

NO. 37012-3

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STEVE ALAN MAHONEY, APPELLANT

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

Appeal from the Superior Court of Pierce County
The Honorable Ronald Culpepper, Judge

No. 07-1-03281-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State adduce sufficient evidence to support the jury verdict finding defendant guilty of felony harassment?
2. As the jury was properly instructed on self-defense, should its rejection of defendant's claim that he acted lawfully in self-defense be upheld?
3. Has defendant failed to show that the prosecutor's argument was so flagrant and ill intentioned that any prejudice could not be cured by an instruction?

B. STATEMENT OF THE CASE.

1. Procedure

On June 21, 2007, the Pierce County Prosecutor's Office charged STEVEN ALAN MAHONEY hereinafter "defendant," with one count of assault in the second degree with a deadly weapon enhancement. CP 1. There were several amendments to the information: CP 4-5, 8-10, 13-15. Ultimately, the case proceeded to trial on October 15, 2007, in front of the Honorable Ronald E. Culpepper on one count assault in the second degree with a deadly weapon enhancement (Count I), one count of felony

harassment with a deadly weapon enhancement (Count II), and two counts of harassment (Count III and Count IV). RP 3¹; CP 13-15.

Prior to submitting the case to the jury, the court dismissed Count IV. RP 233. On October 19, 2007, the jury found defendant guilty on Counts I and II, with firearm enhancements on both Counts. CP 48-51; RP 357-358. The jury found defendant not guilty of Count III. CP 53; RP 358. Defendant moved to vacate his felony harassment conviction, Count II, on November 8, 2007. CP 52. The court denied the motion on November 15, 2007. SRP 7.

A sentencing hearing was held on November 15, 2007. SRP 3. The court sentenced the defendant to a total of 40 months, which consisted of a 4 month standard sentence for assault, plus 36 months for the firearm enhancement, and a 3 month sentence on Count II, with the base sentences to run concurrently. CP 74-86; SRP 18. The Court refused to impose the time for a firearm enhancement on Count II. *Id.* The term of confinement was to be followed by 18 to 36 months of community custody. *Id.*

The State filed a motion to reconsider the decision not to impose a firearm enhancement. CP 87; SRP 22. The court granted the motion and imposed an additional 18 month enhancement on Count II. CP 88-100. Defendant filed a timely notice of appeal. CP 101-114.

¹ The verbatim record of proceedings shall be referred to as follows:
The five sequentially number volumes shall be referred to as RP.
The continuance motion on 07/09/2007 shall be referred 07/09/2007 RP

2. Facts

On June 20, 2007, Ms. Jessica Hawkins was in a canoe with her son Chance (18 months), and nephew Anthony (8 years old), on Jackson Lake in front of her home. RP 70. While on the water, she heard the defendant, who was swimming, yelling profanities. RP 77. Defendant began to swim closer, yelling something to the effect of “run, bitch, run.” Being uncomfortable, she began to paddle back to her property. RP 80-81.

Ms. Hawkins returned and went inside her house. RP 139. Her fiancé, Mr. Clinton Wyatt, was cutting the grass on the lawn in front of their home. RP 131. Defendant had followed Ms. Hawkins; he stated to Mr. Wyatt “what the f**k are you staring at?” RP 139. Mr. Wyatt replied “I am looking at you mother f**ker” RP 140. Mr. Wyatt testified that defendant then said “oh you want some?” and swam closer to the property. RP 140. Mr. Wyatt responded “if you come up here, we’re going to have a problem.” RP 141. Defendant then stated “well I am coming.” RP 141. The defendant swam to the dock but changed his mind, stating “I am not going to climb up on the dock because you have the advantage. I’m going to swim around here.” RP 141. Defendant swam to the shore and began coming out of the water onto a small beach. RP 141.

The sentencing record of proceedings shall be referred to as SRP

Mr. Wyatt testified he was concerned about confronting the defendant due to his size. RP 144. Mr. Wyatt testified that he panicked and kicked the defendant in the chest; the defendant staggered, but did not fall. RP 144. Mr. Wyatt testified that defendant then came at Mr. Wyatt and began trying to grab his legs. RP 144. As they were knee deep in the water, Mr. Wyatt was concerned about the possibility of being drowned if held down. Feeling as if he was the only obstacle between defendant and his family, Mr. Wyatt repeatedly punched the defendant as the struggle continued. RP 144-145. Eventually, the defendant backed off and sat on the dock. RP 146.

