

No. 34397-5-II

2000-01-10
STANLEY
BY: [Signature]

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

MARK ANTHONY TAYLOR

Appellant.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

On October 19th, 2005 the State charged Mark Taylor by Information with one count of Assault in the First Degree while being armed with a deadly weapon. CP 1-2. On October 20th, 2005, the State charged Mark Taylor by Amended Information with one count of Attempted Premeditated First Degree Murder while being armed with a deadly weapon. CP 3-4. The Amended Information was based on the additional allegations that Mr. Taylor had threatened the life of the victim prior to the incident. CP 174 - 179. Mr. Taylor was initially set for trial on December 12, 2005, but the State moved for a continuance of that trial date in accordance with CrR 3.3(f)(2) based on the unavailability of a necessary witness. CP 180-182. RP 40. The judge granted the motion for continuance to January 9, 2006, finding that it was in the interests of justice, that it was justified by the prescheduled unavailability of a necessary witness and finding that the continuance did not prejudice the defendant in the presentation of his defense. RP 43 - 44. CP 183. On January 5th, 2006, the State filed a motion and affidavit for an order allowing the filing of a second amended information to allow the filing of an additional count of assault in the first degree in the

alternative, explaining that both the State and Mr. Taylor's trial counsel, in preparing for trial, were under the misapprehension that assault in the first degree was a lesser included offense to attempted first degree murder. CP 184-185. Mr. Taylor's trial counsel had prepared jury instructions based on his belief that assault in the first degree was a lesser included offense of attempted first degree murder, and acknowledged his own misapprehension in a declaration and memorandum in opposition to the State's motion to amend the information. RP 58. CP 17-20. Mr. Taylor's trial counsel acknowledged that allowing the information to be amended to include a count of assault in the first degree in the alternative would have the effect of potentially lessening his clients exposure, as it would allow the jury to find that Mr. Taylor was guilty of a less serious crime, but argued that the case State v. Harris, 121 Wn.2d 317, 849 P.2d 1216 (1993) forbade the court from allowing the amendment because it is not a lesser included offense. RP 60-61. Mr. Taylor's trial counsel did *not* argue that he had prepared his case based on an absence of premeditation, but rather that the possibility of Mr. Taylor being convicted of both crimes was a prejudice to him, and that proving assault in the first

degree would be easier for the State. He also acknowledged that there were no new allegations that Taylor would be forced to respond to made in the amendment. RP 60 - 63, 68 - 71. Taylor's trial counsel also stated that he would have no trouble going forward on just one count of assault in the first degree, but was objecting to the alternative counts. RP 63. The trial judge found that because there were no new allegations, the original charge had been assault in the first degree, and that there was no surprise and no prejudice to Mr. Taylor, that he would allow the State to amend the information to include a count of assault in the first degree, in the alternative, as permitted by CrR 2.1(d). RP 68-71.

Lester McDonald testified at trial that he got out of prison on October 17, 2005. RP 80. On October 18, 2005, he received word that his ex-girlfriend, Cynthia Moore, had come to his house while he was out working. RP 81. Moore had been dating another man, Mark Taylor, while Lester McDonald was in prison. RP 82. When McDonald went home that evening, he found Moore asleep on the couch at his home. He was confused and had mixed feelings about her being there, so he went for a walk. RP 82. He walked to a park about 100 yards from his

house. RP 83. McDonald sat on a bench at the park when he heard a noise and saw someone approaching him. RP 83. It was dark and he couldn't see who the person was, but McDonald asked the person to identify themselves several times before he finally stood up as the person came right up to him, almost face to face. RP 84. The person at that point said "You know who I am. I'm going to stab you. I'm going to kill you." RP 85. McDonald recognized the person by his voice as Mark Taylor. RP 92. McDonald initially considered trying to strike Mr. Taylor, but then decided to turn and run. RP 85. As McDonald tried to run away, Taylor grabbed his leather coat, and McDonald felt a pinch in his back as Taylor did so. RP 85-86. McDonald then fled from Taylor back to his home. RP 86. When he got home, McDonald still felt the sensation in his back, discovered that his back was covered in blood, and believed that Taylor had stabbed him in the back. RP 94. He yelled to his house-mates and to Moore, telling her that her boyfriend had just attacked him. RP 94. He called an ambulance and also called the Skamania County Sheriff's Office. RP 94. McDonald said that he did not see a knife in Taylor's hand when he attacked him, but said that his hands were low, at his sides, and that one arm was pretty much

behind him. RP 96. McDonald was driven to the hospital by his friend, Roy North, because he did not want to pay for the ambulance ride. RP 95-96. McDonald was not afraid that he would die as a result of the stab wound. RP 101.

