

NO. 39598-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

TERRY NOLAN,

Appellant.

FILED
COURT APPEALS
MAY 11 2011
M11-52
STATE OF WASHINGTON
COURT APPEALS
BY [Signature]

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

The Honorable Brian Tollefson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in excluding evidence of the decedent's reputation for violent behavior.

2. Defense counsel rendered ineffective assistance by failing to move for a mistrial following a serious trial irregularity.

3. The trial court erred in denying appellant's motion for a mistrial following a police officer's prejudicial testimony that violated an order in limine.

4. The prosecutor denied the appellant a fair trial by shifting the burden of proof on the theory of defense of self and others.

5. The prosecutor denied the appellant a fair trial by misstating the jury's obligation and disparaging the defense.

6. The trial court erred in denying appellant's motion for a mistrial based on prosecutorial misconduct.

7. The trial court erred in refusing to give Nolan's proposed "defense of others" instruction as to the felony murder charge.

8. The court erred in refusing to give the defense proposed "excusable homicide" instruction as to the felony murder charge.

9. Alternatively, defense counsel was ineffective for failing to preserve the appellant's claims as to errors 7 and 8.

10. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. The trial court excluded proposed testimony about the decedent's reputation for violence because the appellant and his codefendants did not establish they knew of this reputation. Yet the trial court failed to consider the other permissible basis for admitting reputation testimony: that it tended to prove the decedent was the aggressor. Did the court's refusal to allow the testimony prejudicially undermine the defense theory and deny appellant a fair trial?

2. A State's witness unexpectedly blurted out that because she had children she was afraid to identify the killer. Was the appellant denied effective assistance and thus a fair trial when counsel failed to move for a mistrial?

3. Did the trial court err in denying appellant's motion for a mistrial after a police officer testified contrary to an order in limine that knives were found in codefendant Smith's garage, thereby undermining the appellant's claim he acted reasonably to aid Smith?

4. In closing argument, the prosecutor shifted the burden of proving self-defense and defense of others to the appellant and his codefendants and, despite multiple objections, the court failed to intervene.

The prosecutor also misstated the jury's duty by suggesting it was required to discern the "truth" and disparaged the appellant's defense by inaccurately claiming he presented inconsistent defenses, representing mere "trickery" and incompatible with the duty to discern the truth. Again, despite objection, the trial court failed to intervene.

a. Did prosecutorial misconduct deny appellant a fair trial?

b. Did the trial court err in denying appellant's motion for a mistrial based on prosecutorial misconduct?

5. In deciding which instructions apply to a claim of defense of self or others, the crucial issue is the mental state of the accused in committing the crime. Because the charge was second degree felony murder based on assault and on accomplice liability, did the court err in refusing to give appellant's proposed self-defense/defense of others instruction based on WPIC 17.02 as to that charge?

6. Did the court err by failing instruct the jury on excusable homicide under WPIC 15.01, and, correspondingly, to instruct the jury on defense of another under WPIC 17.02 as to the second degree felony murder charge?

7. Alternatively, was defense counsel ineffective for failing to preserve his claims regarding the court's refusal to give WPIC 17.02 and 15.01?

8. Did cumulative error deny the appellant a fair trial?

B. STATEMENT OF THE CASE¹

1. Charge, conviction, and sentence

The Pierce County prosecutor charged appellant Terry Nolan and three codefendants, Mike McCreven, Barry Ford, and Carl Smith, with the second degree felony murder of Dana Beaudine based on a predicate felony of second-degree assault (Count 1). The State also charged each man with the second-degree assault (assault with a deadly weapon) of Vincent James (Count 2). CP 677-78, 852-53. The State alleged a deadly weapon enhancement as to both counts. CP 852-53. A jury convicted Nolan as charged² and the court sentenced him within the standard range. CP 994-99, 1002-15; 36RP 2775-81; 38RP 2-59.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 11/14/08; 2RP – 1/16/09; 3RP – 1/22/09; 4RP – 1/30/09; 5RP – 2/5/09; 6RP – 2/6/09; 7RP – 3/13/09; 8RP – 4/2/09; 9RP – 4/9/09; 10RP – 4/13/09 (morning); 11RP – 4/13/09 (afternoon); 12RP – 4/14/09; 13RP – 4/15/09; 14RP – 4/16/09; 15RP – 4/16 and 4/17/09; 16RP – 4/20/09; 17RP – 4/21/09; 18RP – 4/22/09; 19RP – 4/23/09; 20RP – 4/30/09; 21RP – 5/4/09; 22RP – 5/5/09; 23RP – 5/6/09; 24RP – 5/7/09; 25RP – 5/11/09; 26RP – 5/13/09; 27RP – 5/14/09; 28RP – 5/18/09; 29RP – 5/19/09; 30RP – 5/20/09; 31RP – 5/21/09; 32RP – 6/1/09; 33RP – 6/3/09; 34RP – 6/4/09; 35RP – 6/9/09; 36RP – 6/10/09; 37RP – 7/23/09; 38RP – 7/24/09; and 39RP – 8/10/09. While portions of the trial are paginated consecutively, the pagination is not consistent.