Mr. Wyatt offered to row the defendant back to the homeowner's beach area. Defendant and his friends were accessing the lake from a homeowner's beach that was across the lake from the Wyatt/Hawkins residence. Defendant was bleeding and Mr. Wyatt was not sure of his ability to swim. RP 147. Defendant said he could swim back, got in the water, and stated "I'm a Hell's Angel and I'll be back." RP 147. Mr. Wyatt then heard two men over on the homeowner's beach area yell "you're dead. I'm going to kill you. Don't go to sleep." RP148. Mr. Wyatt returned to where his family was in an effort to calm them and himself down. RP 149. In order to make sure the situation was resolved and that the defendant got back safely, Mr. Wyatt decided to get in the canoe and follow him across the lake. RP 149.

After defendant got out of the water, Mr. Wyatt, staying about 10 feet away, testified defendant told another person to get a gun. RP 151. Mr. Wyatt tried to explain that he never meant for anything to happen and that he was just trying to protect his family. RP 153. Mr. Wyatt then came ashore in an effort to make sure the situation was over. RP 152-153.

The man defendant sent for a gun returned with a knife and a gun; Mr. Wyatt said "I just want this to be over right now." RP 154. Defendant said "it will be over right there" and asked for the gun, then held it behind his leg. RP 155. Mr. Wyatt began making his way back to the canoe. RP 155-156.

Mr. Wyatt testified he had one foot in the canoe when the defendant pushed the canoe off the shore with his foot. RP 156. Mr. Wyatt avoided falling in the water and began paddling backwards to keep his face towards the defendant; he was certain that the defendant was going to shoot him. RP 156. The defendant yelled "if you come around me again, I'll kill you." RP 156. Mr. Wyatt began to plan what he would do if the defendant shot at him while he was on the water. RP 157. At that point he heard a shot but did not see where the round hit. RP 157. Mr. Wyatt testified that the defendant was waiving the gun in Mr. Wyatt's direction yelling, "the next one [bullet] will be between your eyes." RP 157.

A neighbor, Mr. Terrance Sullivan, testified that he watched most of the confrontation from his property directly across from where

defendant and his friends were partying. RP 163-4. Mr. Sullivan testified that earlier in the day, the defendant had yelled “f**k you!” as he swam past Mr. Sullivan’s house. RP 167. Mr. Sullivan testified he watched as Mr. Wyatt got back in the canoe and defendant grabbed the bow of the boat rocking it back and forth trying to capsize Mr. Wyatt. RP 173. Mr. Sullivan then testified that through binoculars he saw the defendant point the gun directly at Mr. Wyatt and fire. RP 174.

Defendant testified that initially he had been swimming around and saw Mr. Wyatt glaring at him. RP 239. Defendant asked Mr. Wyatt “what the f**k are you looking at?” and he responded “I’m looking at you mother f**ker.” RP 239. As he walked on shore, defendant stated Mr. Wyatt attacked him hitting him on the side of the head. RP 241. When he got away he stated that he rested on the dock and then started to swim back to where his son was. RP 242. As he looked back, defendant saw Mr. Wyatt following him, and he yelled to his son and another man to go get his gun. RP 243.

According to defendant, once he was on shore, Mr. Wyatt came up to him; defendant asked him what was his problem. RP 244. Mr. Wyatt responded that defendant had threatened his family, but could not explain how. RP 244. Defendant testified that Mr. Wyatt would not leave when asked; defendant took his gun and pointed it at Mr. Wyatt to get him back into the canoe. RP 244. Defendant testified that Mr. Wyatt paddled out a short distance, then turned and appeared to be coming back towards him.

RP 245. Defendant testified that he fired a shot into the ground and told Mr. Wyatt to “go away or the next one’s[bullet] coming at you.” RP 245.

Later, the police showed up at defendant’s home, arrested him and took him to Allenmore Hospital where he received three stitches for a laceration near his eye. RP 246, 267. He was then taken to the Pierce County Jail. RP 246.

C. ARGUMENT.

1. THE JURY HAD SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF SECOND DEGREE ASSAULT AND FELONY HARASSMENT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29

Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

- a. The jury had sufficient evidence to find defendant guilty of felony harassment.

To prove a defendant guilty of felony harassment, the State had to convince a jury of the following elements beyond a reasonable doubt:

(1) That on or about the 20th day of June, 2007, after the gunshot was fired, the defendant knowingly threatened to cause bodily injury immediately or in the future to Clinton Wyatt, and

(2) That the words or conduct of the defendant placed Clinton Wyatt in reasonable fear that the threat would be carried out;

(3) That the defendant acted without lawful authority; and

(4) That the acts occurred in the State of Washington.

CP 19-47, Instruction No. 9.

