

NO. 39108-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

FLOYD TEO,

Appellant.

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STATE OF WASHINGTON
BY [Signature]

COURT OF APPEALS
DIVISION II

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

The Honorable Frederick Fleming, Judge

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COURT OF APPEALS
STATE OF WASHINGTON

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied appellant a fair trial when, it gave an aggressor instruction over defense objection. CP 55 (Instruction 24).¹

2. Prosecutorial misconduct denied appellant a fair trial when the prosecutor misstated the law of defense of another, arguing that to accept appellant's defense, the jury had to find "two people deserved to die." RP 754.

3. The trial court erred in admitting evidence of appellant's prior theft under the res gestate exception to ER 404(b).

4. The court erred in failing to give a limiting instruction for evidence admitted under ER 404(b).

5. Ineffective assistance of counsel violated appellant's due process right to a fair trial.

6. Cumulative error denied appellant a fair trial.

7. The trial court failed to enter written findings of fact and conclusions of law after the hearing under CrR 3.5.

¹ Instruction 24 read:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

CP 55.

Issues Pertaining to Assignments of Error

1. Aggressor instructions are disfavored in Washington and should only be used where there is evidence the defendant's intentional act initiated the violence. The evidence showed appellant taunted the victims with gang insults and engaged in a mutually agreed-upon fistfight with one of their friends. Was it reversible error to give an aggressor instruction?

2. Use of force in defense of another is lawful even if the actor is mistaken about the other's need. Did the prosecutor commit misconduct by arguing the shooting was justified only if appellant's friend was "in the process of being beaten so severely that two people deserved to die"?

3. Prior bad acts are inadmissible to show propensity under ER 404(b). Under the res gestate exception, such evidence may be admissible if it is an inseparable part of the crime at issue and is necessary to a complete understanding of events. Appellant is charged with attempted murder and drive-by shooting. Did the court err in admitting evidence that two months before these events, appellant had stolen the gun?

4. To prevent the jury from considering prior bad acts as evidence of propensity to commit crime, a limiting instruction must be

given to the jury when such evidence is admitted under an exception to ER 404(b). Did the court commit reversible error in failing to give a limiting instruction? Alternatively, was defense counsel ineffective in failing to request a limiting instruction?

5. Does cumulative error require appellant's convictions be reversed?

6. CrR 3.5(c) requires written findings of fact and conclusions of law after a hearing on the voluntariness of a defendant's statement. Should this case be remanded for entry of the required findings and conclusions?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Floyd Teo with two counts of attempted first-degree murder while armed with a firearm and one count of drive-by shooting. CP 1-2. The jury found Teo guilty of each count and by special verdict found he was armed with a firearm. CP 64-66, 69-70. The court imposed 195.75 months, 180 months, and two 60-month firearm enhancements on the two attempted murder counts and 36 months for the drive-by shooting. CP 83. Teo timely filed notice of appeal. CP 92.

2. Substantive Facts

Teo's Statement

Teo admitted shooting David Barker and Marimo Yim. In a taped statement to police, he explained he did so to protect his friend Sandy Dillon, who was being badly beaten by at least twelve members of another gang. Ex. 67.² Teo went with Dillon to visit friends in the vicinity of 36th and T streets in Tacoma. Ex. 67 at 6. While there, the local Crips barked insults at Teo and Dillon, who were members of a different gang. Id. Teo exchanged words with Manny Duncan, and the pair returned to Dillon's home. Id. at 6-7; RP 400. Teo's friend Kyle arrived, asking for his dog, which Teo had left with the friends he and Dillon had visited earlier. Ex. 67 at 6-7. Teo and Dillon returned to 36th and T to retrieve the dog. Id.

When they arrived, a friend of Dillon's mother said that the Crips wanted to fight both Teo and his friend Sean McClendon, who drove up in a gold Lincoln Continental as this was happening. Id. Teo and Manny Duncan began to fight, which was supposed to be a fistfight with no weapons. Id. Soon thereafter, other fights broke out. Id. at 8. Teo stated there were at least twelve Crips present and everyone was fighting someone.

² Exhibit 66A is the cassette tape of Teo's recorded statement to police that was admitted into evidence and played for the jury. RP 630-32. Exhibit 67 is the transcript given to the jury to read along, admitted for illustrative purposes only. Id. For ease of reference, this brief will cite the written transcript.

Id. Teo saw his friend Dillon on the ground, with at least four Crips kicking and stomping his back and head. Id.

Because his friend was small and defenseless, Teo ran to the car and grabbed a rifle from his bag. Id. He first pointed it at the people around Dillon and told them to back up. Id. They did, but when Teo moved to put the gun away, they began attacking Dillon again. Id. This time, Teo fired, hitting two people. Id. He stated he believed he hit one in the chest and one in the leg before someone grabbed the gun away from him. Id. He was then attacked by several people, but managed to crawl away. Id. at 8-9. Approximately two weeks later, Teo turned himself in. RP 31-32. At trial, State's witnesses gave various different accounts of events.

