did not believe there was a valid basis to object. RP 480, 505. The trial court agreed that the first aggressor instruction was appropriate, explaining it is "an accurate statement of the law and gives the state the opportunity to argue facts a reasonable person could consider in this case." RP 480. The court instructed the jury on self-defense and gave the following first aggressor instruction:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 58; CP 55-57; RP 480.

C. Verdict, Sentencing, and Appeal

The jury returned verdicts finding O'Neal guilty of three counts of assault in the first degree with firearm enhancements and unlawful possession of a firearm in the first degree. CP 70-79, 96-97. The court imposed an exceptional sentence downward of 342 months. CP 101. The Court of Appeals held that the trial court erred in giving the first aggressor instruction and that this error was not harmless. *O'Neal*, 2019 WL 4187616 at *1. The court affirmed the unlawful possession of a firearm conviction, but reversed the first degree assault convictions. *Id.* This petition follows.

VI. ARGUMENT

A. The Court of Appeals decision that a challenge to a first aggressor instruction may be raised for the first time on appeal conflicts with a published decision of the Court of Appeals and is a significant issue of constitutional law.

This Court should accept review because the decision of the Court of Appeals allowing an appellant to challenge a first aggressor instruction for the first time on appeal conflicts with a published decision from the Court of Appeals. *See* RAP 13.4(b)(2); *see also State v. Davis*, 60 Wn. App.

813, 808 P.2d 167 (1991) (*Davis I*). This Court should also accept review as this case raises a significant question of constitutional law and involves an issue of substantial public interest that has not previously been addressed by this Court: Can a first aggressor instruction be challenged for the first time on appeal as a manifest error affecting a constitutional right? *See* RAP 13.4(b)(3), RAP 13.4(b)(4).

As a general rule, appellate courts will not consider issues raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a). But a claim of error may be raised for the first time on appeal if the appellant demonstrates that the error is "manifest" and truly of constitutional magnitude. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5(a). This exception is not intended to afford defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. *McFarland*, 127 Wn.2d at 333. Rather, the exception is a narrow one. *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). Permitting all possible constitutional errors to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials, and is a waste of the State's limited resources. *McFarland*, 127 Wn.2d at 333; *Scott*, 110 Wn.2d at 685 ("appellate courts will not sanction a party's failure to point

out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial").

Parties are required to make timely and well-stated objections to any jury instructions given in order for the trial court to have the opportunity to correct any error. *Scott*, 110 Wn.2d at 685-86; CrR 6.15(c). This Court has repeatedly refused to review claimed instructional errors where no meaningful ojections were made at trial. *Scott*, 110 Wn.2d at 686.

Thus, in order to raise an issue for the first time on appeal, the appellant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected his rights at trial. *McFarland*, 127 Wn.2d at 333; *O'Hara*, 167 Wn.2d at 98. "Manifest" requires a showing of actual prejudice, which means that there must be a plausible showing by the appellant that the alleged error had practical and identifiable consequences at trial. *O'Hara*, 167 Wn.2d at 99. Without an affirmative showing of actual prejudice from the record, the asserted error is not manifest and not reviewable. *McFarland*, 127 Wn.2d at 334. The focus of actual prejudice must be on whether the error is so obvious on the record that it warrants appellate review. *O'Hara*, 167 Wn.2d at 99-100.

Here, the Court of Appeals erred in concluding that O'Neal met his burden of showing a manifest error such that he may raise this issue for the first time on appeal. O'Neal has not shown "actual prejudice" such that any

alleged error had practical and identifiable consequences at trial. *See O'Hara*, 167 Wn.2d at 99-100. The trial court gave a first aggressor instruction that is consistent with WPIC 16.04 and that has been approved by appellate courts. *See* CP 58; *see also e.g. State v. Riley*, 137 Wn.2d 904, 908-09, 976 P.2d 624 (1999).

In light of the self-defense instructions given at O'Neal's request, the State was entitled to an instruction stating that if he was the aggressor and committed an intentional act that was reasonably likely to provoke a belligerent response, then he could not assert self-defense as an excuse for his subsequent actions. *See* CP 55-58. In the absence of a first aggressor instruction, O'Neal could argue that the force he used—firing multiple shots from a gun—was self-defense and the State would have no instruction supporting its theory of the case. *See State v. Cyrus*, 66 Wn. App. 502, 508, 832 P.2d 142 (1992). The facts supported a first aggressor instruction, which was necessary to allow the State to argue its theory of the case. *See id.* The instruction is particularly appropriate where there is conflicting evidence as to who provoked the altercation. *Id.* at 508-09 (citing *State v. Hughes*, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986)).

The Court of Appeals concluded that giving the instruction was manifest error because "there is no evidence that O'Neal made an intentional act *before* the charged assault that a jury could assume would

provoke a belligerent response[.]" *O'Neal*, 2019 WL 4187616 at *7 (emphasis in original). But the evidence does not support this assertion. The State presented evidence that O'Neal committed an intentional act by firing at the blue car *first*, which the jury could have found provoked a belligerent response from the occupants of the blue car who then returned fire, resulting in O'Neal firing multiple shots that were the basis of the charged assaults. O'Neal understood the State's theory of the case and agreed with giving the instruction, explicitly noting that there was no valid basis for an objection. RP 480, 505. The trial court agreed, stating that the instruction is "an accurate statement of the law" that allows the State "to argue facts a reasonable person could consider in this case." RP 480. O'Neal cannot show manifest error under these circumstances.