² Only Nolan was convicted of count 2. 36RP 2775.

2. Trial testimony

a. The fight from differing perspectives

Beaudine was stabbed to death the evening of April 5, 2008 in the parking lot of a tavern called the Bull's Eye. Various witnesses gave differing accounts of the altercation that led to the stabbing.

Garry Howden stepped outside the tavern and saw Vincent James, Beaudine, and four other men fighting in the parking lot. 17RP 177-79, 203-05, 208. All the men appeared to be throwing punches, but Howden noticed one in particular, a stocky man wearing a white long-john shirt with brownish-red shoulder-length hair.³ 17RP 208, 211, 13, 242. Howden described two of the other three others: one had curly blonde hair and another was large and had a crew cut. 17RP 208. Each of the other three wore leather jackets or vests with patches bearing the word "Hidalgos." 17RP 212. One of the men hit James on the back of the head. 17RP 208-10, 245.

The fight briefly paused before resuming close to a light pole. 17RP 214-15, 245. This time, however, Howden recalled that only Beaudine and the white-shirted man were involved. 17RP 248-50; 18RP 329; 20RP 670. The fight lasted five to 10 minutes. 17RP 246-47. After

³ This description most closely matched Smith, and the consensus at trial was that Smith was the first man to engage with Beaudine.

it ended, the white-shirted man spoke with the other three, who were sitting on motorcycles, then quickly left in a car with license number 750RCA. 17RP 216-18, 223, 258. The men on the motorcycles took their time leaving. 17RP 258. While waiting for the police, Howden stepped on a steel baton wrapped in leather, described by other witnesses as a “sap.” 17RP 222-23; 20RP 559.

When Heather Diamond stepped out of the tavern, she saw four men, each wearing leather jackets with patches, near a tavern exit about 20 feet away. 18RP 343-49, 357. A man in a Harley-Davidson shirt, Beaudine, yelled “fuck your colors” at the men as he walked from the tavern into the lot. 18RP 362, 385-86. Two of the men hurried after Beaudine and pushed him behind the cars. 18RP 362. The other two men eventually joined. 18RP 364. All four were fighting Beaudine, who at one point was held from behind. 18RP 364-65, 406-414. After a woman screamed, Diamond went inside to alert security. 18RP 366.

Jennifer Abbott was at the Bull’s Eye for a bachelorette party. 19RP 453-54. While engaged in a scavenger hunt, Abbott interacted with three men in motorcycle attire, including Nolan. 19RP 459, 462-64. Abbott was on the sidewalk outside when a group of men in motorcycle attire, including Nolan, hurried into the parking lot where a woman was screaming. 19RP 466-70, 487-88, 511. Abbott believed the fight started

before the men ran into the lot. 19RP 466, 480, 482, 488, 514. Abbott then saw “a big group of people just throwing punches.” 19RP 471. One or two men punched Beaudine as another man held or pulled him. 19RP 422. The fight ended when tavern security arrived. 19RP 473. Abbott was surprised to learn someone was stabbed because the fight did not appear serious. 19RP 477.

Kathryn Baccus, another bachelorette party attendee, provided a different account. 32RP 2327. While outside, Baccus saw two men come out of the tavern arguing. 32RP 2328, 2351. One had a bald or shaved head and the other had brownish hair. 32RP 2329. A woman trailed a few feet behind. 32RP 2328. The argument escalated into a fistfight near the cars. 32RP 2331, 2339-40. After a few minutes, more people emerged from the tavern and joined the fray. 32RP 2331. Neither of the first two men “jumped” the other. 32RP 2333. By the end of the fight, however, the bald man was clearly on the losing end. 32RP 2360-62. The fight ended after someone yelled that the police were coming. 32RP 2342, 2361-62.