Sergeant Robison of the Skamania County Sheriff's Office was dispatched to the assault within a few minutes of the call. RP 105-106. He contacted McDonald and observed the wound which he believed to be a stab wound, as opposed to a slice or a puncture, because it was clean, had a clear entrance and exit, had no bruising around it and was not jagged. RP 108. Sergeant Robison also inspected the shirt McDonald was wearing and noted that it had a bloodstain around a clear stab wound that appeared, based on his training and experience to be consistent with a stab wound by a sharp edged weapon. RP 108, 111. Sgt Robison also inspected the leather jacket worn by McDonald during the assault, which had a slice through it on the lower right portion of the jacket. RP 115-118. The stab wound was in the left middle to lower part of McDonald's back. RP 116. The difference in placement of the slice through the jacket and the wound in McDonald's back led Sergeant Robison to believe that the jacket must have been twisted on or pulled from

McDonald's body when he was stabbed. RP 116-117. Sergeant Robison left Mr. McDonald when McDonald went to the hospital and along with several other deputies, tried to find Mark Taylor. RP 123. Sergeant Robison knew that Taylor lived at the "Skamania Coves," which is about a mile and a half east of the park where McDonald was stabbed. RP 123. Deputy Chris Helton and Trooper Neil Hoffberger searched for Taylor for a period of time on Hwy 14 and then tried to locate him at his trailer approximately 40 minutes after the incident. RP 124-125. Taylor was not located at his trailer at that point. RP 125. Trooper Hoffberger and Deputy Helton then searched for Taylor along the railroad tracks that run from the park where the assault occurred to where Taylor lived, but Taylor was not located. RP 126. About 2 hours after the assault occurred, Sergeant Robison decided to check Taylor's residence a second time. Taylor was found in his trailer, crouched down, looking intently at the windows, and was arrested. RP 128-131. Sergeant Robison then questioned Taylor about his involvement in the altercation with McDonald. Taylor admitted to being in an altercation with McDonald. RP 132. Taylor told Sergeant Robison that they had met at the park, yelled a little bit, that he shoved McDonald down, and then took

off. RP 132. After the altercation, Taylor said he immediately walked along the railroad tracks to Hwy 14, and then followed Hwy 14 back to his trailer. RP 133. Sergeant Robison interviewed Taylor a second time at the Skamania County Sheriff's Office, where he gave three different versions of what occurred. RP 133. Sergeant Robison testified in detail about the Taylor's version of events and how the story changed throughout the interview. RP 134-139. Mr. Taylor repeatedly told Sergeant Robison that he did not use knives. RP 139. Sergeant Robison found 11 knives in Taylor's trailer and inside the tent immediately outside the trailer. RP 140. Sergeant Robison then explained that he did follow-up investigation to determine if there was any physical evidence at or near the scene that might corroborate either McDonald's or Taylor's version of events. RP 142-143. Sergeant Robison went to the scene of the altercation and looked for any evidence of any sharp object that could have caused the wound in McDonald's back, such as a narrow piece of glass or metal. RP 143. Sergeant Robison walked over the entire scene in one foot increments looking for signs of any object that might be capable of causing the wound McDonald endured, but found nothing. RP 144. He searched a second time the next morning, expanding the search an additional 60 feet in