David Barker

David Barker lived at 36th and T. RP 341. According to Barker, he and his friends are not in a gang, except for Manny Duncan, who is "affiliated" with the Crips through his brothers. RP 346-47, 355. On September 22, 2006, someone Barker knew as "Curious" and an unnamed companion, both associated with the gang Native Gangster Blood (NGB), walked by saying things like, "There's gonna be crab meat on the ground." RP 350-53. Barker testified he knew this language was intended to be disrespectful to Crips, but it was not particularly meaningful to him. RP 350. He presumed the insult was directed either at him or at Manny

Duncan because of a falling out with Sandy Dillon, also an NGB member. RP 355. He testified at least one of the pair had a gun in his waistband. RP 357-58. The incident ended when the pair left. RP 358.

About an hour later, Dillon, Curious, McClendon, and Teo arrived, and the entire group called to Duncan, "You're gonna fight Floyd [Teo] one-on-one." RP 367-68. Duncan went over to the group, accompanied by Barker, and a fistfight ensued. RP 367-69. Barker described it as a "fair fight" with no injuries. RP 370-71.

After the fight between Teo and Duncan ended, the group demanded Duncan fight McClendon. RP 371. Duncan declined, and he and Barker tried to leave. RP 371. Unfortunately, McClendon took a swing at Barker's friend Sarath Phai, and Dillon and Curious began fighting Barker's friend Marimo Yim. RP 371-73. Barker testified he saw Teo walk to the car and then saw him with a gun. RP 373. Barker pushed Duncan out of the way and was shot twice. RP 374.

Marimo Yim

Marimo Yim testified he was at Barker's home, and a car drove by several times with occupants, including Teo, yelling gang insults such as "What's up, Bloods?" RP 536, 547-48. Yim testified he has never been in a gang, but knows people who are. RP 557. Manny Duncan responded to the

insults, saying, “if you got a problem, we can get ‘em up,” meaning they could fight. RP 539.

Duncan then got into a fight with Teo. RP 539. When Yim approached, two people attacked him. RP 540. He remembered someone running toward the car and grabbing a gun. RP 540. He heard a gunshot and saw Barker shot after pushing Duncan out of the way. RP 540. Yim tried to run, but was shot three times. RP 540-41. As he lay on the ground, a gun was put to his forehead, and Teo “was getting ready to pull the trigger” when Barker’s father grabbed the gun away. RP 541, 551.

Sarath Phai

Sarath Phai testified a fight was in progress when he arrived at Barker’s house. RP 449. Teo was fighting someone, and Curious and one other person were fighting with Yim. RP 454. The scuffle lasted five or ten minutes and was “kind of serious” but no one was hurt. RP 455. He saw Teo go to the car, open the back door, and begin shooting immediately with the gun at his waist. RP 458.

Bruce Barker

Bruce Barker, David’s father, went outside when his wife reported fighting. RP 423. He saw Teo fighting Duncan, but saw no weapons or threats. RP 427, 429. He told them to stop, and the fight ended. RP 429-30. He saw Teo open the car door and pull out a rifle. RP 431. He heard shots

fired, and saw his son fall. RP 431. He saw Teo turn point the rifle at Yim, heard more shots, and saw Yim fall. RP 432. He then grabbed the rifle away from Teo. RP 433.

Chris Sheets

Chris Sheets was also outside the Barker home when Teo and two others came by “talking trash” to Manny Duncan. RP 592-93. Duncan told them if they wanted to fight, to come back without a gun. RP 594. They did. RP 594. Someone yelled something about leaving meat all over the street. RP 595. Teo called to Duncan and the two started fighting. RP 596. Sheets and the others approached to ensure the fight was fair. RP 596. Then, two of Teo’s companions got out of the car and “jumped” Yim. RP 597. While trying to end that fight, Sheets looked up and saw Teo going to the car. RP 597. When he looked up again, Teo had a gun. RP 597. Sheets yelled, “he’s got a gun” and saw Teo begin shooting. RP 598. He heard seven shots as he ran away. RP 599. When he ran back he saw Barker and Yim had been shot. RP 601, 605.

The jury was instructed on self-defense/defense of others. CP 50. Over defense objection, the court also gave an aggressor instruction. CP 55. The court also overruled Teo’s objection under ER 404(b) to the portion of his statement in which he admitted acquiring the gun by theft

approximately two months before this incident. Ex. 67 at 9; RP 633, 646-47.

In closing, defense counsel argued Teo shot without premeditation or intent to kill and that the shooting was justified based on his defense of Sandy Dillon. RP 793, 797. The prosecutor argued the shooting was only justified if, “Sandy Dillon . . . was in the process of being beaten so severely that two people deserved to die.” RP 754.

C. ARGUMENT

1. THE TRIAL COURT ERRED WHEN IT GAVE THE JURY AN AGGRESSOR INSTRUCTION.

“[A]ggressor instructions are not favored.” State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998) overruled on other grounds as noted in State v. Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). An aggressor instruction impacts a defendant’s claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). Accordingly, courts should use care in giving an aggressor instruction. Id. Indeed, this Court has warned that “Few situations come to mind where the necessity for an aggressor instruction is warranted.” State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985). It is reversible error to give an aggressor instruction when not supported by the evidence. State v. Wasson, 54 Wn. App. 156, 161, 772

P. 2d 1039 (1989); State v. Brower, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986).

Here, the court ruled the aggressor instruction was appropriate because either Teo or one of his companions made comments that were provoking, antagonistic, or aggressive. RP 740. This ruling was in error because words alone cannot deprive a person of the right to act in defense of self or another. Riley, 137 Wn.2d at 912. Beyond mere words, there was no evidence to support an aggressor instruction. Teo was thus deprived of his right to present a defense because the jury was wrongly instructed it could disregard his defense.

a. Gang Insults Are Not Sufficient to Justify an Aggressor Instruction.

