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No. 37012-3-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

STEVE ALAN MAHONEY,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 07-1-03281-1  
The Honorable Ronald Culpepper, Judge

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OPENING BRIEF OF APPELLANT

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*P. M. 4-30-2008*

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## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The State failed to present sufficient evidence to disprove Appellant's claim that he acted in lawful defense of himself when he committed second degree assault.
2. The State failed to prove every essential element of the crime of felony harassment.
3. The prosecutor committed misconduct during closing arguments.

### **B. Issues Pertaining to the Assignments of Error**

1. Where the evidence presented by Appellant showed that the alleged victim physically beat Appellant, that Appellant retreated but was followed by the alleged victim, and that the alleged victim left but then appeared to be turning around to return to where Appellant lawfully stood, did the State fail to disprove Appellant's claim that he reasonably feared for his safety and acted lawfully when he fired a warning shot?  
(Assignment of Error 1)
2. Where the alleged victim testified that he was not afraid that Appellant was going to carry out his specific threat to shoot the alleged victim "between the eyes," did the State fail to

prove that Appellant's statement caused the alleged victim to fear that Appellant would carry out the specific threat, which is an essential element of felony harassment? (Assignment of Error 2)

3. Was the prosecutor's statement during closing argument, that he did not believe that Appellant was afraid of the alleged victim, an improper statement of the prosecutor's opinion requiring reversal based on prosecutorial misconduct? (Assignment of Error 3)

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

The State charged Steve Alan Mahoney by Third Amended Information with one count of second degree assault (RCW 9A.36.021), one count of felony harassment (RCW 9A.46.020), and two counts of misdemeanor harassment (RCW 9A.46.020).<sup>1</sup> (CP 13-15) The State also alleged that Mahoney was armed with a firearm when he committed the assault and felony harassment crimes. (CP 13-14)

Concurring with Mahoney's motion, the trial court dismissed

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<sup>1</sup> The pleadings in this case refer to Appellant as "Steven," but his name is actually "Steve." (SRP 16-17) Appellant will be referred to as Steve in this brief.

one count of misdemeanor harassment following the State's case in chief. (TRP 223-32)<sup>2</sup> The jury found Mahoney not guilty of the remaining misdemeanor harassment charge. (TRP 357-58; CP 53) The jury found Mahoney guilty of second degree assault and felony harassment, and found that Mahoney was armed with a firearm. (CP 48-52; TRP 357-58)

At sentencing, Mahoney argued that his separate assault and felony harassment convictions violated double jeopardy. (SRP 4-5; CP 54-62) The trial court disagreed, but found that they were the same criminal conduct for purposes of calculating Mahoney's offender score. (SRP 7, 12; CP 91) The trial court sentenced Mahoney within his standard range to a base-sentence total of 4 months of confinement, to be followed by consecutive 36-month and 18-month firearm sentence enhancements, for a total term of 58 months. (CP 93-94; SRP 18, 23-24) This appeal timely follows. (CP 101)

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<sup>2</sup> Citations to the transcripts containing the trial proceedings, numbered Volumes 1 through 4, will be to "TRP" followed by the page number. Citations to the sentencing proceedings held on November 15 and November 21, 2007, contained in a single volume, will be to "SRP" followed by the page number.

## **B. Substantive Facts**

This case involves an altercation between Steve Mahoney and Clinton Wyatt, on the shores of Jackson Lake on a sunny June day. (TRP 69, 70, 131) Wyatt and his fiancé, Jessica Hawkins, live in a home fronting Jackson Lake, with her daughter Cierra and their son Chance. (TRP 69, 130, 163) Mahoney lives on a nearby property and has legal access to a private lakefront beach area. (TRP 164, 166, 236, 237)

On the afternoon of June 20, 2007, Hawkins took her son and nephew for a ride on the lake in their canoe, while Wyatt mowed their law and Cierra played in the house with a friend. (TRP 70, 115, 131) Fellow lakefront resident Terrance Sullivan was also out in his yard that afternoon. (TRP 162, 165)