each direction, but again there was nothing at the scene that could have caused the stab wound McDonald sustained. RP 145. On cross examination Sergeant Robison was asked about the clothing he recovered from Taylor, and specifically whether the shirt he had recovered from Taylor had buttons missing from it. He answered that despite Taylor telling him that the buttons had been pulled off, he did not see any evidence of missing buttons. RP 149-150. On redirect Sergeant Robison clarified that Taylor had been unclear regarding whether the buttons were ripped off or not, but that in any case, there were no buttons missing. RP 156. Sergeant Robison also recalled Taylor's explanation for why his jacket was so wet, saying that Taylor told him that a cat dish in the trailer tipped over and might have gotten the jacket wet. Sergeant Robison then observed that based on the level of wetness he observed in the jacket, the cat dish would have had to contain a half gallon of liquid to account for it. RP 157. He also testified that it would take between 15 and 30-35 minutes to walk to Taylor's trailer from the park where the altercation occurred, depending on the condition and the route you took. RP 157.

Forrest Hofer, a Physicians Assistant who treated McDonald at Skyline Hospital on the night of October 18

testified regarding his observations of Mr. McDonald, his wound, and the possible consequences of stab wounds. RP 161-177. Hofer described McDonald's wound as a stab wound that was stopped by the ribs before it entered the body cavity. RP 163. The wound was clear of debris and appeared to have been made with something sharp, consistent with a knife wound. RP 164. Hofer testified that if the stab wound had not been stopped by the ribs, and had entered the body cavity, it could have been life-threatening. RP 166. He also testified that it was not consistent with an impact laceration, which is what you normally see when someone is injured in a fall, but that it had to be caused by something sharp and hard and very rigid. RP 166-168. McDonald did not complain of any other injuries, bruises, cuts, scratches or bumps. RP 167. In 30 years of experience, Hofer testified that he'd never seen a wound such as McDonald's that was caused by someone falling down or rolling over an object. RP 167-168.

Roy North testified that he was present when McDonald came home initially, and also when McDonald came back from the park after getting stabbed. RP 180-181. He testified that he did not hear anyone yell anything at his house that evening, and that he likely would have because it is quiet and he also has a video camera

pointed at the street. RP 182-183.

Deputy Helton testified that he responded to 3 Cascade Avenue and was asked to search for Taylor between the park and Taylor's trailer at Skamania Coves along Hwy 14. RP 186-187. Deputy Helton was familiar with Mark Taylor. RP 187. Deputy Helton did an extensive search of Hwy 14 and the railroad tracks between the park and Skamania Coves and did not see anyone walking the Hwy or railroad tracks. He did not see anyone hitchhiking. RP 187. He also tried to contact Taylor at his residence, but he was not there. RP 187.

Lynea Moat testified that she saw Mark Taylor a few days before the altercation at the post office and asked him about his girlfriend, Cindy. RP 192. Taylor got upset and told Moat that Cindy was at McDonald's place and he was tired of the crap, and that if she went back to McDonald when he got out of prison, he would kick down the door and shoot them both. RP 195.

Mark Taylor testified that he yelled Cindy's name as he went by Roy North's (McDonald's) house on the night of October 18, 2005. RP 206. He said he was walking towards the park, through the parking lot, he noticed someone coming up behind him so he moved off to the side and let them pass. The person walked across the footbridge and sat down at the park bench. He thought it

was Cindy. RP 207. Taylor said he approached the person and learned that it was not Cindy but McDonald, and that as he approached, McDonald went to jump up off the picnic table, and Taylor pushed him back down. RP 208. Taylor then said that McDonald came at him and tried to hit him a couple of times, and tried to kick him, and so he grabbed him and threw him off the edge. RP 208. Taylor described the embankment he threw McDonald off of as being 4-5 feet down. RP 209. Taylor testified that when he grabbed McDonald, McDonald pulled on his shirt and pulled all the buttons off. Taylor described the altercation as all happening in just a few seconds and that after McDonald went over the embankment, he (McDonald) jumped up and ran. RP 209-210. Taylor said that when McDonald ran off, he went back to his trailer. He said he walked along Hwy 14 with traffic and saw a police vehicle pass him twice. RP 210. Taylor testified that he was getting his pants on when Sergeant Robison contacted him at his trailer. RP 211. On cross-examination Taylor testified that they did speak to one another before the altercation. RP 216. Taylor testified that he said "who is it, who is that?" and that McDonald answered back "who is that?" He said that he followed McDonald the 10-15 feet to the picnic table and that when the altercation took place, McDonald tried to