The aggressor instruction was never intended to apply when the alleged provocation is merely verbal or non-violent in nature. See Riley, 137 Wn.2d at 912. In Riley, the court found that:

If words alone, and in particular insulting words alone, could justify the “victim” in using force in response and preclude the speaker from self-defense, principles of self-defense would be distorted. . . . For the victim’s use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm. However, mere words alone do not give rise to reasonable apprehension of great bodily harm.

Id. at 911-10. “Numerous courts have held either that one may not use force in self-defense from verbal assaults, or that an aggressor instruction is not

justified where the alleged provocation is merely verbal.” Id. at 912.³ In rejecting an aggressor instruction based on provoking words, the Riley court specifically referred to gang insults such as those used here: “If applied in a case like this one, a rule that words alone preclude the speaker from claiming self-defense could lead to the conclusion that insults about gang affiliation justify a violent response.” Riley, 137 Wn.2d at 912.

In contradiction to the reasoning of the Riley court, the court here explicitly relied on mere words to justify giving the aggressor instruction:

And I remember in the evidence that at least twice this automobile – which is not any stretch of the imagination – contained the defendant, Mr. Teo, came by and they were antagonizing or at least making comments to the other group of people... And it appears to me that there is evidence that there was provocation and that they were provoking or they were being antagonistic and were very aggressive. “Very” is

³ Citing McDonald v. State, 764 P.2d 202, 205 (Okla. Crim. App. 1988) (words alone do not transform the speaker into an aggressor); People v. Gordon, 223 A.D.2d 372, 373, 636 N.Y.S.2d 317 (1996) (jury properly instructed that concept of initial aggressor does not encompass mere insults as opposed to threats); State v. Bogie, 125 Vt. 414, 417, 217 A.2d 51 (1966) (court properly instructed that provocation by mere words will not justify a physical attack); State v. Schroeder, 199 Neb. 822, 826, 261 N.W. 2d 759 (1978) (words alone are not sufficient justification for an assault; “[t] here is a very real danger in a rule which would legalize preventive assaults involving the use of deadly force where there has been nothing more than threat.” Id. at 827); State v. Harris, 717 S.W. 2d 233, 236 (Mo. Ct. App. 1986) (insulting or inflammatory language is not sufficient provocation to justify an assault against the speaker; language does not make the speaker an aggressor when he resists an assault made by the person addressed); Caudill v. Commonwealth, 27 Va. App. 81, 85, 497 S.E.2d 513 (1998) (words alone are never a sufficient provocation for one to seriously injure or kill another); State v. Blank, 352 N.W. 2d 91, 92 (Minn. Ct. App. 1984) (provocative statements alone do not constitute a defense to assault); People v. Manzanares, 942 P.2d 1235, 1241 (Colo. Ct. App. 1996) (that defendant may have uttered insults or participated in arguments does not justify first aggressor instruction) (citing People v. Beasley, 778 P.2d 304, 306 (Colo. Ct. App. 1989) (insults alone do not make one the initial aggressor so as to preclude self-defense); People v. Maves, 262 Cal. App. 2d 195, 197, 68 Cal. Rptr. 476 (1968) (no provocative act which does not amount to a threat or an attempt to inflict injury, and no conduct or words, no matter how offensive or exasperating, justify a battery).

not fair. They were aggressive. And that's why I think there is evidence to support the giving of this instruction. That's why I'm doing it.

RP 740 (emphasis added). In giving an aggressor instruction based solely on words, the court failed to use the requisite care with this disfavored instruction. Riley, 137 Wn.2d at 910 n.2, 912.

b. Aside From Antagonistic Comments, There Is No Evidence of Provoking Conduct Toward the Victims.

To support an aggressor instruction, there must be evidence the defendant engaged in an intentional act reasonably likely to provoke a belligerent response, which precipitated the incident. Wasson, 54 Wn. App. at 159. There is no evidence Teo engaged in such an act. Every eyewitness account of the fistfights that led up to the shooting described them as mutual. RP 367-69 (David Barker's testimony), 539 (Marimo Yim's testimony), 596 (Chris Sheets' testimony). No one described the fight as precipitated by an individual act of aggression on either side.

Even assuming Teo's fistfight with Duncan could be viewed as an act of aggression towards Duncan, it does not justify the instruction because Duncan was not the victim of this crime. See Wasson, 54 Wn. App. at 159-60. Teo's defense may not be limited based on belligerent conduct towards anyone other than the eventual victims. Id. In Wasson, the defendant quarreled with his neighbor Bartlett, drawing the attention of another neighbor, Reed. Id. at 157. During the course of his quarrel

with Bartlett, Wasson obtained his gun. Id. Reed approached and attacked Bartlett before turning toward Wasson. Id. Wasson shot Reed and argued he did so in self-defense. Id. at 157-58. The court reversed Wasson's conviction, holding the aggressor instruction was unjustified because,

Perhaps there is evidence here of an unlawful act by Mr. Wasson, a breach of peace. However, there is no evidence that Mr. Wasson acted intentionally to provoke an assault from Mr. Reed. In fact, there is evidence Mr. Wasson never initiated any act toward Mr. Reed until the final assault.

