

FILED
April 10, 2015
Court of Appeals
Division I
State of Washington

NO. 72732-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES SWEET,

Appellant.

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

The Honorable LeRoy McCullough, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	2
C. <u>STATEMENT OF THE CASE</u>	3
1. <u>Charge, closing arguments, verdict, and sentence</u>	3
2. <u>Trial testimony</u>	4
D. <u>ARGUMENT</u>	10
1. THE PROSECUTOR’S CLOSING ARGUMENT SHIFTED THE BURDEN ON SELF-DEFENSE, MISSTATED THE LAW, AND DEPRIVED SWEET OF A FAIR TRIAL	10
a. <u>The prosecutor shifted the burden of proof to the defense and misstated the law by arguing Sweet’s act was presumed to be unlawful</u>	11
b. <u>The prosecutor misstated the law when he argued the complainant actually had to be in the process of assaulting Sweet for Sweet to assert self-defense</u>	15
c. <u>The misconduct described above was so pervasively prejudicial that no instruction could have cured the prejudicial effect.</u>	17
2. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE MISSTATEMENT OF THE LAW IN CLOSING ARGUMENT, THEREBY DENYING THE APPELLANT A FAIR TRIAL	19
E. <u>CONCLUSION</u>	22

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. A.N.J.</u> 168 Wn.2d 91, 225 P.3d 956 (2010).....	19
<u>State v. Acosta</u> 101 Wn.2d 612, 683 P.2d 1069 (1984).....	14
<u>State v. Boehning</u> 127 Wn. App. 511, 111 P.3d 899 (2005).....	10
<u>State v. Cantu</u> 156 Wn.2d 819, 132 P.3d 725 (2006).....	10
<u>State v. Currie</u> 74 Wn.2d 197, 443 P.2d 808 (1968).....	13
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	11
<u>State v. Gotcher</u> 52 Wn. App. 350, 759 P.2d 1216 (1988).....	11
<u>State v. Graves</u> 97 Wn. App. 55, 982 P.2d 627 (1999).....	12, 14
<u>State v. Janes</u> 121 Wn.2d 220, 850 P.2d 495 (1993).....	13
<u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	21
<u>State v. McCreven</u> 170 Wn. App. 444, 284 P.3d 793 (2012) <u>review denied</u> , 176 Wn.2d 1015 (2013)	13, 14, 15
<u>State v. McFarland</u> 127 Wn.2d 322, 899 P.2d 1251 (1995).....	19, 20

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Miles</u> 139 Wn. App. 879, 162 P.3d 1169 (2007).....	11, 14
<u>State v. Ray</u> 116 Wn.2d 531, 806 P.2d 1220 (1991).....	11
<u>State v. Reichenbach</u> 153 Wn.2d 126, 101 P.3d 80 (2004).....	20
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	19, 21
<u>State v. Walden</u> 131 Wn.2d 469, 932 P.2d 1237 (1997).....	13, 16
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	11, 17, 18
<u>State v. Walker</u> ___ Wn.2d ___, 341 P.3d 976, 985 (2015).....	11, 17

FEDERAL CASES

<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	10
<u>Martin v. Ohio</u> 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987).....	10
<u>Smith v. United States</u> ___ U.S. ___, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013).....	10
<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	19

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9A.16.020	11, 14
Washington Practice: Washington Pattern Jury Instructions: Criminal WPIC 17.02 (3d ed.2008)	12
WPIC 17.04	16
U.S. Const. amend. XIV	10
Const. art. 1, § 3	10

A. INTRODUCTION

The appellant stabbed another person at a social gathering. He asserted the stabbing occurred in self-defense. Although the court determined self-defense instructions were warranted, the prosecutor argued in closing that the appellant was presumed to have acted unlawfully and that he was only entitled to assert self-defense if the complainant, in fact, intended to assault him. The prosecutor's misconduct, which shifted the burden of proof and otherwise misstated the law of self-defense, was so flagrant and prejudicial that it was incapable of being cured by corrective instruction. It undermined a key component of the defense case and denied the appellant a fair trial. Defense counsel's failure to object to each serious misstatement of the law was, moreover, unreasonable and prejudicial. This too denied the appellant a fair trial. This Court should reverse the appellant's conviction and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. The prosecutor's closing argument impermissibly shifted the burden of proving self-defense to the appellant, depriving him of his state and federal due process rights to a fair trial.