hit him a few times, tried to kick him, and then he grabbed McDonald's coat and threw him down the hill. RP 216-217. Taylor next explained that McDonald took a couple of steps and then fell down the hill. RP 217. He said McDonald got up and ran away really fast. RP 218. Taylor then claimed that McDonald did make other statements during the altercation, including that he was going to kick Taylor's ass. RP 219. Taylor was confronted about several apparent inconsistencies between his trial testimony and the interview he gave to Sergeant Robison. RP 224-245.

Sergeant Robison was called to testify in rebuttal regarding his recorded interview with Taylor. He described Taylor as being calm during the interview. RP 248. He said he attempted to get as much detail as possible from Mr. Taylor because it was important to compare the different stories about what occurred to the physical evidence to help him determine what occurred. RP 248-249. Sergeant Robison testified that at no point during his interview with Taylor did Taylor tell him that McDonald attempted to kick him. RP 249. The State attempted to lay the foundation for playing the videotaped interview with Taylor for the jury. When asked if the tape accurately reflected the contents of the interview, Sergeant Robison explained that the video

recording doesn't change, explaining that it is the best evidence of what was said. RP 250. Mr. Taylor's trial counsel objected to the admission of the tape not because it was a surprise, he admitted that he'd reviewed it and knew its contents, but because he claimed it would bolster Sergeant Robison's recollections. RP 251-252. The trial court did not allow the State to play the video because it had not been marked as evidence prior to it being offered. RP 255. Sergeant Robison was then questioned regarding differences between Taylor's statement to him on the night of the incident and his testimony at trial. RP 257-262. Sergeant Robison described specifically which things Taylor testified to, "[the] stepping off the path and sitting down elsewhere and later approaching the suspect, the kicking, all of that," that he had not mentioned to Sergeant Robison in the interview. RP 257. Sergeant Robison also explained that Taylor had not mentioned in the interview the night of the incident that he saw the other person sitting at the table, but had described himself (Taylor) as sitting at the table when McDonald came up and was yelling at him. RP 257. He described several other specific things that Taylor told him about the incident that appeared to be contradicted by Taylor's trial testimony, including that Taylor had told him that he would not have

recognized McDonald at all if he hadn't been speaking, where he was standing when he saw the person exit McDonald's house, whether Taylor was sitting at the picnic table or 15 feet away from the picnic table, how the altercation began and what was said, and whether McDonald pushed or tried to hit Taylor before Taylor pushed McDonald. RP 258-261.

In closing argument the State argued the relative credibility of the defendant, Mr. Taylor, and the victim, Mr. McDonald. RP 289-301. The State pointed out that Mr. Taylor's testimony was not consistent with the testimony of the other witnesses, and described in what way they were inconsistent. RP 299-301. Mr. Taylor's trial counsel argued in his closing that the inconsistencies in Mr. Taylor's testimony were minor and did not undermine his credibility, and contrasted Taylor's inconsistencies with those of Lynea Moat and described a lack of adequate investigation by Sergeant Robison and also described how Deputy Helton could have just made a mistake and gone to the incorrect trailer. RP 317-327. In the rebuttal close, the state argued that Mr. Taylor's inconsistencies were not minor, that they were substantial. RP 339-343. Furthermore, it argued that Mr. Taylor's testimony was at odds with all of the state's witnesses testimony and the physical evidence

testified to by those witnesses. The State pointed out that you could not believe both versions at the same time, and that the upshot was that Mr. Taylor's testimony was not credible, and that they should not believe it. RP 343-345. Mr. Taylor's trial counsel did not object to the State's argument that Mr. Taylor's testimony was not credible and that it was contradicted by the testimony of the State's witnesses. RP 343-345.

Mark Taylor was convicted of one count of assault in the first degree while armed with a deadly weapon. CP 133, 134.

II. ARGUMENT

A. The Trial Court did not abuse its discretion in allowing the State to amend the information to include a second alternative count of Assault in the First Degree.