Id. at 159. Similarly, before the final shooting in this case, the evidence shows Teo fought only with Manny Duncan. There is no evidence he acted aggressively toward David Barker or Marimo Yim.

The shooting itself cannot justify an aggressor instruction because the provocation must be a separate act. Wasson, 54 Wn. App. 159; Brower, 43 Wn. App. at 902. This case stands in contrast to State v. McConaghey, 84 Wash. 168, 146 P. 396 (1965). In that case a wife came to defend her husband, who was engaged in a verbal altercation. Id. at 169-70. She brought a gun hidden under her apron, which she later used after engaging in "overt acts . . . indicating an intended assault" on her husband's opponent. Id. at 170. The evidence warranted an aggressor instruction because the wife had committed more than just verbal provocation by bringing the gun and engaging in overt acts indicating an assault. Id. at 170-71; see also Riley,

137 Wn.2d at 911 n.3 (distinguishing McConaghey). McConaghey's act of bringing the gun and her other overt conduct were non-verbal acts of aggression separate from the subsequent shooting.

By contrast, all the evidence here shows Teo left his gun in the car. Ex. 67 at 8; RP 373, 431, 458, 540, 597. He did not act in a provoking manner by bringing a gun to a fistfight, as the State argued in opening. RP 183. On the contrary, he had to leave the fistfight to get his gun. Unlike the wife in McConaghey, he committed no separate act justifying an aggressor instruction. All eyewitnesses testified he went to the car, grabbed his gun, and started shooting immediately. RP 431, 458, 597. No witness mentioned any separate aggressive act.

Because of its impact on the State's burden to disprove self-defense, error in giving an aggressor instruction is constitutional and requires reversal unless it is harmless beyond a reasonable doubt. Birmel, 89 Wn. App. at 473. The jury may have largely believed Teo's account but concluded from the aggressor instruction that it could not acquit due to his insulting comments or his fistfight with Duncan. The State encouraged this belief in closing, arguing Teo "does not get self-defense" because of his disrespectful "fighting words." RP 771-72. Thus, the instruction deprived Teo of his defense even if the jury believed him. Because the State cannot show the

aggressor instruction was harmless -- that it had no impact -- reversal is required.

2. THE PROSECUTOR COMMITTED INCURABLE MISCONDUCT WHEN HE ARGUED THAT TO ACCEPT TEO'S DEFENSE, THE JURY WOULD HAVE TO FIND "TWO PEOPLE DESERVED TO DIE."

The Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of Washington's constitution guarantee a criminal defendant the right to a fair and impartial trial. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Statements by a prosecutor constitute reversible misconduct if the comments were improper and the defendant was prejudiced. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Prejudice is shown where there is a substantial likelihood the prosecutor's remarks affected the outcome of trial. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995) (1996).

Even if not objected to at trial, prosecutorial misconduct requires reversal when the prosecutor's comments were so flagrant and ill-intentioned they could not have been cured by instruction. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Misconduct that directly violates a constitutional right requires reversal unless the State

proves it was harmless beyond a reasonable doubt. State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000); State v. Fleming, 83 Wn. App. 209, 213-216, 921 P.2d 1076 (1996). Moreover, because such misconduct rises to the level of manifest constitutional error, the absence of a defense objection does not preclude appellate review. Fleming, 83 Wn. App. at 216.

Here, the prosecutor argued that to accept Teo's defense, the jury would have to find that "two people deserved to die." RP 754. This comment was a flagrant misstatement of the law of defense of another, which permits reasonable, even if mistaken, reliance on appearances. State v. Penn, 89 Wn.2d 63, 66, 568 P.2d 797 (1977). The comment was also inflammatory and appears calculated to incite a decision based on passion rather than an impartial application of the law to the evidence. See Belgarde, 110 Wn.2d at 507 (prosecutors have a duty to seek verdicts free from passion and prejudice). By undermining the law supporting Teo's defense the prosecutor's comment caused incurable prejudice.

a. The Prosecutor's Argument Was a Flagrant Misstatement of the Law.

A prosecutor's argument to the jury must be confined to the law stated in the court's instructions. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). When the prosecutor mischaracterizes the law and there

is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. Davenport, 100 Wn.2d at 764. A prosecutor's disregard of a well-established rule of law is flagrant and ill-intentioned misconduct. Fleming, 83 Wn. App. at 214.

It is well settled that self-defense or defense of others depends not upon the actuality of imminent harm, but the actor's reasonable (even if mistaken) belief that such harm appeared imminent. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996); State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004). Self-defense instructions should allow the jury to "put themselves in the defendant's shoes" and from that perspective determine the reasonableness of his conduct. Rodriguez, 121 Wn. App. at 185. The Penn court noted, "[T]his approach may cause an innocent person who is striking in self-defense, to be harmed with impunity merely because appearances were against him." 89 Wn.2d at 67. Nevertheless, the court concluded, "we consider this to be a lesser evil than allowing an innocent defender who is acting under a mistake of fact to be convicted of a serious crime." Id.