2. The prosecutor's closing argument misstated the law of self-defense by adding an inapplicable requirement, depriving the appellant of his state and federal due process rights to a fair trial.

3. Defense counsel provided constitutionally ineffective assistance by failing to object to the State's misallocation of the burden of proof and misstatement of the law in closing argument.

Issues Pertaining to Assignments of Error

1. In closing argument, the prosecutor shifted the burden of proving self defense to the defense, arguing that the defendant's act was presumptively unlawful despite the trial court's prior ruling that the appellant was entitled to self-defense instructions. Did this flagrant, prejudicial misconduct deprive the appellant of his state and federal constitutional rights to a fair trial?

2. In closing argument, the prosecutor also argued that in order for the appellant to argue self-defense, he had to demonstrate the complainant was, in fact, in the process of assaulting him. This argument ignored that the appellant was entitled to act on appearances, and misled the jury as to the subjective and objective components of self defense. For this reason as well, did flagrant, prejudicial misconduct deny the appellant a fair trial?

3. Did defense counsel violate the appellant's state and federal right to the effective assistance of counsel by failing to object to the above-described arguments?

C. STATEMENT OF THE CASE¹

1. Charge, closing arguments, verdict, and sentence

The State charged James Sweet with first degree assault with a deadly weapon enhancement. CP 8. The State alleged Sweet assaulted 14-year-old J.R. with intent to inflict great bodily harm “with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.” CP 8; RCW 9A.36.011(1)(a); RCW 9.94A.533(4).

Based on the evidence at trial, the court instructed the jury on the lesser offense of second degree assault. CP 32; 8RP 141-53. Sweet also testified he stabbed J.R. in self-defense, and the court instructed the jury accordingly. CP 27-31 (Instructions 12-16, detailing what is required for a person to act in self-defense).

Nonetheless, the prosecutor argued in closing that any force employed by an accused is presumed to be unlawful. 9RP 30-31 (attached to this brief as Appendix A). This argument misstated the law because the

¹ This brief refers to the verbatim reports as follows: 1RP – 10/7/14; 2RP – 10/8/14; 3RP – 10/9/14; 4RP – 10/13/14; 5RP – 10/14/14; 6RP – 10/15/14; 7RP – 10/16/14; 8RP – 10/20/14; 9RP – 10/21/14; 10RP – 10/22/14; and 11RP – 11/21/14.

State has the burden of disproving the components of self-defense beyond a reasonable doubt. The prosecutor also argued that, because Sweet had not shown that J.R. was actually committing an assault at the time of the stabbing, Sweet was not entitled to assert self-defense. 9RP 40 (attached as Appendix B). This argument ignored the “act on appearances” instruction and misstated the subjective and objective components of self-defense.

Defense counsel did not object to either argument. 9RP 31, 40.

The jury convicted Sweet as charged. CP 47-49. The court sentenced Sweet to the low end of the standard range plus a 24-month deadly weapon enhancement. CP 83-90. Sweet timely appeals. CP 91.

2. Trial testimony

Sweet, who was 21 years old at the time of the incident, worked with his godfather at a concrete business. 8RP 59-60. The morning of August 24, 2013, a Saturday, Sweet and his godfather visited a worksite for a few hours and then returned to the apartment they shared. 8RP 77-78. Although it was still well before noon, Sweet began drinking, as had become his habit.² 8RP 78. He continued drinking beer and smoking

² Sweet testified that around the time of the incident, he was drinking about 18 Miller beers a day and smoking large quantities of marijuana. 8RP 63.

marijuana throughout the day. 8RP 77-87; see also 8RP 48-56 (testimony of friend who spent the afternoon with Sweet).