O'Neal also cannot show manifest error where he was fully able to argue his theory of the case—that he acted in self-defense and that the occupants in the blue car were the "first aggressors." *See* RP 554-63. Further, if there was no evidence that O'Neal was the aggressor, and the court gave the instruction in error, the only conclusion is that the instruction was inapplicable and superfluous. The jury would simply disregard it and could still come to the correct conclusion after evaluating the evidence.

Finally, the decision of the Court of Appeals conflicts with *Davis I*. *See Davis I*, 60 Wn. App. at 822-23. In *Davis I*, the defendant did not object

to the first aggressor instruction at trial. *Id.* at 815-16. He challenged the instruction for the first time on appeal. *Id.* at 822. The Court of Appeals held that Davis's claim that the trial court erred in giving the first aggressor instruction was not of constitutional magnitude and could not be raised for the first time on appeal. *Id.* at 823. Thus, the Court declined to review his claim. *Id.* Because the decision of the Court of Appeals in this case conflicts with *Davis I*, this Court should accept review. *See* RAP 13.4(b)(2).

B. Whether a defendant's provoking act can be part of the charged assault justifying a first aggressor instruction is an issue of substantial public interest.

This Court should accept review to clarify the law regarding first aggressor instructions and whether a defendant's provoking act can be part of the assault that is taken into account in assessing whether to give a first aggressor instruction. This is an issue of substantial public interest that should be determined by this Court pursuant to RAP 13.4(b)(4).

Courts review de novo whether sufficient evidence justifies a first aggressor instruction. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). Appellate courts must view the evidence in the light most favorable to the party who requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); *State v. Wingate*, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005). The State need only produce "some evidence"

that the defendant was the aggressor to meet its burden of production. *Stark*, 158 Wn. App. at 959 (citing *Riley*, 137 Wn.2d at 909-10).

This Court has held that a court properly submits a first aggressor instruction where: (1) the jury can reasonably determine from the evidence that the defendant provoked the need to act in self-defense; (2) there is conflicting evidence as to whether the defendant's conduct precipitated the fight; or (3) the evidence shows that the defendant made the first move by drawing a weapon. *Riley*, 137 Wn.2d at 909-10; *see Hughes*, 106 Wn.2d at 910-11 (instruction proper where there is credible evidence for the jury to reasonably conclude that the defendant provoked the gun battle by shooting first). A first aggressor instruction is proper if there is conflicting evidence about who provoked the incident. *State v. Davis*, 119 Wn.2d 657, 665-66, 835 P.2d 1039 (1992) (*Davis II*); *Wingate*, 155 Wn.2d at 822-23.

The Court of Appeals did not consider any of these justifications for giving a first aggressor instruction. Rather, the court concluded that the instruction was improperly given because "the defendant's alleged conduct provoking the need to act in self-defense was the charged assault itself." *O'Neal*, 2019 WL 4187616 at *6 (citing *Riley*, 137 Wn.2d at 910-11 and *State v. Brower*, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986)).

First, *Riley* does not state that the provoking act cannot be part of the charged assault. Second, this Court has never held that the provoking

act cannot be part of the charged assault. In *Riley*, this Court held that the evidence supported giving a first aggressor instruction where the defendant drew his gun first and aimed it at someone he later shot. *Riley*, 137 Wn.2d at 906-10. The Court noted this was "aggressive conduct" by the defendant that precipitated the confrontation with the victim. *See id.* at 909-10, 913-14. Further, even assuming a provoking act cannot be part of the charged assault, the jury could have easily determined that the charged assaults involved the second volley of shots fired by O'Neal—as opposed to the first shot that provoked the entire incident.

Finally, *Brower* is distinguishable. In *Brower*, the defendant merely displayed a gun, which was the basis for the assault charge. *Brower*, 43 Wn. App. at 896-97, 902. The court noted that he had a permit to carry a gun and was not involved in any wrongful or unlawful conduct that precipitated the incident. *Id.* at 902. The court explained that if the defendant was the aggressor, "it was only in terms of the assault itself." *Id.* The Court held that the first aggressor instruction was improper because it deprived the defendant of his theory of self-defense, leaving the jury to speculate as to the lawfulness of the conduct prior to the assault. *Id.* Here, O'Neal never objected to the instruction because it was a proper instruction under the facts of his case that did not deprive him of his theory of self-defense. *See* RP

480, 505, 544-63. Further, unlike the defendant in *Brower*, it is undisputed that it was unlawful for O'Neal to carry a gun. *See* RP 432, 436, 540-41.

The provoking act can be part of a "single course of conduct" that leads to the assault. *State v. Sullivan*, 196 Wn. App. 277, 290, 383 P.3d 574 (2016). The Court of Appeals decision that the provoking act cannot be part of the charged assault is contrary to this Court's decision in *Hughes*, *Wingate*, and *State v. Gregory*, 79 Wn.2d 637, 488 P.2d 757 (1971), overruled on other grounds by *State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974).