Sullivan saw several people, including Mahoney, socializing at the private access beach area. (TRP 165-66) He later saw Mahoney swimming in the lake and, as Mahoney approached Sullivan's dock, Mahoney yelled profanities at Sullivan and challenged him to a fight. (TRP 167) Sullivan ignored Mahoney, and Mahoney swam away. (TRP 168)

Hawkins heard Mahoney yelling profanities and making angry comments. (TRP 77, 81) She became uncomfortable and

decided to take the children back to her property. (TRP 81, 84-85)  
She turned the canoe towards her dock, and heard Mahoney yell  
"Run, bitch, run." (TRP 81-82)

Wyatt also saw Mahoney swimming in the lake and heard  
him yelling. (TRP 132-33) He initially ignored it and began mowing  
his lawn. (TRP 133) But when Mahoney got closer to Hawkins,  
Wyatt turned off the mower and watched more closely. (TRP 135-  
36) He heard Mahoney say to Jessica "Run, bitch, I'm coming over  
there anyway." (TRP 136)

Wyatt saw Mahoney swim to the side of the lake, get out for  
a moment, then swim towards Wyatt's dock. (TRP 138) Wyatt and  
Hawkins watched as Mahoney approached, and Mahoney said,  
"What the fuck are you staring at?" (TRP 86-87, 92, 139) Wyatt  
responded, "I'm looking at you, mother fucker." (TRP 92, 140)

According to Wyatt, Mahoney swam closer to Wyatt and  
asked whether he "want[ed] some" or "want[ed] a challenge?"  
(TRP 140) Wyatt told Mahoney, "If you come up here, we're going  
to have a problem[.]" and Mahoney responded, "Well, I'm coming."  
(TRP 93, 141) Wyatt testified that Mahoney chose not to climb up  
onto the dock because it would give Wyatt an "advantage," so he  
swam around and began to walk up the shore onto Wyatt's

property. (TRP 141)

Wyatt immediately kicked Mahoney in the chest and Mahoney staggered backwards. (TRP 94, 144) Mahoney again approached Wyatt and tried to grab his legs, so Wyatt punched Mahoney over and over until Mahoney eventually backed off and sat on the dock. (TRP 94-95, 144, 145, 146) Mahoney was out of breath and bleeding from a cut on his face. (TRP 147)

Wyatt testified that he told Mahoney to leave, but was concerned about whether he could swim back to the private beach area. (TRP 146, 147) Wyatt offered to row Mahoney back to the beach, but Mahoney declined and began to swim back. (TRP 147) According to Wyatt, Mahoney yelled, "I'm a Hell's Angel and I'll be back." (TRP 147) Cierra also heard Mahoney make this statement. (TRP 122)

Wyatt testified that two of Mahoney's friends, who were standing on the private beach, yelled to him, "You're dead. I'm going to kill you. Don't go to sleep." (TRP 148) Sullivan and Hawkins also heard Mahoney's friends yelling these threats at Wyatt. (TRP 97-98, 170)

Wyatt testified that he wanted to ensure the dispute was resolved and that there would not be any future problem, and he

wanted to be sure that Mahoney made it back to shore, so he got into his canoe and followed Mahoney. (TRP 149, 153) As he approached, he heard Mahoney tell one of the men to get a gun. (TRP 151) He testified that he came ashore and told the men that he did not want to fight, and wanted their problem to be over. (TRP 152) He apologized to Mahoney, and explained that he was just trying to protect his family. (TRP 153)

According to Wyatt, Mahoney was calm and things seemed to be resolved. (TRP 153) Mahoney's friend then returned with a gun. (TRP 154) Wyatt testified that Mahoney started getting angry and began yelling and making bizarre statements. (TRP 154) Wyatt told Mahoney he just wanted the dispute to be over. (TRP 154) Mahoney said, "It will be over right [here,]" and asked his friend for the gun. (TRP 155)

