

72732-0

72732-0

NO. 72732-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JAMES ALLEN SWEET,

Appellant.

FILED

July 23, 2015  
Court of Appeals  
Division I  
State of Washington

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	2
a. Testimony At Trial .....	2
b. Instructions And Closing Argument .....	14
C. <u>ARGUMENT</u> .....	18
1. SWEET HAS FAILED TO ESTABLISH THAT THE CHALLENGED COMMENTS IN THE PROSECUTOR'S CLOSING ARGUMENT WERE IMPROPER AND PREJUDICIAL .....	18
a. Misstatement Of Burden Of Proof As To Self-Defense .....	20
b. Comment Regarding J.R.'S Lack Of Intent To Harm Sweet .....	26
2. SWEET HAS FAILED TO ESTABLISH THAT HIS COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN FAILING TO OBJECT TO THE CHALLENGED PROSECUTORIAL STATEMENTS .....	30
D. <u>CONCLUSION</u> .....	34

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052 (1984) ..... 31

Washington State:

State v. Cienfuegos, 144 Wn.2d 222,  
25 P.3d 1011 (2001)..... 31, 34

State v. Dhaliwal, 150 Wn.2d 559,  
79 P.3d 432 (2003)..... 19

State v. Dunn, 180 Wn. App. 570,  
321 P.3d 1283 (2014), review denied,  
181 Wn.2d 1030, 340 P.3d 228 (2015)..... 28

State v. Emery, 174 Wn.2d 741,  
278 P.3d 653 (2012)..... 21, 23, 26, 29, 30

State v. Fisher, 165 Wn.2d 727,  
202 P.3d 937 (2009)..... 19, 20, 22

State v. Gregory, 158 Wn.2d 759,  
147 P.3d 1201 (2006)..... 20

State v. Grier, 171 Wn.2d 17,  
246 P.3d 1260 (2011)..... 31

State v. Kalebaugh, No. 89971-1,  
2015 WL 4136540, \_\_\_ P.3d \_\_\_ (July 9, 2015) ..... 29, 30

State v. McFarland, 127 Wn.2d 322,  
899 P.2d 1251 (1995)..... 31

State v. McKenzie, 157 Wn.2d 44,  
134 P.3d 221 (2006)..... 19, 23

<u>State v. Thorgerson</u> , 172 Wn.2d 438, 258 P.3d 43 (2011).....	32
<u>State v. Walden</u> , 131 Wn.2d 469, 932 P.2d 1237 (1997).....	21
<u>State v. Walker</u> , 164 Wn. App. 724, 265 P.3d 191 (2011).....	22, 23
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	21, 29
<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	33

#### Constitutional Provisions

##### Federal:

U.S. Const. amend. V .....	19
U.S. Const. amend. VI .....	19, 30

##### Washington State:

Const. art. I, § 3.....	19
Const. art I, § 22.....	31

**A. ISSUES PRESENTED**

1. A defendant who alleges prosecutorial misconduct to which he did not object must show that the prosecutor's conduct was improper, caused prejudice that could not have been neutralized by a curative instruction, and had a substantial likelihood of affecting the verdict. Here, only one of the two challenged statements was improper, the error in misstating the burden of proof as to self-defense was isolated to three sentences and surrounded by proper statements of the applicable law, the jury instructions correctly informed the jury of the proper burden of proof and to disregard any argument that contradicted the instructions, and there was overwhelming evidence that the defendant's use of force was unlawful. Has the defendant failed to show that the prosecutor's misstatement had a substantial likelihood of affecting the verdict and could not have been cured?

2. A defendant who claims to have received ineffective assistance of counsel must establish both that his counsel's performance was objectively unreasonable and that there is a reasonable probability that the allegedly deficient performance affected the verdict. Here, the remarks to which defense counsel did not object were only partially improper and were not prejudicial

in light of the surrounding proper argument, jury instructions, and overwhelming evidence. Has the defendant failed to establish that his counsel's performance was deficient and had a reasonable probability of affecting the verdict?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

The State charged the defendant, James Allen Sweet, with one count of assault in the first degree with a special allegation that Sweet was armed with a deadly weapon at the time of the assault. CP 8. A jury found Sweet guilty as charged and found the special allegation proven. CP 47, 49. The trial court imposed a low-end standard range sentence of 111 months in prison, plus an additional 24 months for the deadly weapon enhancement. CP 83-86. Sweet timely appealed. CP 91.

2. SUBSTANTIVE FACTS.

a. Testimony At Trial.

In August of 2013, twenty-one-year-old Sweet began communicating online and through text messages with seventeen-year-old Heather Brickell, eventually asking her out on a date.