Reina Blair and Vincent James accompanied Beaudine and his girlfriend, Shannon Ford, to the Bull’s Eye after James helped Beaudine fix his motorcycle. 21RP 695-96. Both Blair and James drank heavily that day, so Shannon drove Blair and Beaudine drove James. 21RP 697-

98. After a few drinks, the four left the tavern. 21RP 706. James remained on the sidewalk while Blair said goodbye to Beaudine and Shannon near Shannon's Chevrolet Tahoe. 21RP 706-08. Almost immediately, two or more men started hitting Beaudine. 21RP 710. Blair ran to the sidewalk and urged James to help. 21PR 712. He ran toward the fight, but Blair did not see what occurred after that. 21RP 714-15.

Blair heard from others that the people involved in the fight were wearing Hidalgos jackets, but she did not see that. 21RP 719. She denied any memory of telling the police a "Mike" was involved or knowing a "Mike" associated with the Hidalgos, but explained she was drunk when she talked to the police. 21RP 719, 750-52.

Over defense objection, the State asked if Blair told police she would be able to pick out suspects if she was concealed from their view. Blair reiterated she would be unable to pick out the suspects under any circumstances. 21RP 733; see also 21RP 720-31 (objections to line of questioning). Blair then blurted out, "If I had to pick out any killer, I wouldn't want to be known, because I have kids at home." 21RP 733. The court granted the defense motion to strike the testimony. 21RP 733. Blair then denied she was concerned about confronting the suspects and denied telling police that. 21RP 734-36.

The State introduced testimony that after the incident, Blair told police officers she recognized Mike from riding motorcycles with him.⁴ 26RP 1572-74; see also 20RP 646 (Blair's description of "Mike" to officer). The following morning, Blair did not pick out Smith from a photomontage. 21RP 740; 22RP 926-27.

Vincent James lost track of Blair, Beaudine, and Shannon after leaving the tavern. 31RP 2213, 2244. Some time later, he ran in the direction of screams and saw two or more men assaulting Beaudine. 31RP 2215. James told police he threw punches but did not remember that at trial. 33RP 2619. As James tried to drag Beaudine from the scuffle, James was slapped or struck on the back of the head.⁵ 31RP 2217-19. The fight ended almost immediately after James was struck. 31RP 2257-58. James then helped Beaudine to his feet. 31RP 2219, 2225-26, 2247.

Like Blair, James also did not pick out Smith from the photomontage the following morning. 22RP 863-64, 958. According to officers, James said five men were involved and they were "Galegos" or "Delagos" members "flying their colors," i.e., wearing their club patches.

⁴ Mike McCreven's fiancée testified she and McCreven rode with Blair and James on a few occasions. 26RP 1481-82.

⁵ Police reports that James suffered "severe lacerations" were incorrect, as James suffered no visible injuries. 30RP 2121; 31RP 2259; 33RP 2612.

27RP 1634; 31PR 2267-68; 33RP 2622. At trial, however, James testified he did not recall if the men were on motorcycles or if they were “flying their colors.” 31RP 2222-23. Like Blair, James denied seeing “Mike.” 31RP 2232-34.

Shannon Ford noticed four men⁶ at a table across the tavern. 22RP 981-82. All but one wore jackets with “Hidalgos Pierce County” patches.⁷ 22RP 981; 23RP 1009. The men, including Nolan, were glaring toward Shannon’s table. 22RP 983; 23RP 1002-06, 1138. At one point, Nolan turned to Barry Ford, who picked up his phone and made a call. 23RP 1006, 1008, 1058. Soon after, Shannon told the others in her party she wanted to leave, but she did not mention her concerns. 23RP 1002, 1008, 1072.

Shannon noticed nothing unusual as she and Beaudine walked away from the tavern. 23RP 1021, 1074. Before Beaudine could open his door, however, Smith approached Beaudine with his fist cocked. 23RP 1022-25, 1080. Beaudine blocked Smith’s punch and said, “What the hell?” 23RP 1023. Another man grabbed Beaudine’s shoulders from behind. 23RP 1027-28. As the fight moved toward a coffee stand,

⁶A fifth man left around 9:00 p.m. when the band started to play. 22RP 980; 23RP 1010-11.

⁷ At one point, Blair said hello to one of the men at that table, a “Mike” whom Shannon later recognized as McCreven. 22RP 985; 23 RP 1001.

Shannon saw a number of people, more than three, on the ground with Beaudine. 23RP 1029. She tried to pull a man off Beaudine but was pushed away from the fight. 23RP 1030.