In *Hughes*, this Court held that the first aggressor instruction was proper because there was credible evidence from which the jury could reasonably conclude that it was the defendant who provoked the gun battle with the police officers by shooting first. *Hughes*, 106 Wn.2d at 191-92. In *Gregory*, there was a "shoot out" between the defendant and victim with conflicting evidence as to who was the aggressor. *Gregory*, 79 Wn.2d at 638-39. The jury was instructed that a person cannot create a necessity for acting in self-defense and assault or kill another person and then claim self-defense. *Id.* at 645. This Court upheld this instruction because there was evidence that, if believed by the jury, clearly supported the State's theory that the defendant was the aggressor because he fired the first shot. *Id.* at

639, 645-46. In both *Hughes* and *Gregory*, the provoking act and the charged act were the same—shooting at the victims.

In *Wingate*, although the defendant testified that he believed the other person was reaching for a gun, it was undisputed that the defendant was the only person to draw a gun and aim it at another person. *Wingate*, 155 Wn.2d at 819-20, 823. Consistent with *Riley*, this Court concluded that this evidence of aggressive conduct—drawing and aiming a gun at another person—warranted a first aggressor instruction. *See Wingate*, 155 Wn.2d at 823. This Court held that the trial court properly gave the instruction in light of conflicting evidence regarding who precipitated the confrontation. *Id.*

The test for a first aggressor instruction is found in *Riley*—is there a disputed question of fact about who created the need for the defendant's assertion of self-defense? If so, an aggressor instruction is justified. Did the defendant provoke the need to act in self-defense? If so, an aggressor instruction is justified. Is there credibile evidence that the defendant made the first move by drawing a weapon? If so, an aggressor instruction is justified. Viewing the evidence in the light most favorable to the State as the party requesting the instruction, the evidence supports not only one of these scenarios, but all of them. *See Riley*, 137 Wn.2d at 909-10; *see* Ex. 8.

A person who provokes an altercation cannot invoke the right to self-defense. *Riley*, 137 Wn.2d at 909-10; *State v. Craig*, 82 Wn.2d 777,

783, 514 P.2d 151 (1973). This notion is consistent with the first aggressor instruction given in O'Neal's case. The video shows O'Neal pull out a gun as he is walking quickly and purposefully towards the blue car and fire the first shot at the blue car as it was leaving the gas station. Ex. 8. He then *turned his back* on that car and started to calmly walk back to his car. *See id.* The occupants of the blue car then returned fire, and O'Neal responded by firing multiple additional shots at the blue car. *Id.* The State presented credible evidence that O'Neal provoked the entire incident by drawing a gun and firing the first shot. Further, O'Neal testified that he acted in self-defense after the female fired at him first. RP 435-48, 448-60. Thus, he presented conflicting evidence as to who provoked the incident. The first aggressor instruction was needed for the State to argue that the evidence negated his theory of self-defense.

The evidence supported a first aggressor instruction under *Riley*. But the Court of Appeals held that the unobjected-to instruction was given in error because the provoking act cannot be part of the charged assault. This adds another layer to first aggressor instructions that this Court has never held. This Court should accept review in order to clarify the law regarding first aggressor instructions.

VII. CONCLUSION

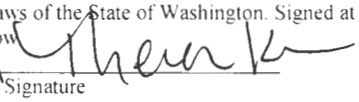
This Court has narrowly construed RAP 2.5, recognizing that permitting every constitutional claim to be raised for the first time on appeal undermines the trial process. This Court should accept review to determine whether a challenge to a first aggressor instruction may be raised for the first time on appeal. This Court should also accept review to clarify the law regarding first aggressor instructions and whether a defendant's provoking act can be part of the charged assault justifying a first aggressor instruction. The State respectfully requests that the Court grant review and consolidate this case with *Grott*, which is currently pending before this Court.

RESPECTFULLY SUBMITTED this 20th day of September, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

KRISTIE BARHAM WSB# 32764
Deputy Prosecuting Attorney

Certificate of Service:
The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

9-20-19 
Date Signature

APPENDIX "A"

2019 WL 4187616
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Dean Michael O'NEAL, Appellant.

No. 50796-0-II
|
Filed September 4, 2019

Appeal from Pierce County Superior Court, 16-1-01803-5, Honorable Garold E. Johnson, Judge.

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UNPUBLISHED OPINION

Worswick, J.

***1** A jury returned verdicts finding Dean O'Neal guilty of first degree unlawful possession of a firearm and three counts of first degree assault. O'Neal appeals from his first degree assault convictions, asserting that (1) the trial court erred by providing a first aggressor jury instruction, (2) the prosecutor committed misconduct during closing argument, (3) his defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct and to the first aggressor jury instruction, and (4) the cumulative effect of the prosecutor's misconduct denied him a fair trial. In his Statement of Additional Grounds (SAG) for Review, O'Neal appeals from all of his convictions, asserting that (5) his Sixth Amendment confrontation right was violated, (6) the State violated his due process right by presenting the testimony of numerous police witnesses, (7) the prosecutor committed several instances of misconduct, and (8) his defense counsel was ineffective for failing to object to the prosecutor's misconduct.