6RP-42. The night before her eighteenth birthday, Heather<sup>1</sup> invited Sweet, who she had not yet met in person, to come with her and her family to her aunt and uncle's house in Enumclaw. 6RP 44-45. After picking Sweet up, Heather's family drove to the rural house where her aunt Moneika R. and uncle Mark R. lived with their sons.<sup>2</sup> 3RP 91-92; 6RP 47. When the Brickells and Sweet arrived, Heather's mother Sondra introduced Sweet to everyone who was on the porch, which included Moneika, Mark, their 23-year-old son Jeremy, their 25-year-old son Justin, and two adult friends of the family. 3RP 95; 6RP 50. Everyone shook Sweet's hand and appeared to be doing their best to make him feel welcome. 6RP 51. Although Sweet had told Heather that he had consumed a few beers earlier in the day, no one on the porch observed any indication that Sweet was intoxicated. 3RP 110; 4RP 12, 133; 5RP 34, 142, 159; 7RP 73, 117.

Heather and Sweet then joined Heather's brother, Steven Brickell, and Moneika and Mark's youngest son, 14-year-old J.R., at the fire pit. 6RP 50, 52. J.R. was just finishing building the fire and

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<sup>1</sup> For clarity, members of the Brickell family will be referred to by their first names. No disrespect is intended.

<sup>2</sup> For clarity and to protect the juvenile victim's identity, members of the victim's family will be referred to by their first names. No disrespect is intended.

pouring diesel fuel on the wood to help it burn. 6RP 52. Heather introduced Sweet to J.R., and told Sweet that J.R. was only 14 years old even though he appeared older. 6RP 81-82. J.R. shook Sweet's hand, and the four young people sat down in chairs approximately five to six feet from the small fire. 4RP 55-56; 6RP 64.

Shortly thereafter, Sweet made a comment that the fire "kind of suck[ed]" because it wasn't burning well, and criticized J.R.'s use of diesel fuel. 4RP 59-60; 6RP 54-55. J.R. felt that Sweet was joking and trying to be funny, so he jokingly responded that the fire would be bigger if they threw Sweet on it. 4RP 60, 165; 6RP 54-55. J.R. was laughing when he said this; he did not appear angry or serious, and was slouched in his chair. 4RP 60, 166; 6RP 56. J.R. gave no indication by tone or action that he intended to actually throw Sweet in the fire. 4RP 61, 166; 6RP 65.

Sweet grew upset and angry, repeatedly asking J.R., "Why you got to do me like that?" and "Are you threatening me?" in a serious and aggressive tone. 4RP 62-63, 166; 6RP 55-57. J.R. initially did not respond and simply continued talking to Steven, but as Sweet continued to repeat his questions, J.R. eventually started responding by telling Sweet, in a serious tone, that he had been

joking, and that Sweet should calm down. 4RP 170; 6RP 55-57. Sweet continued to pose the same questions, and J.R. gave the same responses several times. 4RP 62-63, 170; 6RP 58.

A few minutes later, with no apparent provocation, Sweet got up from his chair, walked six or seven feet away to stand in front of J.R.'s chair, and flipped J.R.'s hat off of his head onto the ground. 4RP 63, 67-68, 174; 6RP 54, 59. J.R. stood up, face to face with Sweet, and a brief staring match occurred. 6RP 60. Sweet then grabbed J.R.'s wrist, prompting J.R. to grab Sweet's hand to try to free himself, and Sweet used his remaining hand to grab J.R.'s other wrist. 4RP 69-70.

After a brief struggle in which Sweet would not let go of J.R., J.R. was able to free one hand and place it on Sweet's collarbone area, to the side of his throat, in order to hold Sweet at arm's length. 4RP 70-71; 5RP 18; 6RP 60. J.R. made no attempt to grab Sweet's throat or choke him, or to push him into the fire. 4RP 71-72, 181; 6RP 61. J.R. then backed up and told Sweet to sit down. 4RP 72-73; 6RP 62. After Sweet returned to his seat on the other side of Heather, J.R. sat down as well. 4RP 73; 6RP 62.

After they both sat down, Sweet continued to make the same comments asking why J.R. had talked about throwing Sweet in the

fire, and J.R. continued to respond by telling Sweet to calm down and that it had been a joke. 6RP 63. After a few minutes, Sweet retrieved his backpack from the Brickells' vehicle. 4RP 64; 6RP 63. When he returned to his seat at the fire, Sweet began to drink a beer and smoke some marijuana that he had brought with him. 6RP 63-65. J.R. commented that he smelled marijuana, and Sweet indicated that he was the one smoking and casually offered J.R. a "hit." 4RP 66, 171; 6RP 65. J.R. declined, and informed Sweet that he and his cousins didn't do drugs. 4RP 66; 6RP 65.

Shortly thereafter, Sweet again brought up J.R.'s earlier comment about throwing Sweet on the fire, and J.R. again told him that it was a joke and not to take it seriously. 4RP 172; 6RP 66. After going back and forth in the same vein several times, Sweet said something like, "You don't mess with us Juggalos," in a serious tone. 4RP 75, 172; 6RP 66. All J.R. knew of the Juggalos was that they are fans of the musical group Insane Clown Posse and frequently paint their faces, so J.R. laughed and responded, "You mean those guys that wear makeup?" in a joking tone. 4RP 75, 173; 6RP 66-67.