A few weeks before the incident, Sweet began corresponding with Heather Brickell, complainant J.R.'s cousin, on Facebook. 8RP 72-73. Their fathers had known each other growing up, and the two went to the same elementary school, although they did not know each other as children. 6RP 41-42; 8RP 73. Sweet and Brickell exchanged phone numbers and began sending each other text messages. 8RP 73-74. Although Sweet and Brickell had not yet met in person, they planned to meet up the night of the incident. 6RP 44-45; 8RP 87.

Brickell invited Sweet to the rural Enumclaw home of her maternal aunt for a party. 8RP 88. Sweet told Brickell he had been drinking, but he did not reveal how much. 8RP 89-90. Brickell and Sweet arranged for Brickell's family to pick up Sweet near his apartment. Sweet rode with Brickell and her mother, while Brickell's father and brother rode in a separate car. 6RP 48; 8RP 94.

Upon arrival at the aunt's rural Enumclaw home, Sweet realized the "party" was a quiet family gathering and no one was drinking. 8RP 95-97. Although the family was generally welcoming, Sweet felt embarrassed to have shown up intoxicated. 8RP 97.

Sweet accompanied Brickell and her brother to a fire ring on the property. Brickell introduced Sweet to J.R., her cousin, who was building a bonfire. 8RP 98. J.R. was about Sweet's height and heavier than Sweet. Although Brickell testified she told Sweet that J.R. was 14, 6RP 81, Sweet did not recall learning J.R.'s age. 8RP 98, 100, 129.

The four sat in a semicircle of chairs placed near the fire ring. 8RP 99. Sweet commented that the fire was small and asked if more wood was available. 8RP 102. J.R. responded that the fire would be bigger if they threw Sweet into the fire. According to Sweet, J.R. laughed "mockingly" following his comment. 8RP 103.

Sweet interpreted J.R.'s comment as a threat.³ He did not know why J.R. would threaten him, but he believed J.R. may have been upset Sweet was attempting to date Brickell. 8RP 103.

Sitting by the fire, Sweet felt intoxicated and increasingly isolated. 8RP 103. Sweet asked J.R. why he made the comment, but J.R. did not

³ Dr. Mark McClung, a psychiatrist, testified for the defense. 7RP 3. He testified the combined effects of alcohol and marijuana use could lead an intoxicated person to misread social cues, interpret neutral actions as negative, and to misperceive his surroundings. 7RP 11, 14. McClung testified that intoxication could even diminish an individual's ability to understand and process spoken language. 7RP 50-52.

respond.⁴ 8RP 104. Frustrated, Sweet got to his feet, approached J.R., and flipped J.R.'s cap off his head. 8RP 105. As he did so, Sweet's back was to the bonfire, and he was standing about a foot from the edge of the fire ring. 8RP 105.

J.R. jumped from his chair and pushed Sweet. 8RP 106. Sweet stumbled backward and grabbed J.R.'s wrist to stop himself from falling into the fire. 8RP 107. J.R. grabbed Sweet by the neck. 8RP 106-07. J.R. was not choking him and may have been simply trying to push Sweet away. 8RP 107. Nonetheless, Sweet feared he would be pushed into the bonfire. 8RP 111. The altercation went on for 10-20 seconds. 8RP 107. J.R. then let go of Sweet's neck, and they both sat down. 8RP 111.

After a few moments, Sweet and Brickell went to Brickell's mother's car to get Sweet's backpack. When they returned to the fire ring, Sweet began smoking the marijuana he had retrieved from his backpack. 8RP 114. J.R. asked, "Who is smoking weed?" 8RP 114. Sweet responded that it was him and offered his pipe to the others. J.R. responded, "We don't do drugs," which caused Sweet to feel further alienated. 8RP 115.