We hold that the trial court erred in giving the first aggressor jury instruction and that this error was not harmless. Consequently, we affirm O'Neal's first degree unlawful possession of a firearm conviction, but we reverse his first degree assault convictions and remand for a new trial on those charges.

FACTS

On April 4, 2016, Tacoma Police Officer Leslie Jacobson responded to a report of multiple gunshots fired at a gas station in Tacoma's Hilltop neighborhood. When Officer Jacobson arrived, a nearby resident told her that a bullet had struck his neighbor's gas meter. Officer Jacobson saw bullet damage to the gas meter and to two nearby houses. Officer Jacobson also saw bullet damage to three of the gas station's gas pumps. Police officers recovered a bullet and five shell casings from the scene.

Tacoma Police Detective Kimberly Cribbin retrieved security video footage of the shooting incident. The video shows a white Ford sedan pull into a crowded gas station parking lot and stop next to a gas pump. A white male, later identified as O'Neal, exits the passenger side of the car and appears to exchange words with three occupant-colored vehicle at a different gas pump. Several other vehicles are at the gas station, including a maroon Dodge. As the dark-colored vehicle starts to drive away from the gas pump, O'Neal leans into the white Ford through the front passenger side window. A female passenger in the dark-colored vehicle leans her upper body out of the back window and appears to say something to O'Neal while the vehicle slowly exits the parking lot. The passenger is also waiving her hand and it appears she is either holding a pistol or pointing her finger and making a gun-like gesture. O'Neal walks toward the dark-colored vehicle, pulls out a handgun from his waistband, and quickly fires a shot before walking back to the white Ford. As the dark-colored vehicle drives on the street in front of the gas station, O'Neal appears to take cover from shots fired in his direction before firing multiple shots at the dark-colored vehicle.

***2** On May 5, 2016, the State charged O'Neal with first degree unlawful possession of a firearm and three counts of first degree assault. On May 21, 2016, Pierce County Sheriff's Deputy Matthew Smith initiated a traffic stop on a vehicle in which O'Neal was a passenger. Deputy Smith arrested O'Neal

after a records check showed that he had a felony arrest warrant for his alleged conduct at the gas station. Deputy Smith told O'Neal that he was being arrested for suspected first degree unlawful possession of a firearm and three counts of first degree assault. O'Neal was visibly upset and crying while waiting to be booked at the jail, stating, I am "going to be in prison for life over this." 2 Verbatim Report of Proceedings (VRP) at 195.

Tacoma Police Detective Vicki Chittick interviewed Danielle Carter, a person associated with the maroon Dodge that was at the gas station on the night of the shooting. Based on information obtained during her interview with Carter, Detective Chittick sought to locate and interview Alyxandria McGriff, Jessica Handlen, and Christopher Legg. Detective Chittick interviewed McGriff and Legg but could not locate Handlen. During her interview with Legg, Legg told Detective Chittick that he was shot at but that he did not know who shot at him. Legg then told Detective Chittick that he doesn't speak with police before leaving the room and slamming the door. [1]

Detective Chittick also interviewed O'Neal at the jail. Detective Chittick told O'Neal that he had been identified as the shooter, and showed him photographs taken from the security video. O'Neal denied having knowledge of the shooting incident and said that he would not say anything even if he knew something "because he wasn't a rat or a snitch." 3 VRP at 299. Before trial, the State obtained material witness warrants for McGriff, Handlen, Carter, and Legg. Only Legg appeared at trial to testify.

At trial, Officer Jacobson, Detective Cribbin, Deputy Smith, and Detective Chittick testified consistently with the facts stated above. The security video showing the shooting was played for the jury.

Detective Chittick also testified that people who are shot at are not always willing to cooperate with police and that courts may have to issue material witness warrants to compel people to testify at trial. Detective Chittick stated that multiple warrants had to be issued to compel Legg to testify and that there were outstanding material witness warrants for Carter, Handlen, and McGriff. Detective Chittick said that she believed Carter was in Idaho and that material witness warrants are not enforced outside of the issuing state. The State asked Detective Chittick about Carter's unwillingness to return to Washington to testify, and defense counsel objected. The trial court sustained the objection, stating that there was not adequate foundation for Detective Chittick to testify about Carter's reasons for not returning to Washington to testify.

Drake Ackley testified that he lives in Gig Harbor and was at the Tacoma gas station on the night of the shooting. Ackley stated that he was looking between the seats of his car for his cell phone when he heard gunshots. Ackley also stated that immediately before hearing the gunshots, he heard a female voice yelling or screaming something in a hostile manner. Ackley said that it "sounded like something was about to happen, like I figured someone was about to get beat up or something." 3 VRP at 357. When the State asked whether he could detect an accent in the female's voice, Ackley responded that it sounded "like a hood rat tone." 3 VRP at 357. The State asked what a "hood rat tone" meant, and Ackley stated, "Very street, ethnic tone." 4 VRP at 358.

***3** Legg testified that he did not remember being at a gas station during a shooting. Legg stated that he did not recognize himself or the car in the security video footage. Legg further stated that he remembered Detective Chittick attempting to interview him but that he does not talk to police. Legg denied telling Detective Chittick that he was at the gas station on the night of the shooting or that someone had shot at him.