Sweet answered, "Yes. The guys that wear makeup," jumped up from his seat, grabbed something out of his backpack,

and walked toward J.R., who then also stood up. 4RP 76; 6RP 67. As Sweet walked past Heather toward J.R., Heather saw that Sweet was carrying a black hunting knife with an approximately six-inch blade. 6RP 67; 7RP 59. When Sweet and J.R. came face to face, the fire was to their side at least three feet away. 4RP 175. Within seconds, J.R. felt what he at first thought was a punch to the right side of his ribs.<sup>3</sup> 4RP 77. He pushed Sweet away from him and backed up. 4RP 78. When J.R. put his hand to his side, he discovered that he was bleeding badly, and immediately swore at Sweet, yelling that Sweet had stabbed him. 4RP 78, 174; 6RP 68.

J.R. took off his shirt and pressed it to his side to try to stop the bleeding. 4RP 78, 176. As he walked toward the house seeking help, Sweet followed him, apologizing and asking J.R. in a panicked voice to let Sweet help him. 4RP 79; 5RP 39; 6RP 69. As they approached the house, Heather's mother observed that Sweet still had the knife in his hand, and her observations of it matched Heather's. 4RP 27.

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<sup>3</sup> The testimony varied as to whether there was any physical contact between Sweet and J.R. immediately prior to the stabbing—J.R. testified the stabbing was the first thing he recalled happening, while Heather testified that there had been a shoving match for 2-3 seconds prior to the stabbing. 4RP 77; 6RP 68. Steven thought he recalled that the shoving match following Sweet flipping J.R.'s hat onto the ground had immediately led into the stabbing. 4RP 74. However, all three agreed that Sweet had started the confrontation and that J.R. had neither said nor done anything threatening or aggressive to Sweet prior to the stabbing. 4RP 106, 175, 181; 6RP 74-75.

When J.R.'s oldest brother, Justin, learned that J.R. had been stabbed, he retrieved a handgun from his room and pointed it at Sweet to dissuade him from trying to come up on the porch where family members were on the phone with 911 and trying to treat J.R. 7RP 82. When Justin threatened to shoot him, Sweet made a comment to the effect that Justin might as well shoot him, because if he didn't, Sweet was going to jail forever. 4RP 31; 5RP 23; 6RP 71; 7RP 119. When Justin didn't shoot him, Sweet fled down the driveway into the darkness. 4RP 31; 5RP 57; 7RP 123.

J.R. lay on the porch, bleeding and vomiting, until police verified that the scene was secure and allowed paramedics to enter. 3RP 114; 4RP 30, 81; 6RP 23; 7RP 78. He was then transported by ambulance to Harborview Medical Center, where a CT scan and surgery revealed that the knife had penetrated into J.R.'s abdominal cavity and lacerated his liver. 4RP 83; 5RP 106, 111. The knife wound was one to one and a half inches wide on J.R.'s skin, and reached three inches or more into J.R.'s body. 5RP 116. J.R. stayed in the hospital for several days before being released. 3RP 124. Officers were unable to locate Sweet after the stabbing until he turned himself in four days later. 5RP 81; 7RP 147, 151.

At trial, the State's witnesses testified to the facts above.<sup>4</sup> Sweet testified in his own defense, and his account of events almost entirely matched those of the State's witnesses. 8RP 88-125. However, Sweet indicated that he had not heard or correctly perceived certain things, and contended that he had felt threatened by J.R. and had stabbed him in self-defense. 8RP 120-21.

Sweet told the jury that when he commented on how small the fire was, and J.R. laughed and responded that it would be bigger if they threw Sweet on it, Sweet interpreted that as a threat. 8RP 102. When asked why he interpreted it that way, Sweet's only explanation was that he didn't know J.R. and J.R. could have been upset that Sweet was hanging out with Heather (despite the lack of any prior indication that J.R. was upset with Sweet). 8RP 102-03. Sweet testified that he was "pretty drunk" after drinking alcohol and smoking marijuana all day, and claimed that he never heard any response from J.R. to his repeated questions about whether J.R. was threatening him, and couldn't tell whether J.R. was joking or serious. 8RP 103-05.

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<sup>4</sup> The State called as witnesses every person other than Sweet who was present at J.R.'s house on the night of the stabbing, plus various police officers and doctors.

Sweet testified that he walked over and flipped J.R.'s hat onto the ground because he was "irritated" at the perceived lack of response by J.R. to his questions. 8RP 103-04. He claimed that after he flipped J.R.'s hat, J.R. pushed him first, and that he had only grabbed J.R. to stop himself from stumbling backwards. 8RP 106-07. Sweet admitted that J.R. had not tried to choke him when J.R. got a hand near Sweet's neck, and that he could not tell whether J.R. was perhaps merely trying to keep him away. 8RP 107. Sweet nonetheless asserted that he feared that he was "going to get hurt" because J.R. had "control over" him, and he feared J.R. was going to throw him into the fire. 8RP 108. Sweet did not claim that J.R. had given any visible indication that he intended to throw Sweet into the fire during the first confrontation, but merely stated that he felt threatened "[b]ecause the fire was there, and [J.R.] had me by the neck."