⁴ J.R. testified he did not respond, 4RP 62-63, but his cousins insisted J.R. attempted to convince Sweet he was joking. 4RP 170; 6RP 55.

Sweet blurted out, “Don’t mess with the Juggalos.” 8RP 116. In retrospect, he was not sure why he did so. 8RP 116. “Juggalos” are fans of a musical group known for performing with eerily painted faces; Juggalos see themselves as an inclusive, yet persecuted, group. 8RP 117, 137-38.

J.R. responded, “You are one of those guys who wear makeup?” 8RP 117. Sweet interpreted the comment as hostile and, feeling intimidated, stood and approached J.R. again. 8RP 118.

A shoving match ensued. Sweet was not sure who pushed whom first. 8RP 118-19. After a few shoves, J.R. grabbed Sweet by his shirt, and Sweet felt himself being pulled into the fire. 8RP 120. To protect himself, Sweet pulled a small folding knife from his pocket and stabbed J.R. in his side. 8RP 121. Sweet did not want to kill J.R., only to defend himself. 8RP 123.

J.R. said, “[y]ou stabbed me” and began walking away from the fire pit. 8RP 123. Sweet followed, hoping to apologize and to urge J.R. to lie down so Sweet could assess the injury and provide assistance if possible. 8RP 123, 125. But J.R. screamed he had been stabbed and yelled at Sweet to leave him alone. 8RP 124.

Sweet followed J.R. to the deck of the residence, hoping to provide assistance of some kind. 8RP 124. Somewhat dazed, Sweet did not *see* a

gun, but he heard a metallic sound that sounded like a shotgun being cocked. 8RP 125. Sweet ducked and ran, and he was not seen again that night. 8RP 125-26. Sweet turned himself in to the police a few days later. 8RP 126.

Upon hearing the commotion outside, one of J.R.'s brothers obtained a gun from his room. 7RP 77. The brother testified he pointed the gun at Sweet and yelled for him to stay off the deck. 7RP 82-83.

Johnny Roberts, a family friend who was present that night, testified that after the stabbing Sweet appeared confused about what he had done. Seeing the reactions of J.R.'s family members, Roberts told Sweet it would be a good idea if he left the property. 7RP 121-22.

After the police and fire department arrived, J.R. was transported to Harborview. According to treating physicians, the stab wound penetrated the abdominal wall below the ribs on the right side. 5RP 111; 8RP 32. It also penetrated the liver slightly. 5RP 111.

J.R.'s vital signs were stable. 5RP 105. The attending surgeon nonetheless decided to perform exploratory laparoscopic surgery to determine the extent of injury to internal organs. 5RP 107. Although the liver was damaged, it had stopped bleeding, so further surgery was unnecessary. 5RP 111-12, 123. The surgeon testified J.R.'s liver would heal and he would experience no long-term effects. 5RP 129-30.

D. ARGUMENT

1. THE PROSECUTOR'S CLOSING ARGUMENT SHIFTED THE BURDEN ON SELF-DEFENSE, MISSTATED THE LAW, AND DEPRIVED SWEET OF A FAIR TRIAL.

Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). Moreover, the State is foreclosed from shifting the burden of proof to the accused when, as in the case of self-defense, an affirmative defense negates an element of the crime. Smith v. United States, ___ U.S. ___, 133 S. Ct. 714, 719, 184 L. Ed. 2d 570 (2013) (quoting Martin v. Ohio, 480 U.S. 228, 237, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987) (Powell, J., dissenting)).

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). When a prosecutor commits misconduct, he may deny the accused a fair trial. Id. at 518; U.S. Const. amend. 14; Const. art. 1, § 3.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. Boehning, 127 Wn. App. at 519. However, he may not make

statements that are unsupported by the evidence. State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991). Moreover, a prosecutor who misstates the law of a case commits a serious irregularity that has the potential to mislead the jury. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). For example, a prosecutor commits misconduct by shifting the burden of proof to the defendant during closing argument. State v. Miles, 139 Wn. App. 879, 889, 162 P.3d 1169 (2007); United States v. Perlaza, 439 F.3d 1149, 1171 (9th Cir. 2006). When the prosecutor mischaracterizes the law, and when there is a substantial likelihood the misstatement affected the verdict, the right to a fair trial is violated. State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191, as amended (Nov. 18, 2011) (citing State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988)).