O'Neal also testified. He admitted that he was the person on the security video firing a handgun but claimed he was acting in self-defense. O'Neal testified that he heard a female screaming and yelling at him. O'Neal stated that he saw the female hanging out the back of a car and that he thought he saw a gun. O'Neal said that he heard a gunshot and fired one shot because he felt threatened and was afraid of getting shot again. O'Neal stated that more gunshots were fired at him and that he took cover before returning fire at the vehicle. O'Neal also testified that he had been shot in the stomach in 2015 and required the use of colostomy bag.

On cross-examination, the State asked O'Neal, "The colostomy bag that you have, it's because you shot yourself, right?" 5 VRP at 438. When O'Neal answered, "No," the State asked him who had shot him, to which O'Neal replied that he did not know. 5 VRP at 439. When asked why he did not report the 2015 shooting to the police, O'Neal responded that he did not have any reason for not reporting it. O'Neal also testified that he did not remember who was in the car with him on the night of the shooting.

The trial court provided the jury with a first aggressor instruction that stated:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Clerk's Papers (CP) at 58. Defense counsel did not object to this instruction.

During closing, the State argued:

> Victims of a shooting who nearly got killed that night, who don't stick around and don't want to cooperate or report to the police.
>
> The defendant, who nearly kills others and nearly gets a whole bunch of other people, innocent bystanders, killed that night, who doesn't want to stick around and tell the police about what he did.
>
> Whole bunch of people in that parking lot that night, who once the scene is safe and once these players are all out of there don't want to stick around because they know the police are coming and have no interest in reporting to the police what happened that night.
>
> Witnesses and victims of crimes who don't want to come in and testify. Warrants have to be issued for them to try and find them, and when they are found are told by the Court you stay in touch with the state, you stay in touch with the prosecutor, and then they just disappear again. And even when they are found, they get on the stand and they tell you something entirely different from what they told a detective.
>
> Someone like the defendant who takes the stand, swears to tell the truth, and then just lies through his teeth.
>
> All of it, all of it is a black eye and shameful, shameful, all of it, all around.
>
> And what it tells you is that you cannot always rely on human beings to do the right thing. That more often than not all someone cares about is me. I don't care about how dangerous this was. I don't care about doing the right thing and coming in to testify. I don't care about honoring the oath I swear to tell the truth. I just don't care. What's most in my personal interest.
>
> *4 And so what it should tell you is that when you can't rely on human beings to do the right things, you have to look for other types of proof, other types of evidence.

6 VRP at 511-12. O'Neal did not object to this argument. Later in its closing argument, the State discussed the legal standards for evaluating a self-defense claim as provided in the jury instructions, stating:

> The law talks about what would a reasonably prudent person do. Not what Dean O'Neal would do, because Dean O'Neal would tell you that I had to act in self-defense no matter what. What would a reasonably prudent person do.
>
> And you're reasonably prudent people. That's your job, to decide what a reasonably prudent person would do.
>
> The law also talks about look at all the circumstances, everything that was happening, to gauge whether a reasonably prudent person would have done what the defendant did that night.
>
> If—if, hypothetically, someone from that car did shoot first, but then they're driving off and they are no longer a threat to you, you don't get to return fire and call it self-defense, because it's not necessary.

6 VRP at 523. During the defense closing, defense counsel referred to O'Neal's interview statement to Detective Chittick that he would not tell the police anything because he's not a snitch or rat, arguing:

> If [O'Neal is] the one that's guilty, if he's the one that initiated this whole thing, if he's the one that's just pulling out guns willy-nilly and shooting at people, what's he going to snitch or rat somebody else about?
>
> Because they're the ones that started it and he wasn't going to snitch and rat on them. That's exactly what he meant by that.
>
> Call it the code of the street. Call it whatever you want to call it. But it speaks volumes about what truly

happened and creates a reasonable doubt right there as to whether [O'Neal] assaulted anybody and/or who initiated this incident.

6 VRP at 549. Defense counsel also argued that certain witnesses may not have wanted to testify because they were the ones who initiated the shooting incident. Defense counsel also referred to Ackley's testimony regarding a female yelling something in a hostile tone, stating, "If Mr. Ackley can have that same uneasy queasy feeling that something is about to happen, why can't Dean O'Neal have that same uneasy queasy feeling that something bad is about to happen." 6 VRP at 557.

The State addressed defense counsel's reference to Ackley's testimony in its rebuttal closing, arguing:

Do not compare those two people. Mr. Ackley, *straightlaced from Gig Harbor* is not the defendant. Mr. Ackley, coming over at midnight to the Hilltop to get some gas, doesn't have the same state of mind as the defendant.

Yeah. Mr. Ackley there at midnight hears a woman yelling, hears a woman taunting, hears a woman running her mouth. It probably did make him queasy. Anyone who's just a normal, everyday person who sees that unfold at a gas station would get uncomfortable.

Maybe you've been there and just someone is acting crazy; someone is being stupid; someone is creating drama and makes you uncomfortable.