Sweet acknowledged that he felt "almost embarrassed" when he offered marijuana to J.R. and was rebuffed. 8RP 115. He testified that he told J.R. "don't mess with the Juggalos" "just to let him know that . . . that's what I am." 8RP 116. Sweet claimed that when J.R. responded by referring to Juggalos wearing makeup, Sweet was scared because he believed J.R. hated Juggalos and

therefore hated him, and “kind of” thought J.R.’s comment was a threat. 8RP 117. Sweet acknowledged that “[i]t could have been a joke,” but said he didn’t remember anyone laughing, and he personally did not find it funny because being a Juggalo is part of his identity. 8RP 117.

Sweet told the jury that after J.R.’s comment about wearing makeup, he walked up to J.R. because “I felt intimidated, so I thought it was time to fight.” 8RP 118. He denied remembering who had pushed whom first, but insisted that “we both pushed each other” for a few seconds. 8RP 119. Sweet claimed that J.R. then grabbed him by the front of his shirt and tried to pull him sideways toward the fire, so Sweet pulled a knife out of his pocket and stabbed J.R. 8RP 120. Sweet denied using a knife like the one Heather and her mother had described, and claimed that it was only a legal folding pocket knife, with a blade no longer than his pinky finger. 8RP 121.

When asked on direct examination whether he felt at the time that he needed to stab J.R. to protect himself, Sweet responded, “It was the only thing I thought of at the time.” 8RP 121. When asked what was running through his head immediately after the stabbing, Sweet didn’t mention anything about self-

defense, and said only that he was thinking about whether J.R. was hurt. 8RP 122. When his attorney followed up with a specific question about whether Sweet was afraid at that point, Sweet initially responded that he was afraid that J.R. was hurt, and then added that he was also afraid J.R. was going to do something to hurt him. 8RP 122.

Before he testified in his own defense, Sweet called psychiatrist Mark McClung to testify as an expert witness regarding how Sweet's judgment and perception might have been affected by the quantities of alcohol and marijuana that Sweet reported having consumed the day of the stabbing. 7RP 3-14. The State then elicited a number of statements that Sweet had made to McClung about the incident. 7RP 37-44. Sweet had told McClung that he is easy to upset and "thin-skinned." 7RP 37. As an example of this, Sweet had described an incident in fifth grade when he beat someone up for making fun of him. 7RP 37, 45. Sweet also acknowledged that he gets defensive when hanging out with people different than himself, particularly "red-neck kids." 7RP 38.

Sweet told McClung that when J.R. made the comment that the fire would be bigger if they threw Sweet on it, Sweet "snapped." 7RP 42. He explaining to McClung, "I don't take kindly to that kind

of stuff. Shit, in my neighborhood we are fighting if you say some stupid shit like that.” 7RP 42. He stated that when he later told J.R. “you shouldn’t fuck with a Juggalo,” J.R. had “antagonized” him by referring to Juggalos as “guys who wear makeup.” 7RP 43. Sweet reported that J.R.’s comment was “making fun of [Juggalos], making fun of me.” Sweet indicated that this was “very irritating” to hear the Juggalo culture mocked, and stated:

Had I not been drunk, I probably would have been fuck you, and been on my way, walked down the road, wouldn’t want to hang out there. I think now about it all the time. If that had not had set me [sic],<sup>5</sup> I wouldn’t be here. I would have just walked away.

7RP 43. Although Sweet’s initial broad description of the incident had included an assertion that Sweet thought J.R. was going to throw him in the fire, when Sweet gave McClung a more detailed description of what had led up to the stabbing later in the interview, his focus was consistently on feeling angry that J.R. had made fun of the Juggalos, and not on any sense of peril. 7RP 54. In his testimony at trial, Sweet admitted making the statements about which McClung testified. 8RP 140.

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<sup>5</sup> It appears that Sweet meant, “If that had not set me off.” It is not clear whether he misspoke when talking to McClung, McClung misspoke on the witness stand, or the transcriptionist misheard McClung’s words on the audio recording of the proceedings.

b. Instructions And Closing Argument.

Prior to closing argument, the trial court read the jury instructions to the jury, and provided copies of the written instructions to each juror. 9RP 4. The jury was instructed that they should look to the instructions for the applicable law, and must disregard any remark, statement, or argument that is not supported by the law in the instructions. CP 15. The court had also read the same instruction to the jury at the beginning of the trial. 3RP 80-81.

The jury was also instructed on the presumption of innocence and the State's burden to prove each element of the crime beyond a reasonable doubt. CP 17. The to-convict instruction again reminded the jury that it must find that each element had been proven beyond a reasonable doubt in order to find Sweet guilty. CP 21. One of the elements listed was that "the defendant assaulted [J.R.]" CP 21. Another instruction defined assault, in relevant part, as an act done "with unlawful force." CP 22.

The instruction defining a lawful use of force reminded the jury that "[t]he State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful" and that the jury had a duty to acquit Sweet if the State failed to prove

beyond a reasonable doubt that the force was unlawful. CP 27. The first aggressor instruction also instructed the jury that self-defense was unavailable as a defense if it found beyond a reasonable doubt that Sweet's conduct provoked or started the fight. CP 31.