It was precisely to ensure that the jury consider self-defense based on the actual circumstances of the particular defendant that the subjective

standard was enunciated by Washington courts. State v. Wanrow, 88 Wn.2d 221, 240-41, 559 P.2d 548 (1977).⁴ In Wanrow, the court held it was prejudicial error to instruct that a defendant has no right to use a weapon “unless he believes, and has reasonable grounds to believe, that he is in imminent danger of death or great bodily harm.” 88 Wn.2d at 239. The court stated that this instruction “misstates our law in creating an objective standard of ‘reasonableness.’” Wanrow, 88 Wn.2d at 241. Here, the court gave a correct instruction on the defender’s right to rely on appearances, but the prosecutor’s inflammatory and incorrect argument distorted this principle, replacing the proper subjective standard with an objective one. This argument flagrantly misstated well-established law and misled the jury on the crucial legal issue in this case.

b. This Argument Was Calculated to Induce a Verdict Based on Sympathy for the Victims.

A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a “heated partisan.” State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds. Belgarde, 110 Wn.2d at 507. “It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring

⁴ The error in Wanrow was compounded by the use of an “ordinarily cautious and prudent men” standard that the court held denied equal protection of the law to the female defendant. 88 Wn.2d at 240-41.

about a just one.” Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1934). As a quasi-judicial officer, a prosecutor is duty bound to seek a decision based on reason rather than sympathy or prejudice. State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968).

The prosecutor’s closing argument here invited the jury to find Teo guilty because Barker and Yim did not deserve to die. But the culpability of the victims, both of whom survived to testify at trial, was not at issue. Thus, the only possible effect of this argument was to create sympathy for the victims and induce a decision on that basis, rather than on the facts supporting Teo’s defense. A fair reading of the evidence in this case would be that nearly everyone involved had some connection to gangs. The prosecutor may have worried the jury would be less likely to convict if it lacked sympathy for the victims based on their gang affiliation. But it was highly improper to create sympathy for the victims by equating an acquittal to a finding that they deserved to die.

c. The Prejudice from this Comment Was Incurable Because It Indelibly Shifted the Burden of Proof on Self-Defense.

The prejudice caused by this improper argument could not have been cured by instruction for two main reasons. First, it impacted Teo’s constitutional right to present a defense and improperly shifted the burden of proof by presenting a false choice between guilt and death for the

victims. Second, it did so in the context of self-defense, where courts are particularly concerned that the applicable law be manifestly apparent to jurors.

The prosecutor's argument shifted the burden of proof by requiring Teo to prove Barker and Yim deserved to die, rather than properly placing the burden on the State to disprove his defense. A misstatement of the law pertaining to the burden of proof cannot be easily dismissed despite proper instruction that jurors are to disregard any argument not supported by the court's instructions.⁵ Fleming, 83 Wn. App. at 213-14. (argument that jury could only acquit if it found a witness was lying or mistaken misstated the State's burden of proof, was "flagrant and ill intentioned," and required a new trial). The instruction to disregard unsupported remarks by attorneys is not sufficient to cure the prejudice because jurors are also instructed to consider the lawyers' remarks when applying the law. See CP 31 ("The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law."). More importantly, comments that undermine the burden of proof should be viewed as incurable because "the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system." State v. Bennett, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007).

⁵ See CP 31 ("You must disregard any remark, statement, or argument that is not supported by . . . the law in my instructions.").

Additionally, this argument undermined the presumption of innocence and shifted the burden of proof by presenting the jury with a “false choice,” similar to the one that occurs when a prosecutor argues the jury must find the State’s witnesses are lying in order to acquit. See, e.g., State v. Wheless, 103 Wn. App. 749, 758, 14 P.3d 184 (2000); Fleming, 83 Wn. App. at 214. Prosecutors may not argue that, in order to acquit, the jury must find the State’s witnesses are lying. Id. This argument misleads the jury by presenting a false choice because witness testimony may be unconvincing or partially incorrect for many reasons unrelated to deliberate misrepresentation, such as mistake. State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). In State v. Wheless, the court reversed the conviction in part because the prosecutor told the jury the defense’s theory of the case required finding “every officer in that chain is lying,” one officer in particular was “confused or mistaken,” or the officer was “a big fat liar,” and “made this up.” 103 Wn. App. at 757. The court concluded the argument was “may well have misled the jury.” Id.

The improper either/or choice the prosecutor put before the jury in this case was even more egregious than in Wheless, Castaneda-Perez, and Fleming. In those cases, jurors were told they had to either convict or conclude the State’s witnesses committed perjury. Castaneda-Perez, 61 Wn. App. at 359-60. By asking whether “two people deserved to die,” the

prosecutor essentially told jurors they had to either convict Teo, or find Barker and Yim guilty of some crime meriting death. RP 754. No instruction could have erased this inflammatory framing of the issue from jurors' minds.

Misstating the law of self-defense is particularly problematic in the context of the heightened scrutiny afforded self-defense instructions. See, e.g., State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (“Jury instructions must more than adequately convey the law of self-defense.”); State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004) (courts subject self-defense instructions to “more rigorous scrutiny”). When read as a whole, the relevant legal test for self-defense must be readily apparent to the average juror. State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984). A jury instruction that misstates the law of self-defense is an error of constitutional magnitude and is presumed prejudicial. LeFaber, 128 Wn.2d at 900 (citing State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); Wanrow, 88 Wn.2d at 237). Overall, the heightened scrutiny of self-defense instructions shows the court’s concern that the jury properly understand the law supporting the right to defend oneself or another. The prosecutor’s comment argument here directly interfered with the jury’s understanding, making the law of self-defense less than “manifestly apparent.” Allery, 101 Wn.2d at 595.