And of course, it really makes Mr. Ackley uncomfortable when he thinks about that in the context of what happened afterwards.

***5** But just because Mr. Ackley got uncomfortable with what he heard that night doesn't tell you that what the defendant did was justified. Because you don't get to shoot someone for running their mouth.

6 VRP at 575-76 (emphasis added). Finally, in rebuttal the State argued:

When you talk about self-defense, it's very tempting to say well, no one got hit that night, or the victims are probably dirtbags, or the victims don't care so why should we. It's very tempting to have that state of mind.

But be mindful of how dangerous this was in the bigger picture. Be mindful how innocent people could have been hit and killed that day.

And when you're thinking about the idea that this was self-defense, remember what you're justifying. When you say that something is self-defense, you say that pulling that trigger was justified, consequences be damned.

Wherever that bullet goes after it leaves the barrel of that gun, it's irrelevant to the equation.

You are saying that in the moment that the defendant pulled that trigger that was a lawful act of self-defense, and whatever happens as a result is irrelevant to the equation. The fact that no one was hit, irrelevant. If someone driving down Sprague had been hit, caught in the crossfire, tragic, irrelevant to the equation.

If that bullet pierces that gas vein at 1018 South Sprague Street and the home erupts, tragic. But the act of pulling that trigger was justified.

So whatever your conclusion is about self-defense, make sure that you're comfortable with that conclusion regardless of the consequences, because the consequences tell you the reasonableness of the actions.

6 VRP at 576-77. Defense counsel did not object to this argument.

The jury returned verdicts finding O'Neal guilty of first degree unlawful possession of a firearm and three counts of first degree assault. The jury also returned special verdicts finding that O'Neal was armed with a firearm during his commission of the first degree assaults. The trial court imposed an exceptional downward sentence of 342 months of incarceration and 36 months of community custody. O'Neal appeals his first degree assault convictions.

ANALYSIS

I. FIRST AGGRESSOR JURY INSTRUCTION

O'Neal contends that the trial court erred by providing the jury with a first aggressor instruction because his only alleged conduct provoking the need to act in self-defense was the charged assault itself. We agree that it was error to provide a first aggressor jury instruction because the only provoking act was O'Neal's assault itself. We further hold that the constitutional error was not harmless beyond a reasonable

doubt, and therefore, we reverse O'Neal's first degree assault convictions and remand for a new trial.

1. *RAP 2.5(a)(3)*

As an initial matter, we must determine whether O'Neal may challenge the first aggressor jury instruction for the first time on appeal because he did not object to the instruction at trial. To raise the issue for the first time on appeal, O'Neal must show that giving the instruction involves a manifest error affecting a constitutional right. RAP 2.5(a)(3).

Due process requires the State to prove beyond a reasonable doubt every element of a charged offense. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). If a defendant claims self-defense, the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A first aggressor instruction may prevent a jury from considering whether the State has proved beyond a reasonable doubt that the defendant did not act in self-defense. *State v. Bea*, 162 Wn. App. 570, 575-76, 254 P.3d 948 (2011). Therefore, O'Neal has shown that the first aggressor instruction implicated his constitutional due process rights.

***6** Next, O'Neal must show that it was manifest error for the trial court to provide the first aggressor jury instruction. To show manifest error warranting review for first time on appeal under RAP 2.5(a)(3), O'Neal must demonstrate that the alleged error had "practical and identifiable consequences apparent on the record that should have been reasonably obvious to the trial court." *O'Hara*, 167 Wn.2d at 108. In other words, an error is manifest where "given what the trial court knew at [the] time, the court could have corrected the error." *O'Hara*, 167 Wn.2d at 100. O'Neal has met this showing.

Generally, a defendant cannot claim self-defense when he or she was the aggressor provoking an altercation. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). Therefore, "[w]here there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate." *Riley*, 137 Wn.2d at 909-10. The first provoking act must be an act that a " 'jury could reasonably assume would provoke a belligerent response by the victim.' " *Bea*, 162 Wn. App. at 577 (internal quotation marks omitted) (quoting *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989)).

A first aggressor instruction is appropriate even where there is conflicting evidence as to whether the defendant's conduct provoked the altercation. *Riley*, 137 Wn.2d at 910. But a first aggressor instruction is inappropriate where the evidence shows the defendant's "words alone" provoked the altercation or where the defendant's alleged conduct provoking the need to act in self-defense was the charged assault itself. *Riley*, 137 Wn.2d at 910-11; *State v. Brower*, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986).

Here, our review of the record leads us to conclude that the trial court erred by providing the jury with a first aggressor instruction because O'Neal's conduct that allegedly provoked the need to act in self-defense was the charged assault itself. The State concedes that there was no evidence presented of a prior conflict between O'Neal and the victims before the altercation at the gas station. But the State argues that O'Neal's conduct in walking toward the victims' vehicle as it was exiting the gas station, drawing his gun, and firing a shot was sufficient to warrant a first aggressor jury instruction.

The State's argument that O'Neal's conduct in firing a shot supported the first aggressor instruction clearly fails because this conduct was part of the actual charged assaults. To support a first aggressor instruction, the evidence would have to show that O'Neal made an intentional act *before* the shooting that a jury could reasonably assume would provoke a belligerent response.