Mr. Taylor claims that the Trial Court abused its discretion in allowing the State to amend the information on the morning of trial to include a second, less serious, alternative count of Assault in the First Degree. CrR 2.1(d) states that "The court may permit any information or bill of particulars to be amended at any time before verdict

or finding if substantial rights of the defendant are not prejudiced." A Trial Court's grant of a motion to amend an information is reviewed for abuse of discretion. State v. DeSantiago, 108 Wash.App 855, 33 P.3d 394 (2001), citing State v. Brett, 126 Wash.2d 136, 892 P.2d 29 (1995). The defendant has the burden of showing prejudice. State v. DeSantiago, 108 Wash.App 855, at 874, 33 P.3d 394 (2001). The fact that a defendant does not request a continuance is persuasive of lack of surprise or prejudice. State v. Brown, 55 Wash.App 738, 743, 780 P.2d 880 (1989). "Where the principal element of the new charge is inherent in the previous charge, and no other prejudice is demonstrated, it is not an abuse of discretion to allow amendment on the day of trial." State v. Gosser, 33 Wash.App 428, at 435, 656 P.2d 514 (1982).

The trial Court found that there was no prejudice to Mr. Taylor in allowing the filing of the amended information. As in State v. Brown, Mr. Taylor did not request a continuance, and the allegations (and the "principle element," that is an assault) underlying the alternative count of assault in the first degree were identical to the allegations in the attempted murder in the first

degree count. See CP 56 - 82 for Taylor's trial counsel's proposed jury instructions on attempted first degree murder. In fact, Mr. Taylor was originally charged with assault in the first degree, and the information was amended when additional information was provided suggesting an intent to cause the death of the victim, Mr. McDonald. CP 174-179. Mr. Taylor's trial counsel admitted that he had been proceeding under the impression that assault in the first degree was a lesser included offense of attempted murder in the first degree and did not deny that he had prepared jury instructions in accordance with that belief. CP 17-20. RP 58. Mr. Taylor's trial counsel also stated that he "would have no problem" going forward on the assault in the first degree count, but was objecting to the alternative counts, suggesting that he was not unprepared to deal with the amended count of assault in the first degree, but was worried about Mr. Taylor being convicted of both counts. RP 63. The only argument he made for prejudice was that Mr. Taylor could be convicted of both crimes and therefore the amendment would increase his potential punishment. This was never a possibility as the State asked that they be allowed to charge the two

crimes in the alternative, not as two separate crimes.

Mark Taylor now contends that his trial counsel had prepared a defense based on a lack of premeditation. This is not supported by the record. Furthermore, while assault in the first degree is not a lesser included offense to attempted murder in the first degree, attempted murder in the second degree is a lesser included offense of attempted murder in the first degree, so trial counsel should have been prepared to respond to similar accusations where premeditation is not an element. And certainly if the alternative count of assault in the first degree had not been added, the State would have sought a lesser included instruction for attempted murder in the second degree, based on Taylor's trial counsel's argument that there was no premeditation.

Mark Taylor now relies on two cases to support his claim that the judge abused his discretion in allowing the amended information, State v. Michielli, 132 Wn2d 229, 937 P.2d 587 (1997) and State v. Earl, 97 Wn.App 408, 984 P.2d427 (1999). However, both of these cases are distinguishable from Mr. Taylor's case. In Michielli, there were

allegations that the State brought additional charges to harass the defendant, and the trial court granted a motion to dismiss the newly amended counts based on CrR 8.3(b): "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order." Also, in Michielli, the defendant's asked for a continuance in order to prepare to defend the additional charges. Michielli, at 233. In Michielli, the amended charges included much more serious counts. In State v. Earl, the amended information involved new allegations and a new, second victim. Earl, at 410-411. In that case, Earl requested a continuance to prepare for the new allegations. In Mr Taylor's case, there were no allegations that the State was harassing Mr. Taylor or that the motion to amend was made in anything but good faith. In fact, both counsel were under the impression that the amended count would have been a lesser included offense of the attempted murder count, and had prepared for trial with that in mind.