- a. The prosecutor shifted the burden of proof to the defense and misstated the law by arguing Sweet's act was presumed to be unlawful.

Under RCW 9A.16.020, the use of force “upon or toward the person of another” is lawful in the following cases:

- (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

Consistent with the statute, Washington pattern jury instructions require that the person using the force: (1) “reasonably believe[] he is about to be injured in preventing or attempting to prevent an offense against the person;” (2) not use more force than is necessary, and (3) “employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the person” CP 27; 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (WPIC) 17.02 (3d ed.2008).

Here, the prosecutor correctly argued that stabbing another person constituted an assault, provided the force used was “unlawful.” 9RP 30 (summarizing common law definitions of assault).⁵ Thus, the prosecutor argued, the question was whether Sweet’s use of force toward J.R. was lawful. 9RP 30.

And this is what we are getting at when we ask, was [Sweet] acting in self defense? *Because if he is acting in self defense, it was lawful. If he is not acting in self defense, then it wasn’t, and it is an assault. When is the use of force lawful?* And the instructions tell you. Instruction[s] 12 through 16 lay out for you when the use of force is lawful – when it is allowed. *And in synthesizing those instructions, there are several main points to take*

⁵ See also CP 22 (Instruction 7, stating “an assault is an intentional touching or striking or cutting or shooting of another person, with unlawful force, that is harmful or offensive”); *State v. Graves*, 97 Wn. App. 55, 61, 982 P.2d 627 (1999) (because “assault” is not defined in the criminal code, Washington courts apply the common law definition of assault).

away. First, the presumption is that the use of force is unlawful.

9RP 30-31 (emphasis added). The prosecutor then went on to describe the requirements of the lawful use of force:

[I]f the person using force is not the first aggressor; the person using force subjectively believes he is about to be injured and that belief is objectively reasonable; the force used is being used to prevent an offense against the person; and the amount of force is not more than necessary.

9RP 31.

The forgoing arguments shifted the burden of proof as to self-defense. Whether an accused has produced sufficient evidence to raise a claim of self-defense is a matter of law for the trial court. State v. McCreven, 170 Wn. App. 444, 471, 284 P.3d 793 (2012), review denied, 176 Wn.2d 1015 (2013). It is proper to refuse a self-defense instruction when there is no evidence to justify a reasonable inference that the defendant acted in self-defense. State v. Currie, 74 Wn.2d 197, 198, 443 P.2d 808 (1968). But a self-defense instruction must be given when the accused produces some evidence of self-defense. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Once the accused produces such evidence, the State has the sole burden to prove the absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); Janes, 121 Wn.2d at 237. It is “unassailable”

that the burden of proof remains with the State. Miles, 139 Wn. App. at 889.

Here, the prosecutor's argument shifted the burden of proof to the defense. Prefaced by the argument that the use of force was presumptively unlawful, the prosecutor then listed the requirements to render the use of force lawful. But because the court had determined that Sweet had met his burden of production as to self-defense, the presumption was not that the use of force was unlawful. Rather, the law presumed, at that point, that Sweet had acted lawfully. See State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984) (self-defense is defined by statute as a lawful act) (citing RCW 9A.16.020(3)); accord, State v. Graves, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999). The jury was thus required to review each of the requirements from the standpoint of the State having to *disprove* them beyond a reasonable doubt, rather than for Sweet to prove he satisfied them. The State's argument flipped this constitutionally-mandated burden on its head.