If the threat made is a threat to kill the person, the crime becomes a felony. RCW 9A.46.020(2)(b). Defendant contests the proof of the second element of jury instruction no. 9. To convict a person of felony harassment, the State must “prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out”. *State v. C.G.*, 150 Wn.2d. 604, 612, 80 P.3d 594 (2003). In determining reasonable fear, “the nature of the threat depends on all the facts and circumstances and it is not proper to limit the inquiry to a literal translation of the words spoken” *Id. at* 611.

Courts have stated that a person need only be placed in reasonable fear that the threat “will be carried out” *C.G.*, 150 Wn.2d. 604, 612. In *State v. Ragin*, a court convicted a man of felony harassment when he telephoned the threatened victim from King County Jail asking for bail money and when the victim denied the request, the defendant stated “you son of a bitch, I’m going to murder you and I am going to take care of your family” *State v. Ragin*, 94 Wn. App. 407, 410, 972 P.2d 519 (1999).

The defendant in our case was convicted of felony harassment for a statement he made at the end of the altercation between the two parties that “the next one [bullet] is going to be between the eyes”. CP 19-47, Instruction No. 8, 50; RP 157-158. Mr. Wyatt testified that because defendant was too far away, he did not feel immediately threatened, but was concerned for the future. RP 158. Although the immediate threat was not there because it was physically not possible at that moment, Mr. Wyatt did feel threatened.

Ragin shows even when the immediate possibility of a threat being carried out does not exist, a court may convict a defendant based on his previous behavior and interactions with the victim so long as the jury believes such actions contribute to placing the victim in reasonable fear. Regardless of being out of range of the gun, the trier of fact could reasonably find that Mr. Wyatt was in fear that defendant might act upon his threat if not at that moment, then in the future.

Mr. Wyatt testified the threat caused him concern for his own safety and the safety of his family. RP 206-207. Mr. Wyatt also stated that defendant's willingness to fire the gun showed that he was willing to take it to the next level. RP 207-208. Their conflict had escalated from a physical fight to the use of deadly force. RP 207-208. The evidence is beyond dispute that defendant was not only willing to threaten someone with a gun, he was willing to use it. RP 316. Defendant engaged in considerable behavior aimed at intimidating others; he made unprovoked intimidating comments to Ms. Hawkins and Mr. Sullivan; he initiated the confrontational exchange with Mr. Wyatt; he claimed he was a Hell's Angel gang member. RP 322. All of this evidence indicates that defendant's purpose that afternoon was to intimidate anyone in his vicinity. None of the defendant's behavior was aimed at defusing the situation. The jury was entitled to believe from this evidence that Mr. Wyatt's concern for his safety and the safety of his family in the future was a reasonable fear that the threat would be carried out. The jury's verdict should be upheld.

- b. The State presented sufficient evidence to disprove defendant's claim that he acted lawfully in self-defense.

A person commits the crime of assault in the second degree if he or she (c) assaults another with a deadly weapon. RCW 9A.36.021(1)(c). On appeal, defendant does not challenge the evidence supporting the

elements of the crime of assault, but contends that the jury should have concluded he was acting in self-defense.

Once some evidence of self-defense is presented, it becomes the State's burden to prove defendant acted in the absence of self-defense. *State v. McCullum*, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983) (citing *Patterson v. New York*, 432 U.S. 197 at 214-215, 97 S. Ct. 2319, 53 L.Ed.2d. 281 (1977)).

In this case, the court gave defendant's requested instructions on self-defense. CP 19-47, Instruction No. 16-20. The defense attorney did not object to any of the court's instructions detailing the law on self-defense. RP 289. A jury is presumed to follow the court's instructions. *State v. Kroll*, 87 Wn.2d 829, 837, 558 P.2d 173 (1976) (citing *State v. Ingle*, 64 Wn.2d 491, 392 P.2d 442 (1964)). Because the jury was correctly instructed on the law, the determination of whether defendant was justified in using deadly force comes down to a credibility determination. Credibility determinations are not subject to appellate review. It is the trier of fact's responsibility to determine the sufficiency and credibility of the evidence, and so once the State has produced their evidence of all of the elements of the crime, the decision of the trier of fact should be upheld.

It is not difficult to understand why the jury rejected the claim of self-defense. The jury instructions stated that actions of self-defense are lawful so long as they are out of a reasonable belief that one is about to be injured. CP 19-47, Instruction No. 16. The jury instructions further stated:

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

CP 19-47, Instruction No. 17.

While a finding of actual danger is not necessary, a reasonable *belief* that one is in actual danger *is* necessary. The jury could have found that it was unreasonable to believe that an unarmed man retreating from the situation in a canoe is an actual danger to someone standing on the shore armed with a deadly weapon. RP 315.