The amended count was actually a less serious charge than the original count, and was based on the exact same conduct, not additional factual allegations. Mr Taylor's trial counsel did not ask for a continuance and did not report to the court that he was unprepared to defend the assault first degree allegation. On the contrary, he reported that he was prepared to go forward with the assault in the first degree allegation. RP 63.

Mr. Taylor did not demonstrate any prejudice to his right to a speedy trial or his right to effective representation, or any other prejudice, and therefore the trial court did not abuse its discretion in granting the State's motion to amend the information.

B. The State did not commit misconduct by eliciting testimony regarding inconsistencies in the testimony and out of court statements of Mr. Taylor, the testimony was not objected to at trial, and the testimony was not a direct comment on Mr. Taylor's credibility so does not constitute "manifest" constitutional error, so it cannot be asserted for the first time on appeal.

Mr. Taylor argues that Sergeant Robison impermissibly commented on his credibility when he testified that Mr. Taylor's statements were not consistent with the physical evidence he observed. Mr. Taylor focuses on the kind of language used by Sergeant Robison to contrast what he personally observed with what Mr. Taylor told him, rather than the substance of Sergeant Robison's testimony. Having Sergeant Robison contrast what Mr. Taylor told him with what he observed with his own senses is not a comment on the credibility of a witness, but an essential part of an investigation. Furthermore, Sergeant Robison's comparison of Mr. Taylor's prior statements to his testimony at trial is also not a comment on Mr. Taylor's credibility, but proper impeachment by prior inconsistent statements. For example, Sergeant Robison observing that statement's made by Taylor at trial were "all new information" is no different than him pointing out that Mr. Taylor did not make those statements to him in his interview the night of the altercation. Sergeant Robison at no point states that he does not believe Mr. Taylor, nor does he comment that he believes Mr. Taylor is guilty. Mr. Taylor's trial counsel did not object to any of the testimony that

Mr. Taylor now describes as impermissible error.

Mr. Taylor relies on State v. Kirkman, 126 Wn.App 97, 107 P.3d 133 (2005), for his argument that Sergeant Robison's testimony is "manifest constitutional error" and therefore can be raised for the first time on appeal. However, the Court of Appeals decision Kirkman was reversed by the Washington Supreme Court in State v. Kirkman, 155 Wn.2d 1014 (2005), which held that "testimony of an investigating officer . . . if not objected to at trial, does not give rise to a manifest constitutional error. Manifest error requires an explicit or almost explicit witness statement on an ultimate issue of fact." State v. Kirkman, 155 Wn.2d 1014 (2005). The Supreme Court pointed out that while the investigating officer or examining doctor did give opinions on whether a witnesses allegations were consistent with physical evidence, so long as they do not affirmatively state that they believe or disbelieve the witness or that they believe the defendant is guilty, the testimony is not manifest error. State v. Kirkman, 155 Wn.2d 1014 (2005). See also State v. King, 131 Wn.App 789, 797, 130 P.3d 376 (2006) ("[Where] a witness does not explicitly state his ir her belief in a

victim's story, the testimony does not constitute manifest constitutional error.")

Sergeant Robison's testimony was not an impermissible comment on Mr. Taylor's credibility, and in any case was not objected to at the time of trial so cannot be raised for the first time on appeal unless it constitutes manifest constitutional error. Because Sergeant Robison did not comment directly on Mr. Taylor's credibility, his testimony is not manifest constitutional error.

C. The State did not commit misconduct by arguing to the jury that in order to believe the testimony of Mr. Taylor, they had to disbelieve the testimony of the State's witnesses, and in any case, such argument was not objected to at trial and was not likely to affect the jury's verdict.

If defense counsel does not object to a prosecutor's remarks, the issue of prosecutorial misconduct cannot be raised on appeal unless the misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. State v. Zeigler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). A

prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on the credibility of the witnesses based on the evidence. State v. Stenson, 132 Wash.2d 668, 727, 940 P.2d 1239 (1997). Even if the defendant proves the conduct was improper, the error still does not warrant a new trial unless the appellate court determines there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Fleming, 83 Wn.App 209, 921 P2d 1076 (1996).