McCreven is instructive because there, the State engaged in a similar attempt at burden-shifting. There, as here, the court determined the defense had adduced sufficient evidence for the jury to be instructed on self-defense. But the prosecutor argued the defendants still had to prove self-defense by a preponderance of the evidence before the State

had any duty to disprove self-defense beyond a reasonable doubt. 170 Wn. App. at 468-70. In rebuttal, moreover, the prosecutor acknowledged it was the State's burden to disprove self-defense. But the prosecutor then added, "What I want to say is this, for the State to disprove self-defense, first there must be proof of self-defense." Id. at 470. Based in part on this shifting of the burden as to self-defense, the Court reversed the defendants' convictions. Id. at 471.

The situation here is similar to the argument held improper in McCreven. The prosecutor's argument misallocating the burden of proof, made immediately before listing the requirements of self-defense, confusingly asserted that Sweet had the burden as to each of the requirements of self-defense.

- b. The prosecutor misstated the law when he argued the complainant actually had to be in the process of assaulting Sweet for Sweet to assert self-defense.

To make matters worse, the prosecutor also argued self-defense was not available to Sweet because J.R. was not, in fact, attempting an offense against Sweet. 9RP 40. According to the prosecutor, "[There must be] some intent [on J.R.'s] part to commit an offense at the time that [Sweet] stabbed him." 9RP 40.

Like the burden-shifting argument described above, this argument seriously misstated the applicable law. As the court correctly instructed the jury:

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

CP 13; see also WPIC 17.04 (“Lawful Force—Actual Danger Not Necessary.”). The prosecutor’s argument misrepresented both the subjective and objective prerequisites to self-defense: Even the “objective” requirement does not require the actor to be experiencing actual danger. See Walden, 131 Wn.2d at 474 (subjective component of self-defense requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done). Nothing requires that the injured party *actually* be attempting to injure the person acting in self defense. Rather, the law requires that the person acting in self-defense reasonably believe such an attempt was being made.

Yet the prosecutor told the jurors they had to find J.R. was actually intending to assault Sweet in order to find Sweet acted in self-defense. As

with the shifting of the burden on self-defense, the prosecutor's argument seriously misstated the law and misled the jury.

- c. The misconduct described above was so pervasively prejudicial that no instruction could have cured the prejudicial effect.

Prosecutorial misconduct is reversible error when the misconduct is so flagrant and ill-intentioned as to be incurable by corrective instruction. Walker, 164 Wn. App. at 737. Even if an instruction might have cured an isolated misstatement, the cumulative effect of repeated prejudicial misconduct may require reversal. Id. This Court's analysis of the prejudicial impact of misconduct does not rely on a review of sufficiency of the State's evidence. State v. Walker, ___ Wn.2d ___, 341 P.3d 976, 985 (2015).

Argument that consistently misleads the jury regarding the law supporting the defense can amount to reversible misconduct, even without objection at trial. Walker, 164 Wn. App at 731-39. In Walker, the prosecutor explained that the self-defense standard was tantamount to arguing, "I would do it too if I knew what he knew. That's the objective standard in defense of others." Id. at 735. The prosecutor repeated the message, "While you're listening to the defense argument, while you're deliberating this, ask yourselves and ask each other repeatedly, 'Would I do it too if I knew what he knew?'" Id. Later, the prosecutor argued, "I

would suggest to you, in addition, there isn't a single one of you who would do what he did." Id.

The prosecutor repeated this theme in rebuttal. This time, defense counsel objected that the argument was a misstatement of the law, but the trial court overruled the objection. The prosecutor then repeated that the jury "determine[s] the reasonably prudent person's standard. And that's, would you do it too if you knew what he knew?" Id.

On appeal, Division Two of this Court found the comments were improper and prejudicial even under the standard for unobjected-to comments. Id. at 736 n. 7. First, the Court explained, the nature of the evidence presented at trial created a situation in which "the prosecutor's improper arguments could easily serve as the deciding factor." Id. Additionally, the Walker court noted, the prosecutor did not make only one or two isolated comments. Id. Rather, the prosecutor used the improper comments, "to develop themes throughout closing argument." Id.