The prosecutor's comment here was far more vivid than the comments found cured by instruction in State v. Warren, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008). There, the prosecutor misstated the law of reasonable doubt by arguing the defendant did not get the benefit of the doubt. Id. at 24-25. The court held that a prompt and thorough curative instruction obviated any prejudice. Id. at 26-28. But the prosecutor's comment on self-defense in this case was far more likely to impress itself indelibly on the minds of jurors than the dispassionate "benefit of the doubt" language used in Warren. The Warren prosecutor's comments were tame compared to the stark false choice between death and conviction presented here.

The prosecutor's assertion that the jury had to believe Barker and Yim "deserved to die" in order to accept Teo's defense unavoidably and improperly indicated Teo had some burden to convince the jury with regard to that defense. By telling jurors they could not acquit on the basis of defense of another unless they believed the State's witnesses were so culpable as to merit death, the prosecutor deprived Teo of his constitutional right to have the State prove every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Given the likely enduring impact on the jury's understanding of the burden

of proof, only a new trial can cure the prejudice resulting from this misconduct.

3. THE COURT'S WRONGFUL ADMISSION OF BAD ACT EVIDENCE UNFAIRLY INFLUENCED THE OUTCOME OF THE CASE.

Interpretation of an evidentiary rule is a question of law reviewed de novo. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). When the trial court correctly interprets the rule, the trial court's decision to admit evidence under ER 404(b) is reviewed for abuse of discretion. Id. "[D]iscretion does not mean immunity from accountability." Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

"The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Failure to adhere to the requirements of an evidentiary rule can thus be considered an abuse of discretion. Foxhoven, 161 Wn.2d at 174.

Here, the trial court abused its discretion in admitting evidence Teo stole the gun used in the shooting because this evidence does not fall under the res gestate exception to ER 404(b). Ex. 67; RP 656. Reversal is required because this evidence was not admissible under the res gestate exception to ER 404(b) and the jury likely viewed evidence of prior criminal activity as proof of propensity to commit crimes.

a. The Court Erred Misapplied The Res Gestate Exception in Admitting Evidence of Teo's Prior Theft Under ER 404(b).

“The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined.” State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To that end, ER 404(b) prohibits evidence of past misconduct to show a criminal propensity. Id. at 336.

Under the res gestate or “same transaction” exception to ER 404(b), evidence of other bad acts is admissible only if it is so connected in time, place, circumstances, or means employed that proof of the other misconduct is necessary for a complete description of the crime. State v. Schaffer, 63 Wn. App. 761, 769, 822 P.2d 292 (1991) (citing 5 K. Tegland, Wash. Prac. § 115, at 398 (3d ed. 1989)), affirmed, 120 Wn.2d 616, 845 P.2d 281 (1993). The justification for admitting res gestate evidence is so the State will not be prejudiced by being forced “to present a truncated or fragmentary version of the transaction.” State v. Bockman, 37 Wn. App. 474, 490-91, 692 P.2d 925

(1984). Put another way, evidence of another offense is admissible if it “constitutes a ‘link in the chain’ of an unbroken sequence of events surrounding the charged offense.” State v. Hughes, 118 Wn. App. 713, 725, 77 P.3d 681 (2003). Each act must be “‘a piece in the mosaic necessary to depict a complete picture for the jury.’” State v. Fish, 99 Wn. App. 86, 94, 992 P.2d 505 (1999) (quoting State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995)).

The res gestate exception should be narrowly applied to avoid abusive misuse. United States v. Hill, 953 F.2d 452, 457 n.1 (9th Cir. 1991). The “inseparable crimes” doctrine “became completely perverted when courts began to use the infamous Latin tag ‘res gestate’ to describe the rule.” Id. (quoting 22 C. Wright and K. Graham, Federal Practice and Procedure § 5329 at 447, 449-50). The very ‘looseness and obscurity’ of the phrase res gestate ‘lend too many opportunities for its abuse.’” Hill, 953 F.2d at 457 n.1 (quoting 1 Wigmore, Evidence § 218 at 320-21 (3d Ed. 1940)).

The narrow res gestate exception is patently inapplicable here. Teo’s theft of the gun is not inseparable from the events of the shooting. Nor is it a link in an unbroken sequence of events leading up to the shooting. It is not even relevant to any question properly before the jury. Thus, the jury could only have considered it for the improper purpose of finding a propensity to commit crimes.

The res gestate exception extends to the immediate time and place of the alleged crime, and cases applying the res gestate exception almost uniformly involve uncharged acts occurring very close in time to the charged crime. See, e.g., State v. Tharp, 96 Wn.2d 591, 592, 594, 637 P.2d 961 (1981) (same day); Hughes, 118 Wn. App. at 718-19 (same day); State v. Thompson, 47 Wn. App. 1, 11, 733 P.2d 584, 733 P.2d 584 (1987) (same evening). Misconduct occurring farther in the past has been admitted only when it is part of a specific pattern or sequence of events leading up to the charged crime. See Powell, 126 Wn.2d at 263 (misconduct two days before murder admissible under res gestate exception because misconduct tended to show pattern of hostilities between defendant and victim); State v. Lane, 125 Wn.2d 825, 835, 889 P.2d 929 (1995) (two-day crime spree admissible as res gestate); cf. State v. Elmore, 139 Wn.2d 250, 285-88, 985 P.2d 289 (1999) (evidence Elmore previously molested the murder victim admissible under res gestate because evidence indicated Elmore and the victim discussed the molestation the day of the crime and this affected decision to murder her). Here, by contrast, the theft of the gun occurred “a couple of months” before the charged shooting. Ex. 67. There is no evidence these two incidents were part of a crime spree or a pattern of conduct.