Furthermore, under these facts, defendant was fortunate to receive instructions on self-defense. In *State v. Walker*, Walker, armed with a knife, stabbed an unarmed victim to death after a fight had broken out over a romantic triangle. The trial court “found no evidence supporting defendant’s claimed belief that he was in serious danger of being killed or grievously injured by [the victim]” and refused to instruct on self-defense. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). The Supreme

Court affirmed the trial court's refusal to instruct on self-defense.

Defendant got the benefit when the jury was able to hear and consider his argument for self-defense when, under *Walker*, it was within the court's discretion to deny the instructions altogether. The jury here considered defendant's claim, and found that the State disproved defendant's claim of self-defense beyond a reasonable doubt. The verdict finding him guilty of assault should be upheld.

2. DEFENDANT HAS FAILED TO SHOW THE
EXISTENCE OF ANY PROSECUTORIAL
MISCONDUCT THAT COULD NOT HAVE BEEN
CURED BY AN INSTRUCTION TO THE JURY.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and his actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)).

Before an appellate court reviews a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L.Ed.2d 834 (1962);

State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993).

A defendant claiming prosecutorial misconduct in argument bears the burden of demonstrating that the remarks were improper and that they prejudiced the defense. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). Allegedly improper comments are reviewed in the context of the entire argument, the issues of the case, the evidence addressed in the argument, and the instructions given. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998); *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). Prejudice on the part of the prosecutor is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” *Dhaliwal*, 150 Wn.2d at 578, *quoting Pirtle*, 127 Wn.2d at 672; *accord Brown*, 132 Wn.2d at 561.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, 79 Wn. App. at 293-294. The absence of an objection by defense counsel “*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v.*

McKenzie, 157 Wn. 2d 44, 53, 134 P.3d 221 (2006)(quoting *State v. Swan*, 114 Wn.2d 613,661, 790 P.2d 610(1990))(emphasis in original).

Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.* In the present case, defendant asserts the prosecutor engaged in misconduct in the emphasized portion of the following argument:

Prosecutor: Maybe there was self-defense here, but that was Clinton Wyatt. **So maybe he [defendant] 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.** But certainly, even if he did have that belief, that belief was entirely unreasonable and out of whack under these circumstances, where Clinton Wyatt is paddling away, trying to get away from the area, Clinton Wyatt, who was just there trying to calm things down, to make sure these people didn't come back to harm his family and harm him.

RP 343 (emphasis added)

Defendant did not object to this argument in the trial court. *Id.* Thus, he must meet the flagrant and ill-intentioned standard in order to succeed on this claim. He cannot meet this standard.

The court's instructions clearly describe the jury's role in the trial and explain how it is to construe statements made by the attorneys.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the

lawyers' statements are not evidence...you must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 19-47, Instruction No. 1.

You are the sole judges of the credibility of each witness.
You are the sole judges of the value or weight to be given to the testimony of each witness.

Id.

Courts recognize there is a “distinction between *the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.*” ***State v. McKenzie***, 157 Wn.2d 44, 53, 134 P.3d 221 (2006)(quoting ***State v. Swan***, 37 Wash. 51, 54-55, 79 P. 490 (1905))(emphasis in original). While it is improper for a prosecutor to express his personal opinion, arguments made in closing arguments sometimes appear as such if not looked at in light of the entire case. ***State v. McKenzie***, 157 Wn.2d 44, 53-4, 134 P.3d 221 (2006). By looking at the total argument, it may become apparent that counsel is arguing an inference from the evidence and trying to convince the jury to reach such a conclusion. *Id.*

In this case, when looked at in the context of his entire closing argument, it becomes clear that the prosecutor was merely making a conclusory statement regarding the defendant's self-defense claim. The preceding and succeeding statements discuss the facts of the case,

including the parties' behaviors in the situation. In making his statements, the prosecutor was describing to the jury a conclusion that could be drawn about the claim of self-defense by the defendant. This was not a personal opinion, but instead, an argument related to an issue presented at trial.

But even if the court finds the argument to be improper, any prejudice from the alleged misconduct could have been eliminated by a curative instruction that repeated instructions previously given. Defendant's argument that this alleged misconduct is so egregious as to constitute reversal is meritless.

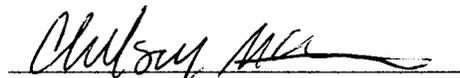
D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: June 4, 2008

GERALD A. HORNE
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Chelsey McLean
Legal Intern

Certificate of Service:

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

6-4-08 Theresa Kab
Date Signature

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