In closing argument, the prosecutor began by noting that the primary dispute in the case was *why* Sweet had stabbed J.R., and argued that Sweet's statements and actions revealed that he was angry rather than frightened at the time of the stabbing, and that no reasonable person in Sweet's position would have felt threatened. 9RP 21-25. As the prosecutor began to go through specific jury instructions, he repeatedly reminded the jury of the State's burden to prove the defendant's guilt beyond a reasonable doubt. 9RP 28. After going through the to-convict instruction and the definition of assault, the prosecutor focused the jury on the issue of lawfulness of Sweet's use of force:

Was it lawful, or was it unlawful? Because if it is unlawful, then it is an assault. If it is lawful, then it is not. So was his use of force lawful is the question.

And this is what we are getting at when we ask, was he acting in self defense? 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 [numbers] 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 away. First, the presumption is that the use of force is unlawful. Because unless it fits within those definitions, the presumption is unlawful. It becomes lawful if 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 no more than necessary. If you have all these things, then the use of force is lawful. If any of these is missing, it is unlawful.

9RP 30-31. Sweet did not object. 9RP 31.

The prosecutor went on to explain why Sweet's use of force was unlawful, going through each factor he had just mentioned to explain why the evidence established that that particular factor was not present in Sweet's case. 9RP 31-41. In doing so, the prosecutor correctly referenced the State's burden to prove beyond a reasonable doubt that the use of force was unlawful, and properly framed the rest of his argument in terms reflecting that burden. 9RP 32 (stating self-defense is not available as a defense "[i]f you find beyond a reasonable doubt that the defendant was the aggressor . . . ."), 38 (arguing that Sweet's lack of subjective belief that he was acting in self-defense "means that his use of force was not lawful," and that even if Sweet did subjectively believe it, the

fact that such belief was unreasonable “dooms his claim that this was self defense.”). At no point did the prosecutor repeat his misstatement regarding a presumption of unlawfulness or state that Sweet had the burden to prove anything regarding his claim of self-defense. 9RP 31-50.

At one point, in arguing that Sweet’s use of force was not lawful because there was no offense being committed against him that needed to be prevented, the prosecutor stated:

[J.R.] wasn’t making any actual attempt at that point to commit an offense against him. And that’s a requirement for lawful force. Even if you accept this claim that [J.R.]’s statement about throwing him in the fire was a threat. And that [J.R.]’s actions at the end of the first scuffle constituted a threat. That is not enough. What has to be there is that there was some intent to commit an offense at the time that the defendant stabbed him. That is not here, either.

9RP 40. Sweet did not object. 9RP 40. The prosecutor then went through the circumstances leading up to the stabbing, and concluded, “There is just no evidence to suggest that [J.R.] was committing or about [to] commit an assault or an offense against the defendant. And that means that his use of force was not lawful.” 9RP 40.

Defense counsel reiterated the State’s burden of proof in her own closing argument. 9RP 50. In the State’s rebuttal closing, the

prosecutor again referred the jury to the written instructions and repeatedly reaffirmed the State's burden to prove every element of the crime beyond a reasonable doubt. 9RP 72 ("The law requires the State to prove every element of the crime. Absolutely. It requires the State to prove it beyond a reasonable doubt."), 74 (arguing that even if the jury accepts Sweet's assertion that he felt threatened, "it is still not a lawful use of force. The evidence still shows beyond a reasonable doubt that it wasn't."). The prosecutor ended his rebuttal closing by asking the jury to "look at the jury instructions, look at what it means to prove something beyond a reasonable doubt, and find him guilty." 9RP 80.

**C. ARGUMENT**

1. SWEET HAS FAILED TO ESTABLISH THAT THE CHALLENGED COMMENTS IN THE PROSECUTOR'S CLOSING ARGUMENT WERE IMPROPER AND PREJUDICIAL.

Sweet contends that his conviction should be reversed because the prosecutor misstated the law in closing argument. This claim should be rejected. Sweet has waived his claim because a timely objection and curative instruction would have removed any possible prejudice. Furthermore, because the prosecutor's misstatement was confined to three sentences and the

prosecutor correctly stated the law numerous times before and after the misstatement, there is not a substantial likelihood that the misstatement affected the jury's verdict.

The United States and Washington Constitutions guarantee every defendant a fair trial. U.S. Const. amend. V, VI; WA Const. art. I, § 3. A defendant who claims on appeal that prosecutorial error or misconduct deprived him of a fair trial bears the burden of establishing that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." Id. Appellate courts evaluate allegedly improper comments "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Improper comments will be deemed prejudicial only if there is a substantial likelihood that the comments affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A defendant who did not object to an allegedly improper comment has waived any claim on appeal unless the comment was

so flagrant and ill-intentioned that it caused an enduring prejudice that could not have been neutralized by a curative instruction. Fisher, 165 Wn.2d at 747 (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

Sweet contends that the prosecutor misstated the law in two places—first by misstating the burden of proof as to self-defense, and later by suggesting that Sweet’s use of force was lawful only if J.R. actually intended to commit an offense against Sweet at the time of the stabbing. Brief of Appellant at 11-17.

a. Misstatement Of Burden Of Proof As To Self-Defense.