Wyatt took a stance indicating that he was going to take the gun, and Mahoney put the gun down. (TRP 155) Wyatt decided to leave, and returned to his boat. (TRP 156) Mahoney followed and when Wyatt got into the boat, Mahoney pushed it out into the water. (TRP 156) Mahoney told Wyatt that he would kill him if he came back again. (TRP 157)

Wyatt paddled away while facing Mahoney. (TRP 156-

57)When he believed he was out of range of the gun, about 35-40 yards from shore, he started to turn the canoe around. (TRP 157, 158) Wyatt heard a gunshot, and looked around in the water to see how close the bullet landed. (TRP 157) He did not see any indication in the water that the bullet had landed nearby, so he continued to row. (TRP 157) He heard Mahoney yell, "The next one will be between your eyes." (TRP 157)

Sullivan watched this confrontation from his deck, about 400-500 feet away. (TRP 178) He testified that Wyatt seemed calm, but that Mahoney was yelling and getting in Wyatt's face, and taunting him to fight. (TRP 172-73, 184) He testified that Mahoney actually rocked Wyatt's boat back-and-forth, trying to capsize it. (TRP 173) He also testified that Mahoney pointed his gun towards Wyatt as he fired. (TRP 174)

Sheriff's deputies contacted Mahoney at his residence shortly after the altercation. (TRP 212, 214) They observed that Mahoney had blood on his face and his right eye was purple and swollen. (TRP 218) They arrested Mahoney and retrieved his gun. (TRP 214, 218) Mahoney was transported first to a hospital emergency room, where he received three stitches to close the laceration over his eye. (TRP 246, 267)

Mahoney testified that he swims in the lake frequently as a form of physical therapy for his injured knees. (TRP 237-38) That afternoon, he had a disagreement with his son, and was yelling to him while he swam around the lake. (TRP 238-39, 247) As he passed by Wyatt's dock, he saw Wyatt "glaring" at him. (TRP 239) He testified that Wyatt asked him to come ashore to talk, and when he did, Wyatt attacked him. (TRP 240-41) Wyatt hit and kicked Mahoney over-and-over again. (TRP 242)

When Wyatt finally stopped, Mahoney rested on the dock, then began to swim back to the private beach. (TRP 242) He testified that he yelled that he was a Hell's Angel because he was afraid of Wyatt and because Wyatt had told Mahoney that he had been trained in the Army, so Mahoney wanted to say something that would make Wyatt leave him alone. (TRP 251) As he swam away, he saw Wyatt go towards his house, and Mahoney did not know what for. (TRP 285)

When Mahoney made it back to the private beach, he felt dazed, had blood on his face and could not see out of one eye. (TRP 243) He saw Wyatt following him in the canoe. (TRP 242) He was afraid, so he asked his son to get a gun from their home. (TRP 243)

According to Mahoney, Wyatt came ashore and immediately confronted Mahoney and angrily accused him of threatening his family. (TRP 244) Mahoney's son then gave Mahoney a gun, and Mahoney ordered Wyatt to leave. (TRP 244) Wyatt refused, so Mahoney chased him with the gun to the canoe. (TRP 244) Mahoney did not try to tip the canoe; he only tried to push it away and into the water. (TRP 245)

Mahoney watched Wyatt paddle away, but when Wyatt turned around, Mahoney thought he was coming back. (TRP 245) He shot towards the ground, and said, "Go away or the next one's coming at you." (TRP 245) Mahoney testified he may have made the comment about it being "between the eyes." (TRP 246) He testified that he did not fire towards Wyatt. (TRP 245)

### III. ARGUMENT & AUTHORITIES

#### A. **The State failed to present sufficient evidence to convict Mahoney of second degree assault and felony harassment.**

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to

support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

1. *The State failed to disprove Mahoney’s claim that he acted lawfully in self-defense.*

As charged and instructed in this case, to convict Mahoney of second degree assault, the State had to prove that Mahoney assaulted Wyatt with a deadly weapon. (CP 13; 39) See also RCW 9A.36.021(1)(c). Mahoney argued that his actions were lawful and in self-defense because he believed he was in danger and he acted to prevent Wyatt from inflicting additional injury. (CP 48-49; TRP 327-29, 334-36)

In order to establish self-defense, a finding of actual danger is not necessary. The jury instead must find only that the defendant reasonably believed that he or she was in danger of imminent harm. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996); RCW 9A.16.020(3). The evidence of self-defense must be

assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993).