In Tharp, the Supreme Court specifically distinguished proper res gestate evidence from evidence that was erroneously admitted under that

theory. 96 Wn.2d at 594-95. Tharp was tried for murder, and the trial court admitted evidence of a series of uncharged crimes attributed to Tharp the day of the murder. Id. at 592-93. The Supreme Court held the trial court properly admitted that evidence:

[T]he uncharged crimes were an unbroken sequence of incidents tied to Tharp, all of which were necessary to be placed before the jury in order that it have the entire story of what transpired on that particular evening. Each crime was a link in the chain leading up to the murder and the flight there from.

Id. at 594. On the other hand, the trial court should not have admitted as res gestae evidence Tharp's prior conviction for auto theft and his furlough status from prison at the time of the murder. Id. at 594-95. Ultimately, the court held the trial court abused its discretion because it failed to balance the probative value against the potential for prejudice on the record before admitting this evidence. Id. at 598.

The State argued the auto theft and prison furlough was necessary to show Tharp's motive to kill the victim, who apparently caught him with his son's car. Id. at 595. According to the State, Tharp's furlough status made him more likely to kill the victim to avoid apprehension and the lengthening of his prison term that would result. Id. The court found this theory "tenuous at best." Id. at 597. Nor was the furlough necessary to show Tharp was in Bellingham at the time of the murder because this fact was

undisputed. Id. at 598. Despite the similarity of the prior auto theft to the charged murder in the course of auto theft, the court concluded these facts “had no direct connection with the crime charged.” Id. at 594.

Teo’s prior theft of the gun is also a prior crime with no direct connection to the charged crimes. The events of the day of the shooting provided a complete picture. It was undisputed that the gun belonged to Teo, as opposed to someone else. There was no reason to tell the jury he acquired it by criminal means. If the state wished to present evidence of this theft to the jury, it could have charged Teo with theft. Res gestate was not an appropriate theory of admissibility.

Teo’s prior theft of the gun was simply not relevant. See State v. Perrett, 86 Wn. App. 312, 936 P.2d 426 (1997). In determining whether res gestate evidence is admissible, a court’s primary consideration is relevance. Lane, 125 Wn.2d at 832 (citing State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Goebel, 40 Wn.2d 18, 240 P.2d 251 (1952), overruled on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995)). In Perrett, the issues before the jury were whether Perrett pointed a gun at the victim, and if so whether he was justified in doing so in self-defense. 86 Wn. App. at 319. The court held it was an abuse of discretion to admit evidence of the defendant’s statement upon arrest that “the last time the sheriffs took his guns, he didn’t get them back.” Id. at 319-20. This

statement was not relevant to any element of the charged offense or any material issue at trial and it raised the inference Perrett had committed a prior crime involving a gun, making it more likely he had done so again. Id. at 319-20.

The situation here is strikingly similar to Perrett. The only issues before the jury were whether Teo had the mental state of premeditation or intent to kill and whether his attempt to kill was justified under the law of defense of another. His statement that he had previously stolen the gun was entirely irrelevant to either of these issues or any element of the crime. As in Perrett, this trial court abused its discretion in admitting evidence that could only invite the jury to find Teo guilty on the basis of propensity.

b. Erroneous Admission of Prior Bad Act Evidence Allowed the Jury to Convict Teo on the Basis of Criminal Propensity.

Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only “if the evidence is of minor significance in reference to the evidence as a whole.” Id. Admission of his prior theft prejudiced Teo because propensity evidence undermined his defense and the State relied on this evidence in closing argument.

“ER 404 is intended to prevent application by jurors of the common assumption that ‘since he did it once, he did it again.’” State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990); see also 5 Karl B. Tegland, Wash. Prac., Evidence § 404.10, at 498 (5th ed. 2007) (evidence of prior felony convictions is generally inadmissible because it is highly prejudicial and deemed too likely to lead the jury to conclude the defendant is guilty). When the jury is likely to make that assumption, reversal is required. See State v. Trickler, 106 Wn. App. 727, 734, 25 P.3d 445 (2001).

In Trickler, as in this case, the State was permitted to introduce evidence of other misconduct on the theory that it would help the jury understand the context in which the offense occurred. There, the defendant was charged with possession of a stolen credit card. When police searched his car, they found a stolen credit card, as well as several other stolen items. 106 Wn. App. at 729-30. The Court of Appeals found the evidence of those other stolen items was highly prejudicial and should have been excluded. 106 Wn. App. at 734. The court noted that, in theory, the State had introduced that evidence to give the jury a complete picture of the events leading to the discovery of the stolen credit card. The practical effect of its admission, however, was to allow the jury to consider the defendant’s propensity to possess stolen property. Id. Therefore, the court reversed Trickler’s conviction. Id. at 729.

The practical effect of introducing evidence Teo stole the gun was also to allow the jury to consider his propensity for crime. Particularly without a limiting instruction, discussion of his prior theft invited the jury to infer Teo must be guilty because of a propensity to commit crimes. The rule against propensity evidence was designed to prevent the admission of the evidence at issue here. Moreover, if this evidence were “of only minor significance,” the prosecutor would not have gone to the trouble of mentioning it twice during closing argument. RP 773, 778. Reversal on all counts is the proper remedy for the wrongful admission of this unfairly prejudicial evidence.