The State concedes that the prosecutor improperly misstated the burden of proof as to self-defense when he said

First, the presumption is that the use of force is unlawful. Because unless it fits within those definitions, the presumption is unlawful. It becomes lawful if 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 no more than necessary.

9RP 31. The prosecutor accurately listed the “elements” of the lawful use of force, but he should have said that the presumption is that the use of force is lawful, and it becomes unlawful if the State disproves any of the listed elements. CP 27, 31; see State v.

Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (once defendant has established that he is entitled to a self-defense instruction, the State has the burden to prove the absence of self-defense beyond a reasonable doubt).

However, the prosecutor's mistake was confined to the three sentences quoted above; throughout the rest of his closing and rebuttal argument, the prosecutor properly noted that the State bears the burden of proving beyond a reasonable doubt that the use of force was not lawful, and framed his argument consistent with that burden, going through the elements of self-defense one by one and arguing that the evidence disproved each one. 9RP 32, 38, 72, 74. Because the prosecutor's misstatement of the law was brief, was not repeated, and was not an inflammatory type of error, any prejudice could have been neutralized by a prompt objection and curative instruction. See State v. Emery, 174 Wn.2d 741, 763-64, 278 P.3d 653 (2012) (improper argument undermining reasonable doubt standard was not inflammatory and could have been neutralized by curative instruction); State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008) (prejudice from comments misstating presumption of innocence and undermining burden of proof was neutralized by curative instruction). Because Sweet did

not object or request a curative instruction, he waived the error.

Fisher, 165 Wn.2d at 747.

Sweet relies on State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011), to support his contention that the improper comments caused prejudice so pervasive that it could not have been neutralized by a curative instruction. Brief of Appellant at 17-19. However, that case involved a closing argument in which the prosecutor improperly (1) told the jury its job was to declare the truth, (2) made a “fill in the blank” argument and compared the reasonable doubt standard to everyday decision-making, and (3) repeatedly told the jury, over Walker’s objection, that the self-defense standard required them to determine whether they themselves would have done the same thing if they had been in the defendant’s position. Walker, 164 Wn. App. at 730-36.

The court of appeals in Walker concluded that because the greatly conflicting testimony made it a close case in which the prosecutor’s pervasive improper comments might easily have been the deciding factor, the cumulative effect of the three types of misconduct was such that no instruction could have erased their combined prejudicial effect. Id. at 737-39. Not only are the facts in this case very different than in Walker in that the improper

statements here were isolated and not repeated (just like in Emery), but the original Walker decision upon which Sweet relies was the subject of a successful petition for supreme court review, resulting in the supreme court remanding the case for reconsideration in light of Emery and the court of appeals issuing a new, unpublished, opinion following remand. 175 Wn.2d 1022, 295 P.3d 728 (2012). Sweet's reliance on Walker is thus misplaced, and this Court should find that the improper comments could have been cured had Sweet objected and requested a curative instruction.

Even if this court determines that Sweet did not waive his claim of error, the claim still fails because he has not established a substantial likelihood that the improper comments affected the jury's verdict. McKenzie, 157 Wn.2d at 52. As noted above, the misstatement regarding the burden of proof as to self-defense was isolated, and rest of the prosecutor's argument correctly stated the burden of proof and argued that the evidence showed beyond a reasonable doubt that Sweet's use of force was not lawful. 9RP 32, 38, 72, 74. The jury instructions correctly communicated the law to the jury, and the jury had twice been instructed to disregard any statement by the attorneys that conflicted with the law in the instructions. CP 15, 27-31; 3RP 80-81; see Emery, 174 Wn.2d at

766 (“[J]urors are presumed to follow the court’s instructions.”).

The prosecutor’s closing argument also repeatedly reminded the jury to rely on the instructions during their deliberations. 9RP 26-28, 30, 80.

Furthermore, the evidence at trial overwhelmingly established that Sweet did not reasonably believe that he was about to be injured at the time he stabbed J.R. J.R., Heather, and Steven all testified that J.R.’s comments to Sweet were said in a clearly joking manner except when J.R. repeatedly told Sweet in a serious tone that his comment about putting Sweet on the fire was a joke. 4RP 60-61, 165-67; 6RP 54-58. They also all testified that it was Sweet who had acted aggressively in initiating each confrontation, and that J.R. had only acted to protect himself from Sweet’s aggression and had not said or done anything threatening or aggressive to Sweet prior to the stabbing. 4RP 70-73, 106, 181; 5RP 17-18; 6RP 57-62, 74-75.

Sweet’s testimony did not greatly contradict that of the other witnesses regarding the objective circumstances of the incident, other than insisting that J.R. had tried to pull Sweet’s shirt toward the fire immediately before the stabbing. 8RP 120. Instead, Sweet merely denied having heard or correctly perceived things, such as

J.R. telling him the fire comment was a joke. 8RP 104. Rather than asserting that it had been necessary to stab J.R. to avoid the perceived danger, Sweet merely said that it was the only thing he could think of at the time. 8RP 121.