The State bears the burden of disproving self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The State in this case had to disprove that Mahoney's assertion that he reasonably believed he was about to be injured by Wyatt. LeFaber, 128 Wn.2d at 899.

After being soundly beaten by Wyatt, Mahoney left his property and returned to the private beach, where he had a lawful right to be. (TRP 145, 147, 166, 242) Wyatt followed Mahoney and sought further contact. (TRP 149, 242) Mahoney already knew that Wyatt could physically overtake him, so his decision to obtain a weapon for protection after being followed was reasonable. (TRP 243) In addition, Mahoney saw Wyatt go back to his house before getting in the canoe, so Mahoney did not know whether Wyatt retrieved a weapon. (TRP 285)

Once Mahoney had the gun, Wyatt acted as if he was not afraid, and took an aggressive stance. (TRP 155) Without using force, Mahoney chased Wyatt off the beach and back to the canoe.

(TRP 156, 244) He pushed the canoe away from the shore and watched as Wyatt paddled away. (TRP 156, 245) It was not until Wyatt appeared to be turning the canoe around to return to the beach that Mahoney fired a warning shot, which landed nowhere near the canoe. (TRP 156-57, 245)

This evidence amply supports Mahoney's claim that he acted out of fear that Wyatt was going to return to the beach and harm him again. Viewed from Mahoney's perspective, his actions were reasonable. Even though Wyatt may have been coming to the beach in an effort to smooth things over, it was reasonable for Mahoney to believe that Wyatt intended to continue the confrontation and intended to cause additional injury to Mahoney.

The State failed to disprove beyond a reasonable doubt that Mahoney acted lawfully and with a reasonable belief that he was in danger. Accordingly, Mahoney's second degree assault conviction must be reversed.

2. *The State failed to prove that Wyatt feared Mahoney would carry out his threat to shoot him "between the eyes."*

The State charged Mahoney with felony harassment under RCW 9A.46.020(1)(a)(i), .020(1)(b), and .020(2)(b). A person is guilty of harassment if he or she:

knowingly threatens . . . [t]o cause bodily injury immediately or in the future to the person threatened or to any other person . . . and . . . [t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

RCW 9A.46.020(1)(a)(i), .020(1)(b). The crime is elevated from a misdemeanor to a felony if the threat made is a threat to kill. RCW 9A.46.020(2)(b). To convict, “[t]he State must prove that the victim is placed in reasonable fear that the threat made is the one that will be carried out.” State v. C.G., 150 Wn.2d 604, 610, 80 P.3d 594 (2003). Accordingly, “in the case of a threat to kill, the victim must be placed in reasonable fear that a threat to *kill* will be carried out.” C.G., 150 Wn.2d at 610 (emphasis in original).

The State elected to prove that the statement made by Mahoney after he fired the gun constituted felony harassment. (CP 30; TRP 312) Wyatt testified that Mahoney waved his gun and said, “The next one will be between your eyes[.]” (TRP 157) To convict Mahoney of felony harassment based on this statement, the State had to prove that this statement put Wyatt in reasonable fear that Mahoney would shoot and kill him immediately or in the future. C.G., 150 Wn.2d at 610; RCW 9A.46.020. The State did not meet this burden.