The State's argument that O'Neal's conduct in walking towards the victims' vehicle and pulling out his handgun supported a first aggressor instruction also fails. The video exhibit shows O'Neal firing a shot immediately after pulling out the handgun. Therefore, the facts here are distinct from *Riley*, where the defendant's intentional conduct in brandishing a firearm at the victim before firing was sufficient to warrant a first aggressor instruction. 137 Wn.2d at 906, 909-10. And O'Neil's conduct in walking toward the victims' vehicle similarly fails to support a first aggressor instruction because a jury could not reasonably assume that merely walking toward the vehicle would provoke a belligerent response. Again, the video exhibit shows O'Neal walking toward the vehicle before pulling out a handgun and firing a shot. O'Neal does not make any gestures while walking toward the vehicle and there was no evidence that he hurled any threats while walking toward the vehicle. Given the innocuous nature of O'Neal's conduct in approaching the vehicle, this conduct alone is insufficient to warrant a first aggressor instruction.

*7 Because there is no evidence that O'Neal made an intentional act *before* the charged assault that a jury could assume would provoke a belligerent response, he has shown that providing the jury with a first aggressor instruction was manifest error. This does not end our inquiry however, as the State may show that the constitutional error in providing the first aggressor instruction was harmless beyond a reasonable doubt.

2. *Harmless Error*

Where, as here, a trial error is of constitutional magnitude, "prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt." *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The issuance of an erroneous first aggressor instruction is harmless beyond a reasonable doubt if no reasonable jury could have determined that the defendant's acts constituted lawful self-defense. *State v. Kidd*, 57 Wn. App. 95, 101, 786 P.2d 847 (1990). Our review of the evidence presented at trial, including the video exhibit showing O'Neal's assaults, leads us to conclude that the State has not met its burden of proving constitutional harmless error.

The video exhibit presented at trial shows that, prior to O'Neal firing his handgun, a female passenger of the alleged victims' vehicle leaned her upper body out of the back window and waved her hand in a manner in which it appears she could either be holding a handgun or pointing her finger in a gun-like gesture. Based on this evidence, a reasonable jury could have found that O'Neal's conduct in firing his handgun constituted lawful self-defense. The first aggressor instruction, however, permitted the jury to improperly find that O'Neal was the first aggressor based on this same act and, by doing so, relieved the State of its burden to prove beyond a reasonable doubt that O'Neal was not acting in self-defense. On the record before us, the State cannot meet its burden to prove this error harmless beyond a reasonable doubt. Accordingly, we reverse O'Neal's first degree assault convictions and remand for a new trial.

II. PROSECUTORIAL MISCONDUCT

Although we reverse O'Neal's first degree assault convictions based on the instructional error discussed above, we address some of his remaining contentions because they may again arise at a new trial. Specifically, we address O'Neal's contention that the prosecutor committed misconduct at closing by arguing that the jury should consider the potential consequences of his firing a gun at the gas station when determining whether he acted in self-defense.

To establish prosecutorial misconduct, a defendant bears the burden of proving the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If a defendant shows that the prosecutor's conduct was improper, we must determine whether the improper conduct prejudiced the defendant. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). A prosecutor's improper conduct results in prejudice when " 'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.' " *Thorgerson*, 172 Wn.2d at 443 (alteration in original) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

Where, as here, a defendant fails to object to alleged prosecutorial misconduct, the defendant is deemed to have waived any error unless he or she shows that the misconduct was so flagrant and ill-intentioned that an instruction from the trial court could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61. To meet this heightened standard, the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455).

*8 O'Neal contends that the prosecutor's discussion of the potential consequences of his firing a gun at a crowded gas station near residential homes improperly appealed to the jury's passions and prejudices because it requested the jury to convict even if it found he acted in self-defense based on the potential injury that could result from firing a gun in a public place. We agree.

It is improper for a prosecutor to " 'use arguments calculated to inflame the passions or prejudices of the jury.' " *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). A prosecutor improperly appeals to the passions and prejudices of a jury when arguing for the jury to convict a defendant "in order to protect the community, deter future law-breaking, or other reasons unrelated to the charged crime." *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011) (discussing holding in *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991)).

Here, the prosecutor argued that the jury should consider the "bigger picture" of how "dangerous" firing a gun at a gas station was when determining whether O'Neal acted in self-defense. 6 VRP at 576. The prosecutor also argued that the jury should be "mindful" of the potential injury to persons and property that could have occurred when deciding whether O'Neal's firing of a handgun was "justified, consequences be damned." 6 VRP at 576-77. And the prosecutor argued that, should the jury determine that O'Neal acted in self-defense, it would be justifying the "tragic" consequences that could have occurred from his act, such as "someone driving down" the street being "caught in the crossfire" or a home erupting as a result of a "bullet pierc[ing a] gas vein." 6 VRP at 577. Additionally, and perhaps most concerning, the prosecutor argued that the jury must be "comfortable" with these potential extraneous and hypothetical consequences when deciding whether O'Neal acted in self-defense. 6 VRP at 577.