As in Walker, the above-discussed misconduct was pervasive, effectively shifting the burden on all requirements of self-defense. 9RP 30-31. This was not isolated misconduct on an unimportant point of law. Rather, self-defense was one of two closely-related defenses raised by Sweet. 9RP 65-69, 71 (arguing self-defense in closing argument); see also

9RP 64, 71 (arguing Sweet lacked intent necessary to prove first degree assault). And although the court correctly instructed the jury as to the State's burden, the prosecutor repeatedly misstated the law and severely undercut the court's self-defense instructions. This made it difficult, if not impossible, for the jury to apply the correct law to the facts, and deprived Sweet of a fair trial. As in Walker, this Court should reverse Sweet's conviction and remand for a new trial.

2. COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE MISSTATEMENT OF THE LAW IN CLOSING ARGUMENT, THEREBY DENYING THE APPELLANT A FAIR TRIAL.

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22 of the state constitution. Strickland v. Washington, 466 U.S. 668, 685-86; 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

An accused asserting ineffective assistance must show (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor performance prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (citing Strickland, 466 U.S. at 686; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). This Court reviews claims of ineffective assistance of counsel de

novo, as they present mixed questions of law and fact. A.N.J., 168 Wn.2d at 109.

With respect to the deficient performance prong, “[t]here is a strong presumption that defense counsel’s conduct is not deficient,” but an accused rebuts that presumption if “no conceivable legitimate tactic explain[s] counsel's performance.” State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To meet the prejudice prong, an accused person must show a reasonable probability “based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation.” McFarland, 127 Wn.2d at 337.

Sweet satisfies both requirements. As to the performance prong, there could be no legitimate trial strategy in failing to object to the prosecutor’s improper closing argument, which shifted the burden of proof on self-defense and imposed an additional requirement upon Sweet that the law did not. As discussed above, once an accused puts forth sufficient evidence to merit a self-defense instruction, the law is well established that the State bears the burden of proving beyond a reasonable doubt that the force used was unlawful. It is also well-established that that a person defending himself is entitled to act on appearances, regardless of the subjective intent of the person he harms or offends. Counsel had a

duty to be aware of the applicable law. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). And no conceivable legitimate tactic explains counsel's failure to act: Even if counsel did not wish to highlight the State's improper closing argument, she could have moved for a mistrial and requested a curative instruction outside the presence of the jury.⁶

The remaining question is whether counsel's deficient performance prejudiced Sweet. There was evidence before the jury from which it could have inferred that Sweet acted in self-defense. 8RP 118-23. Had counsel timely addressed the fact that the prosecutor was repeatedly misstating the law, Sweet could have obtained curative instructions clarifying that the State bore the burden of proving the absence of self-defense, as well as clarifying that there was no requirement that J.R. actually be intending to assault Sweet at the time. With such instructions, Sweet would likely have prevented the State from undermining its burden of proof.

Sweet has established both deficient representation and prejudice. For this reason as well, this Court should reverse his conviction and remand for a new trial. Thomas, 109 Wn.2d at 232.

⁶ Counsel did not even attempt to correct the prosecutor in the defense closing argument; rather, she declined to go over the requirements of self-defense, stating "I know that [the prosecutor] talked back and forth about self defense and you have the instructions, so I am not going to go over the instructions." 9RP 65.

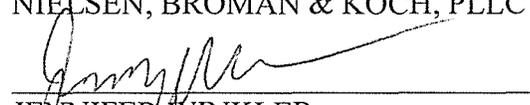
E. CONCLUSION

For the foregoing reasons, this Court should reverse the appellant's conviction and the accompanying enhancement and remand for a new trial.

DATED this 10TH day of April, 2015.