Mr. Taylor alleges that the State's argument, made at the very end of the rebuttal close, that in order to believe the testimony of Mr. Taylor, you need to not believe Lester McDonald, Sergeant Robison, Deputy Helton, Roy North and Forest Hofer, was misconduct because it was essentially arguing that in order to believe Mr. Taylor, you had to believe that all the other witnesses were lying. Mr. Taylor then cites a long list of cases

suggesting it is improper to argue that in order to "acquit" the defendant, you must find that the police officer (or the complaining witness) is "lying." However, nowhere in the record did the State argue that in order to "acquit" Mr. Taylor that the jury needed to believe that anyone lied. The State's comments, in context, were clearly an argument concerning the credibility of Mr. Taylor, and nothing more, which is why the State used the word "believe," and not "acquit." Mr. Taylor's trial counsel made several arguments in his closing argument for why the jury might find reasonable doubt, none of which had anything to do with Mr. Taylor's credibility. Mr. Taylor's trial counsel argued that the lack of a knife was reasonable doubt. He argued that Sergeant Robison's search of the area for an item that could have caused the stab wound in Mr. McDonald's back was inadequate. He argued that Mr. McDonald's own story did not support the inference that Mr. Taylor wanted to cause either great bodily harm or death, as Mr. Taylor allowed Mr. McDonald to run away and did not chase him down. All of these suggest ways that Mr. Taylor could be acquitted and do not involve the State's witnesses lying. The state did not make the argument that in

order to believe Mr. Taylor, you had to believe the State's witnesses were lying and that argument is not inherent in the argument regarding Mr. Taylor's credibility. What the State did argue is that Mr. Taylor's account is contradicted by parts of each of the State's witnesses, and that the weight of the evidence is with the State's witnesses. Therefore Mr. Taylor's version of events is not a credible one, because in order to believe it, you'd have to believe that Mr. Hofer is wrong about whether McDonald's wound could have been caused by a fall, or rolling over an item, you'd have to believe that Sergeant Robison was wrong about the fact that there was nothing in the area of the altercation that could have caused the injury to Mr. McDonald, you'd have to not believe Mr. North when he says that no one yelled Cindy's name out near his house that night, you'd have to not believe Deputy Helton when he said that there was no one on Hwy 14 that night, or that he went to Mr. Taylor's trailer and not someone else's by mistake when he went to look for Taylor that night, and you'd have to believe that Mr. McDonald's version of events is either untrue, or terribly mistaken. Again, there is nothing improper about calling into question the credibility

of the defendant, based on the fact that it is inconsistent with the physical evidence and other testimony presented at the trial. That is exactly what the State's argument did, when taken in context, and it was therefore not improper. In this way, the State's argument is much more like the one in State v. Wright, 76 Wn.App 811, 888 P.2d 1214 (1995), where the Court of Appeals found that it was not improper for a prosecutor to argue that in order to believe the defendant, the jury must conclude that the police officers were mistaken. Id., at 823.

Furthermore, because there was no objection to the State's argument at trial, Mr. Taylor must demonstrate that the misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. State v. Zeigler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). No such demonstration has even been attempted by Mr. Taylor, likely because the comment was little more than an afterthought at the end of close to 45 minutes of argument.

Finally, even if the court finds that the argument was misconduct, and that it was flagrant and ill-intentioned and could not have been cured by an instruction from the trial judge, Mr. Taylor

still must establish a substantial likelihood that the misconduct affected the jury's verdict. Mr. Taylor has made no effort to establish that likelihood, and in the two most egregious examples of misconduct found by appellate courts, State v. Barrow, 60 Wn.App 869, 877, 809 P.2d 209 (1991) and State v. Casteneda-Perez, 61 Wn.App 354, 364, 810 P.2d 74 (1991), the court found the misconduct to be harmless error.