4. THE COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION FOR THE ER 404(b) EVIDENCE AND DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST ONE.

Regardless of admissibility, in no case may evidence of other bad acts “be admitted to prove the character of the accused in order to show that he acted in conformity therewith.” Saltarelli, 98 Wn.2d at 362. “A juror’s natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended.” Bacotgarcia, 59 Wn. App. at 822. For this reason, when ER 404(b) evidence is admitted, an explanation should be made to the jury of the purpose for which it is admitted, and the court should give a cautionary instruction that it is to be considered for no other purpose.

Saltarelli, 98 Wn.2d at 362. Failure to give such a limiting instruction allows the jury to consider bad acts as evidence of propensity, giving rise to the danger that the jury will convict a defendant because he has a bad character.

A defendant has the right to have a limiting instruction to minimize the damaging effect of properly admitted evidence by explaining the limited purpose of that evidence to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993). Indeed, the Supreme Court recently reiterated, “a limiting instruction must be given to the jury” if evidence of other crimes, wrongs, or acts is admitted. Foxhoven, 161 Wn.2d at 175. The court erred in failing to issue a limiting instruction in this case.

Some courts hold the failure to request a limiting instruction waives the error. See, e.g., State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975); Donald, 68 Wn. App. at 547. If this Court finds defense counsel waived the error by failing to request a proper limiting instruction or in failing to object to its absence, then counsel’s failure constitutes ineffective assistance of counsel.

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

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Defense counsel was deficient for failing to ensure the trial court gave a proper limiting instruction that would have prevented the jury from considering Teo's prior act of theft as evidence of a propensity to commit crime. There was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of this propensity evidence.

Allowing the jury to convict Teo on the basis of bad character did nothing to advance his defense. Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER

404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence). But the “reemphasis” theory is inapplicable here. Evidence that Teo stole the gun was not the type of evidence the jury could be expected to forget or naturally minimize. Teo’s recorded statement to police was played for the jury twice, and the prosecutor emphasized the theft during closing argument. RP 656, 773, 788, 822. This is not a case where a limiting instruction raised the specter of “reminding” the jury of briefly referenced evidence.

Regardless of whether the court erred in failing to fulfill its obligation to issue a limiting instruction or counsel was ineffective in failing to request one, the dispositive question is whether the jury used this evidence for an improper purpose in the absence of a limiting instruction. There is no reason to believe the jury did not consider evidence of prior theft as evidence of propensity to commit the charged crimes. The jury is naturally inclined to treat evidence of other bad acts in this manner. Bacotgarcia, 59 Wn. App. at 822; see also Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) (“Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.”). If that were not the case, there would never be any reason to give a limiting instruction for ER 404(b) evidence.

There is a reasonable probability the outcome of the trial would have been different had the instruction been given because the absence of a limiting instruction allowed the jury to consider evidence of prior misconduct as evidence of Teo's propensity to commit crime. Reversal of the convictions is therefore required.

5. CUMULATIVE ERROR REQUIRES REVERSAL.

In response, the State may contend that each of the errors above need not individually result in reversal. But Washington law is well-settled in recognizing "[t]he combined effect of an accumulation of errors, no one of which, perhaps, standing alone might be of sufficient gravity to constitute grounds for reversal, may well require a new trial." State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); see also State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992). Reversal is required whenever cumulative errors deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997).

Three separate errors invited the jury to disregard Teo's defense on improper grounds. First, the aggressor instruction improperly permitted the jury to disregard his defense without evidence of aggressive conduct. Second, the prosecutor's closing argument invited the jury to disregard his defense unless the State's witnesses deserved to die. Finally, evidence that

Teo stole the weapon he used portrayed him as a criminal element, inviting jurors to disregard his defense on the basis of his criminal propensity. Because these errors cumulatively deprived Teo of a fair opportunity to present his theory of the case, this court should reverse Teo's convictions.

6. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 3.5.

After a CrR 3.5 hearing, the court ruled the statement Teo made to police was admissible. RP 101. The court, however, failed to enter written findings or conclusions.

CrR 3.5 provides in part:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

Written findings of fact and conclusions of law are required following a CrR 3.5 hearing. "When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy." State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992); accord State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205.

Although the court below rendered an oral decision following the hearing, no written findings of fact and conclusions of law have been entered in this case as of this date. A trial court's oral decision is "no more than a verbal expression of [its] informal opinion at the time . . . necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Consequently, the court's decision is not binding "unless it is formally incorporated into findings of fact, conclusions of law, and judgment." State v. Hescocock, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

Where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is an appropriate remedy. Id.

D. CONCLUSION

For the foregoing reasons, this court should reverse Teo's convictions and remand for a new trial.

DATED this 31st day of August, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", written over a horizontal line.

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Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39108-2-II
)	
FLOYD TEO,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 31ST DAY OF AUGUST 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
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- [X] FLYOD TEO
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2009 AUG 31 11:14:29
STATE OF WASHINGTON
DIVISION II

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST 2009.

x *Patrick Mayovsky*

09 SEP 03 PM 12:01
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY
COURT OF APPEALS
DIVISION II