Respectfully submitted,

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APPENDIX A

1 Well, again, you have your definitional instructions to
2 fall back on. What is assault? Instruction No. 7 tells you:
3 An assault is an intentional striking or cutting or
4 shooting or any of these other things done with unlawful
5 force that is harmful or offensive. So what does that mean
6 in this case? Was this an assault? Yeah. There is an
7 intentional striking or cutting. Even the defendant admits
8 that he intentionally stabbed Jakob. That is what he was
9 trying to do. Was it harmful or offensive? Clearly it was.
10 Jakob was transported to the hospital, and you have heard
11 all of the evidence about the injury that he actually
12 suffered. Was it force? Clearly, when stabbing someone in
13 the abdomen, is the use of force against them? So that is
14 really the question when you look at was this an assault at
15 all? Was it lawful, or was it unlawful? Because if it is
16 unlawful, then it is an assault. If it is lawful, then it
17 is not. So was his use of force lawful is the question.

18 And this is what we are getting at when we ask, was he
19 acting in self defense? Because if he is acting in self
20 defense, it was lawful. If he is not acting in self
21 defense, then it wasn't, and it is an assault. When is the
22 use of force lawful? We don't call it self defense in many
23 of the instructions, but that is what we are talking about.
24 When is it lawful? And the instructions tell you.
25 Instruction Nos. 12 through 16 lay out for you when the use

1 of force is lawful -- when it is allowed. And in
2 synthesizing those instructions, there are several main
3 points to take away. First, the presumption is that the use
4 of force is unlawful. Because unless it fits within those
5 definitions, the presumption is unlawful. It becomes lawful
6 if the person using force is not the first aggressor; the
7 person using force subjectively believes he is about to be
8 injured and that belief is objectively reasonable; the
9 force used is being used to prevent an offense against the
10 person; and the amount of force is no more than necessary.
11 If you have all of these things, then the use of force is
12 lawful. If any of these are missing, it is unlawful.

13 So was his use of force lawful? What does the evidence
14 and what does the law tell you? That it was not. And here
15 is why: He was the first aggressor. He did not subjectively
16 believe he was about to be injured. Even if he did, that
17 belief was not objectively reasonable. Jakob was making no
18 attempt to commit any sort of offense against him. His use
19 of force was more than necessary. And just common sense.

20 All of these things tell you that this was not self
21 defense. This was not a lawful use of force. And I want to
22 talk about each one of them and explain why. First let's
23 talk about the first aggressor issue. And you are given an
24 instruction about this. Instruction No. 16 tells you what
25 it means to be an aggressor. What it means to be the first

APPENDIX B

1 force was lawful cannot be believed.

2 Fourth one: Jakob wasn't making any actual attempt at
3 that point to commit an offense against him. And that's a
4 requirement for lawful force. Even if you accept this claim
5 that Jakob's statement about throwing him in the fire was a
6 threat. And that Jakob's actions at the end of the first
7 scuffle constituted a threat. That is not enough. What has
8 to be there is that there was some intent to commit an
9 offense at the time that the defendant stabbed him. That is
10 not here, either. Because remember, what the defendant
11 himself admits happened, they were both sitting down. Jakob
12 wasn't even talking to him. They are 10 feet apart, and
13 there is a person in between them. And it is the defendant
14 who gets up and goes over towards Jakob, not the other way
15 around. There is just no evidence to suggest that Jakob was
16 committing or about to commit an assault or an offense
17 against the defendant. And that means that his use of force
18 was not lawful.

19 Fifth: The use of force must be no more than necessary.
20 Which again makes sense, that there has to be -- and we
21 talked about this in jury selection -- some proportionality
22 in the response. And that is what the jury instructions
23 actually tell you about the law. Jury Instruction Nos. 12
24 and 14 define for you what a necessary amount of force is.
25 And you put it together, and what you get is the amount and

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 72732-0-1
)	
JAMES SWEET,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10TH DAY OF APRIL, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES SWEET
DOC NO. 378939
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF APRIL, 2015.

X Patrick Mayovsky