Wyatt testified that he paddled quickly to get out of range of

Mahoney's handgun, then he turned the boat. (TRP 157) He also decided before Mahoney fired to look for a round bullet impact in the water and, if he saw one, to jump out of the boat and use it for cover. (TRP 157) After Mahoney fired, Wyatt looked for a round impact and saw none, so he knew the bullet did not come close to him. (TRP 157, 203) Wyatt did not jump out of the boat, but continued to paddle back to his dock. (TRP 207)

When asked specifically whether Mahoney's "between the eyes" statement concerned him, Wyatt replied, "No. I mean, because he was too far away [for] shooting between the eyes." (TRP 158) Wyatt stated that he was generally concerned because Mahoney knew where he lived, and thought he was "going to have to deal with this a long time[.]" but stated that "it didn't cause an immediate threat to me." (TRP 158)

The State recalled Wyatt later in an effort to fill the obvious hole in its evidence, and Wyatt then testified that he knew he was out of range for accuracy, but not for a stray bullet, so he felt he was in danger. (TRP 203) But he testified he was not fearful, just alarmed and was concerned for his safety. (TRP 205, 206, 207)

The State proved that Wyatt had a general concern that Mahoney might injure him or might harm or cause trouble with his

family in the future, but there was simply no testimony showing that Wyatt feared that Mahoney was going to carry out the specific threat to kill him by shooting him “between the eyes” or otherwise fatally shooting him.

**B. The prosecutor committed misconduct during closing arguments when he expressed his personal opinion concerning the issue of whether Mahoney was afraid for his safety.**

A prosecutor commits error in closing argument if it is clear and unmistakable that he is not arguing an inference from the evidence, but rather is expressing a personal opinion. State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983). The prosecutor’s statements are reviewed in the context of the entire argument, the issues of the case, the evidence addressed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

During closing arguments in this case, the prosecutor told the jury, “So maybe he believed he was about to be injured. I don’t think he did. I would submit to you that he did not believe he was about to be injured, so I would say no.” (TRP 343) By making this statement, the prosecutor was not merely arguing inferences from the evidence, but was expressing a personal opinion. The

prosecutor clearly committed misconduct.

Defense counsel did not object to the statement. (TRP 343) However, such allegations may be raised for the first time on appeal where the alleged misconduct is so "flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

In this case, the most critical issue before the jury was whether to believe Mahoney reasonably feared for his safety. The prosecutor flagrantly and intentionally expressed his opinion on this issue by telling the jury that he did not believe Mahoney was afraid. (TRP 343) Much like a police officer, a deputy prosecutor has a special role in society, such that his opinions have a special aura of reliability. See e.g. State v. Kirkman, 126 Wn. App. 97, 105, 107 P.3d 133 (2005) (a police officer's testimony may particularly affect a jury because of its "special aura of reliability").

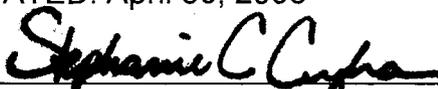
Such a strong statement from the prosecutor regarding his belief in Mahoney's guilt would not have been cured by an objection and jury instruction because it struck at the heart of the defense's case—that Mahoney was afraid for his safety. See e.g. State v.

Powell, 62 Wn. App. 914, 920, 816 P.2d 86 (1991) (where misconduct strikes at the heart of the defense case, a curative instruction is ineffective to “unring the bell”).

#### IV. CONCLUSION

The State failed to prove that Mahoney was not acting lawfully and in self-defense when he fired a warning shot, and failed to prove that Wyatt was fearful that Mahoney would carry out the specific threat to shoot him “between the eyes.” Because the State failed to meet its constitutional burden of proof, Mahoney’s convictions must be reversed. In addition, the prosecutor’s statement in closing arguments clearly and improperly expressed his opinion on the critical issue of whether Mahoney was afraid for his safety, and also requires reversal of Mahoney’s convictions.

DATED: April 30, 2008



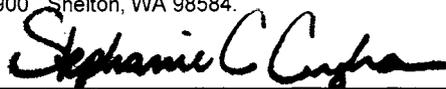
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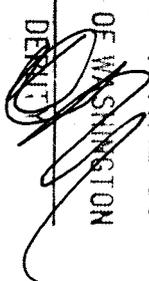
Attorney for Steve Alan Mahoney

#### CERTIFICATE OF MAILING

I certify that on 04/30/2008, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Steve A. Mahoney, DOC#312728, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.



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