Furthermore, the credibility of Sweet's claim that he acted in lawful self-defense was greatly diminished by a number of factors, including his statement after the stabbing that he was going to jail forever if Justin didn't shoot him, Heather's observation that Sweet took out his knife before approaching J.R., and Sweet's attempt to minimize his own culpability by claiming that he had used only a small, legal, folding knife the length of his pinky, when two witnesses had seen him holding a hunting knife and medical testimony about the size of J.R.'s wound indicated that the knife blade had been one to one and half inches wide. 4RP 27, 31; 5RP 23, 116; 6RP 67, 71; 7RP 119; 8RP 121.

Finally, the credibility of Sweet's claim of self-defense was destroyed when the jury heard about Sweet's admissions to Dr. McClung that he had been angry at J.R. for making fun of Juggalos, and that the stabbing would not have happened if Sweet had not been drunk and upset at the perceived mockery. 7RP 43.

In light of the isolated nature of the prosecutor's improper comments, the prosecutor's surrounding proper statements of the law, the proper jury instructions, the court's instruction that the jury must disregard any comment by the attorneys that conflicts with the instructions, and the overwhelming evidence that Sweet neither objectively nor reasonably believed that stabbing J.R. was necessary to prevent injury to himself, Sweet has failed to establish that there is a substantial likelihood that the improper comments affected the jury's verdict. See Emery, 174 Wn.2d at 764 n.14 (no substantial likelihood improper statements regarding reasonable doubt standard and role of the jury affected jury's verdict where misconduct was limited to nine sentences, rest of closing argument and all instructions correctly stated burden of proof, State's evidence was very strong, and jury was instructed to disregard any statements not supported by the instructions). His conviction should therefore be affirmed.

b. Comment Regarding J.R.'S Lack Of Intent To Harm Sweet.

The jury instructions correctly defined the lawful use of force by stating, "The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is

about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary." CP 27. During his closing argument, the prosecutor went through each of the components of a lawful use of force and explained why the evidence disproved that component. In addressing whether Sweet reasonably believed at the time of the stabbing that he was preventing or attempting to prevent an offense against him, the prosecutor stated:

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

9RP 40.

Although the prosecutor's statement that "[w]hat has to be there is that there was some intent to commit an offense at the time

that the defendant stabbed him” was inartful, when viewed in the context of the entire paragraph, the jury would not have interpreted it as an assertion that the victim’s intent to commit an offense against the defendant was a necessary element of a lawful use of force. Instead, the surrounding context made clear that the prosecutor was merely arguing that because the evidence established that there was no objective indication that J.R. intended to commit an offense against Sweet, any belief by Sweet that J.R. was about to commit an offense against him was unreasonable.<sup>6</sup> As such, Sweet has failed to establish that the prosecutor’s comment was improper. Cf. State v. Dunn, 180 Wn. App. 570, 575, 321 P.3d 1283, 1285 (2014) (“inartful” prosecutorial argument found to nevertheless be proper), review denied, 181 Wn.2d 1030, 340 P.3d 228 (2015).

Even if this Court were to find the challenged comment improper, it was an isolated remark, was not inflammatory, and the rest of the prosecutor’s closing argument, with repeated references to the written instructions, made clear that the victim’s intent to commit an offense against the defendant was not actually a

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<sup>6</sup> The jury would have also have the benefit of observing the prosecutor’s tone of voice and body language in determining that he was not actually contending that J.R.’s intent was an element of self-defense.

required element of a lawful use of force. A timely curative instruction would thus have neutralized any prejudice, and Sweet waived his claim by failing to object. See Emery, 174 Wn.2d at 763-64; Warren, 165 Wn.2d at 28.

Furthermore, even if Sweet had not waived his claim, he has failed to establish that he was prejudiced by it. The reference to the victim's lack of intent to commit an offense against Sweet was confined to a single sentence, and rest of the prosecutor's argument correctly laid out the components of a lawful use of force. 9RP 31-40. As noted earlier, the jury instructions correctly stated the definition of a lawful use of force, the jury had twice been instructed to disregard any statement by the attorneys that conflicted with the law in the instructions, the prosecutor's closing argument also repeatedly reminded the jury to rely on the instructions during their deliberations, and the evidence at trial overwhelmingly established that Sweet's use of force was not lawful. CP 15, 27; 3RP 80-81; 4RP 70-73, 106, 181; 5RP 17-18; 6RP 57-62, 74-75; 9RP 26-28, 30, 80.

Sweet has thus failed to establish a substantial likelihood that the challenged comment affected the jury's verdict, and his conviction should be affirmed. See State v. Kalebaugh, No.