Because the State's closing argument properly called into question the credibility of the defendant, Mr. Taylor, and did not equate his acquittal with dishonesty on the part of the State's witnesses, it does not constitute misconduct. Furthermore, even if it was improper, it was not so flagrant and ill-intentioned that it could not have been cured with an instruction from the trial judge if properly objected to at the time of trial, and in any case, there has been no showing whatsoever that there is a substantial likelihood that the misconduct affected the jury's verdict, and would therefore at worst constitute harmless error.

D. Sufficient evidence existed to prove that Mark Anthony Taylor committed the crime of assault

in the first degree.

When reviewing a conviction for sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Bencivenga, 137 Wn.2d 703, 706, 974 P.2d 832 (1999). A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from the evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and most strongly against the defendant. Salinas, 119 Wn.2d at 201. No distinction exists between circumstantial evidence and direct evidence, as both are equally reliable. Bencivenga, 137 Wn.2d at 711; State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In determining whether the necessary quantum of proof exists, we need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Summers, 107 Wn.App. 373, 388, 28 P.3d 780, 43 P.3d 526 (2001) (citing State v. Fiser,

99 Wn. App. 714, 718, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000)). Evidence is substantial when it is sufficient to persuade a fair-minded person of the truth of the stated premise. State v. Thetford, 109 Wn.2d at 396.

Substantial evidence exists and the inferences drawn from that evidence show that Mr. Taylor assaulted Lester McDonald with intent to inflict great bodily harm, and that the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death. RCW 9A.36.011(1)(a).

Taylor told Lynea Moat that if his girlfriend, Cindy Moore, returned to Lester McDonald, he would shoot them both. RP 195. A reasonable inference from Taylor's statement to Moat suggests his state of mind and that he wanted not only to hurt McDonald, but to kill him. When Taylor approached McDonald, according to McDonald Taylor said to him "I'm going to stab you. I'm going to kill you." RP 85. A reasonable inference from this is that Taylor wanted to cause great bodily injury ("stab") or the death ("kill") of McDonald. McDonald stated that the first thing Taylor did when he stood up to him, face to face, was grab at him. RP 85-86. McDonald

said that he immediately turned to flee. RP 86. It is a reasonable inference from the evidence that McDonald was able to avoid further injury because he immediately decided to flee. Taylor testified that McDonald ran away very fast. RP 210, 218. It is a reasonable inference from this that Taylor did not pursue him because he did not want to get caught, and that McDonald was fleeing to a more populated area (his home). RP 86. McDonald sustained a stab wound in his back as a result of his altercation with Taylor. RP 94. It is a reasonable inference from this that Taylor stabbed McDonald in the back during the altercation. Forest Hofer, the physician's assistant that treated McDonald said that it was a deep wound and that if it had penetrated a different part of McDonald's body, and had not been stopped by his rib, it likely would have penetrated the thorax and caused internal bleeding, which is life threatening. RP 163-166. It is a reasonable inference from Mr. Hofer's testimony that the assault was committed by a force or means likely to produce great bodily harm or death.

Mr. Taylor argues that if he'd wanted to kill McDonald, he could have stabbed him in the abdomen

when he first approached the picnic table. However, this assumes the truth of the defendant, Mr. Taylor's testimony, which is inappropriate when the claim is one of insufficiency of evidence. Mr. Taylor alleged the pushing match. Mr. McDonald described the incident very differently and in his description, Taylor does stab McDonald when he first approaches him, not in the abdomen, but in the back. Also, it is improper to infer a lack of intent or a lack of weapon from the relatively minor injury. The proper inference to make is that Mr. McDonald was very lucky that he did not get stabbed in a more vulnerable spot, which would lead to internal bleeding and possible death.

The statements of Taylor, to Moat and McDonald, and the nature of the wound inflicted on McDonald, in combination with Mr. Taylor's admissions to being involved in the altercation are sufficient evidence to prove that Mark Taylor committed the crime of Assault in the First Degree.

III. CONCLUSION

For the reasons stated above, the State respectfully requests that the court affirm the

defendant's conviction and dismiss the appeal.

Respectfully Submitted this 19th day of
April, 2007.

A handwritten signature in black ink, appearing to read "Adam N. Kick", written over a horizontal line.

ADAM N. KICK, WSBA # 27525

Deputy Prosecuting Attorney