These arguments were an improper appeal to the jury's passions and prejudices. The arguments urged the jury to not only consider whether the facts presented at trial supported O'Neal's self-defense claim, but also whether O'Neal's self-defense claim was justified in light of "bigger picture" potential consequences that may result from such conduct. 6 VRP at 576. Although the prosecutor attempted to tie these arguments to the reasonableness standard of evaluating a self-defense claim as set forth in the jury instructions, [2] stating that "the consequences tell you the reasonableness of the actions," we conclude that the arguments were so removed from the appropriate reasonableness standard as to constitute a bare emotional appeal to the jury's passions and prejudices. 6 VRP at 577. Accordingly, we hold that the argument was improper. Because we reverse O'Neal's first degree assault convictions based on instructional error, we do not address whether the prosecutor's improper argument resulted in prejudice that was incurable by a jury instruction.

III. SAG

***9** Because it appears that O'Neal raises issues related to all of his convictions, we address his SAG.

A. *Confrontation Right*

O'Neal first contends in his SAG that his Sixth Amendment right to confront witnesses against him was violated because two of the alleged occupants of the vehicle at which he shot did not testify at trial. We disagree.

The Sixth Amendment of the United States Constitution guarantees a criminal defendant's right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. The confrontation clause of the Sixth Amendment "bars the admission of 'testimonial' hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination." *State v. O'Cain*, 169 Wn. App. 228, 235, 279 P.3d 926 (2012); *see also State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009).

Here, the trial court did not admit any statements made by the alleged occupants of the vehicle who did not testify at trial. Accordingly, O'Neal's confrontation right claim fails.

B. *Due Process*

Next, O'Neal appears to contend that his due process right was violated because the State presented testimony from several law enforcement officers. O'Neal does not explain how testimony from multiple law enforcement officers implicate his due process rights. And although O'Neal is not required to provide citations to authority to support his SAG claims, he must "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). O'Neal's bare assertion that testimony from multiple law enforcement officers violated his due process right is insufficient to meet this requirement. *See also State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) ("Parties raising constitutional issues must present considered arguments to this court. We reiterate our previous position: 'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.' ") (internal quotation marks omitted) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

To the extent that O'Neal is contending that the trial court should have excluded certain law enforcement testimony as cumulative under ER 403, this contention cannot succeed. O'Neal did not object below to any officer testimony on the basis that it was needlessly cumulative under ER 403. *See State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) ("A party may assign evidentiary error on appeal only on a specific ground made at trial.").

C. *Prosecutorial Misconduct*

Next, O'Neal contends that the prosecutor committed several instances of misconduct at trial and during closing argument. We disagree.

First, O'Neal asserts that the prosecutor committed misconduct when it asked, "I was unclear about something. If you're to be believed, Mr. O'Neal—" 5 VRP at 457. Defense counsel objected before the prosecutor finished its question. The trial court did not rule on the objection but instead asked the prosecutor to ask its question. When the prosecutor resumed the question, he rephrased it in a manner that did not state anything about a belief in O'Neal's testimony. Because the prosecutor rephrased its question following an objection, we discern nothing improper in this exchange to support a claim of misconduct.

***10** Next, O'Neal asserts that the prosecutor committed misconduct by asking him on cross-examination about being shot in 2015 and asking why he did not report the 2015 shooting to police. But O'Neal testified on direct examination about being shot in 2015 and stated that he had fired a shot at the alleged victims' vehicle because he feared "being shot again." 5 VRP at 436. And defense counsel argued at closing that O'Neal acted in self-defense when firing a shot because "[h]e was on guard about getting shot again and didn't want that to happen." 6 VRP at 555. Because O'Neal raised the issue of his previous gunshot wound during direct examination, it was proper for the State to inquire about that incident during cross-examination. Accordingly, O'Neal's claim of prosecutorial misconduct on this ground fails.

Next, O'Neal appears to assert that the prosecutor committed several instances of misconduct in closing argument by commenting on his credibility and his guilt to the charged offenses. We will not find prejudicial error unless it is clear and unmistakable that the prosecutor was expressing a personal opinion. *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553 (2009). Here, the prosecutor's comments about O'Neal's veracity and guilt do not clearly and unmistakably express a personal opinion. Accordingly, the prosecutor's comments on O'Neal's veracity and guilt were not improper, and his claim of prosecutorial misconduct on this ground fails.

D. *Ineffective Assistance of Counsel*

Finally, O'Neal contends in his SAG that his defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct in commenting on his credibility and his guilt to the charged offenses. Having failed to demonstrate that the prosecutor committed misconduct on these bases, O'Neal cannot show that his defense counsel was ineffective for failing to object.

We affirm O'Neal's first degree unlawful possession of a firearm conviction, but we reverse his first degree assault convictions and remand for a new trial on those charges.

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.

We concur:

Lee, A.C.J.

Cruser, J.

All Citations

Not Reported in Pac. Rptr., 2019 WL 4187616

Footnotes

1 Chittick's testimony regarding Legg's statements were admitted at trial for the limited purpose of determining Legg's credibility.

2 The trial court provided a self-defense jury instruction that provided in relevant part:

> 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 55. The trial court also provided the following definitional jury instruction:

> Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP at 56.

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PIERCE COUNTY PROSECUTING ATTORNEY

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