89971-1, 2015 WL 4136540, at \*4, \_\_\_ P.3d \_\_\_ (July 9, 2015) (judge's erroneous oral description of reasonable doubt standard was harmless beyond a reasonable doubt in light of surrounding proper descriptions of standard and later proper written instructions); Emery, 174 Wn.2d at 764 n.14 (no substantial likelihood improper argument regarding reasonable doubt standard and role of the jury affected jury's verdict where misconduct was limited to nine sentences, rest of closing argument and all instructions correctly stated burden of proof, State's evidence was very strong, and jury was instructed to disregard any statements not supported by the instructions).

2. SWEET HAS FAILED TO ESTABLISH THAT HIS COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE IN FAILING TO OBJECT TO THE CHALLENGED PROSECUTORIAL STATEMENTS.

Sweet contends that his trial counsel was constitutionally ineffective in failing to object to the allegedly improper comments in the prosecutor's closing argument. This claim should be rejected, as Sweet has not shown that his counsel's performance both was deficient and prejudiced him.

A defendant in a criminal case has a constitutional right to the effective assistance of counsel. U.S. Const. amend. VI; Wash.

Const. art I, § 22; State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011, 1014 (2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984).

In order to show that defense counsel's representation was deficient, a defendant must show that "it fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Performance is not deficient if it represents a legitimate trial strategy or tactic. Grier, 171 Wn.2d at 33. There is a strong presumption that counsel's representation was effective, and the defendant bears the burden of showing that the representation was deficient. Id. at 35. In order to show that he was prejudiced by deficient conduct, a defendant must show that defense counsel's errors were "so serious as to deprive him of a fair trial." Cienfuegos, 144 Wn.2d at 230. This requires "the existence of a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.” Id. at 229.

Sweet has failed to show that defense counsel was deficient in failing to object to the challenged statements. As explained in pages 20-26 above, although the prosecutor's isolated misstatement regarding the burden of proof as to self-defense was improper, it was not prejudicial in the context of the argument as a whole. A reasonable defense attorney might have chosen not to object immediately to avoid highlighting the incorrect standard, as Sweet acknowledges. Brief of Appellant at 21. But a reasonable defense attorney might also have chosen not to request a curative instruction once the jury was out of the room, because it was clear at that point, in light of the remainder of the prosecutor's argument, that the brief misstatement was not prejudicial.

As explained in pages 26-30 above, the prosecutor's reference to the victim's lack of intent to commit an offense against Sweet was not actually improper or misleading when viewed in context, nor was it prejudicial, and thus defense counsel's choice to avoid emphasizing it by not objecting was also a reasonable trial tactic. See State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011) (defense counsel not deficient in failing to object to

prosecutorial argument that was neither improper nor prejudicial). Because it cannot be said that no reasonable defense attorney would have failed to request a curative instruction regarding the challenged comments in this case, the performance of Sweet's trial counsel was not constitutionally deficient.

Even if this Court were to find that defense counsel provided deficient representation by not objecting to one or both of the challenged comments, Sweet has failed to establish that he was prejudiced by the alleged deficiency. As explained in pages 20-30 above, there is not a substantial likelihood that the challenged comments affected the jury's verdict in light of the comments' isolated nature, the surrounding correct statements of the law and proper jury instructions, and the overwhelming evidence that Sweet's use of force was not lawful. There is thus not a reasonable probability that the outcome of the trial would have been different had defense counsel objected to the challenged remarks and obtained a curative instruction. See State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) ("substantial likelihood" that verdict was affected used synonymously with "reasonable probability" that outcome of trial would have been different).

Because Sweet has failed to establish that his trial counsel's performance was both deficient and prejudiced him, he has not met his burden to establish that he received ineffective assistance of counsel, and his conviction should be affirmed. See Cienfuegos, 144 Wn.2d at 226-27.

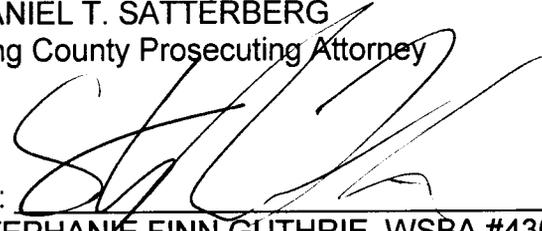
**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Sweet's conviction and the accompanying enhancement.

DATED this 23<sup>rd</sup> day of July, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the appellant, at Winklerj@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT, in State v. James Allen Sweet, Cause No. 72732-0, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 23<sup>rd</sup> day of July, 2015.

U Brame

Name:

Done in Seattle, Washington

**KING COUNTY PROSECUTOR**

**July 23, 2015 - 2:10 PM**

**Transmittal Letter**

Document Uploaded: 727320-Respondents' Brief.pdf

Case Name: James Allen Sweet

Court of Appeals Case Number: 72732-0

Party Represented:

**Is this a Personal Restraint Petition?**  Yes  No

Trial Court County: \_\_\_\_\_ - Superior Court # \_\_\_\_\_

**The document being Filed is:**

- Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_\_
- Answer/Reply to Motion: \_\_\_\_\_
- Brief: Respondents'
- Statement of Additional Authorities
- Affidavit of Attorney Fees
- Cost Bill
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- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
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**Comments:**

No Comments were entered.

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