Some time later, Shannon saw Nolan walk from the general direction of the scuffle and toward motorcycles parked next door to the Bull's Eye. She was uncertain whether Nolan had been involved in the scuffle. 23RP 1032, 1035, 1104-05, 1110; 24RP 1154, 1158; 33RP 2646-47. Nolan removed an unknown object from a motorcycle saddlebag and walked into the fray. 23RP 1038; 24RP 1158. Shortly after Nolan reached the group, someone yelled that the police were coming and the group dispersed. 23RP 1039-40. Shannon then saw Beaudine, bleeding from the neck, standing with Blair and James by the Tahoe. 23RP 1040-46.

Shannon did not see Beaudine involved in any arguments in the bar and described his demeanor as "happy and social[T]hat's how he is." 23RP 999-1000. Beaudine had a few beers at the bar but may have had more beer earlier while working on his motorcycle with James. 23RP 998, 1061-63, 1067-68; 24RP 1148-49.

Joy Hutt, a bartender at the Bull's Eye, was familiar with Beaudine personally and by reputation.⁸ 32RP 2389. Hutt saw Beaudine walk by the codefendants table⁹ and declare their patches “stupid, a joke . . . your colors don't mean anything.” 33RP 2524-25, 2543-43. The men at the table did not react, however, as the young women from the bachelorette party absorbed their attention. 33RP 2531-32, 2544. Beaudine then went to the other side of the bar and loudly announced he was a member of “H.A.,” the Hell's Angels. 33RP 2526. Hutt doubted the codefendants would have heard this announcement because the band was loud. 33RP 2526.

Some time later, Hutt learned of a disturbance outside the bar. She ran outside and yelled for everyone to leave because she was calling 911. 33RP 2526-31, 2578, 2588. A large man in a white shirt¹⁰ and Beaudine, both with blood-soaked shirts, were standing next to each other. 33RP 2529, 2574. Each pointed at the other and stated, “[H]e started it.” 33RP

⁸ Hutt, who had worked as a bartender in the area for 20 years, was prepared to testify to Beaudine's reputation for threatening behavior and belligerence when intoxicated, but the court precluded her from doing so. 32RP 2395-99; 33RP 2504-21, 2534.

⁹ Hutt knew one of the men, Ford, from various local establishments. 33RP 2533-34, 2550.

¹⁰ Hutt was also unable to pick out Smith from the same photomontage Blair and James were shown. 28RP 1722-23; 33RP 2625-28.

2530, 2578. Hutt returned to the tavern and called 911. 33RP 2532. Most people were gone when she went back outside. 33RP 2533.

b. Aftermath and police investigation

According to Mike McCreven's fiancée Rebecca Dobiash, McCreven returned home around 10:00 accompanied by Nolan. 26RP 1471. The men told her a fight had occurred. 26RP 1472. Nolan appeared upset and mentioned he hit a man with his sap and lost the device. 26RP 1474. Dobiash noticed a small amount of blood on McCreven's chaps and on Nolan's jeans. 26RP 1468, 1477, 1505

The first 911 call occurred at 9:53. CP 925. Police arrived within minutes. 20RP 556, 633; 28RP 1825, 1843. Medical aid soon arrived, but Beaudine died on the way to the hospital. 20RP 558-63, 638, 684-85. Detective Tara Simmelink noticed blood on the ground next to the Tahoe as well as on the fronts of two nearby cars. 20RP 564-65; 26RP 1571. There was more blood on the ground near the coffee stand. 20RP 565. The blood soon began to wash away in the rain. 30RP 2014.

Simmelink was alerted to a folding knife on the ground, and Howden pointed out the sap he found. 20RP 566-70; 26RP 1571; 29RP 1866; Exs. 58-59. Simmelink talked to James, who was agitated and uncooperative but did not appear injured. 20RP 579-80, 605.

After unsuccessful print testing, the knife was sent to the state crime lab for DNA analysis. 29RP 1888. The forensic scientist attempted to obtain "handler" DNA by avoiding bloody areas on the blade and handle and focusing on an area with a rough surface where a handler's skin cells were more likely to slough. 29RP 1938-41, 1948. Dean found DNA on the knife from a single donor: Beaudine. 29RP 1940, 1952.

The medical examiner testified Beaudine died from stab wounds, including one that struck the jugular vein, which could have been caused by the knife found in the lot. 27RP 1656-58, 1662-68, 1693. Beaudine also suffered a number of abrasions to his body and face and a laceration to the back of his head. 27RP 1654, 1670, 1672. The laceration did not result in a skull fracture or significant internal bleeding. 27RP 1676-77. It was possible but unlikely the sap caused the injury: It had rounded edges and the wound was jagged. 27RP 1673-74, 1682-83; 28RP 1794, 1811. The head wound did not cause Beaudine's death. 28RP 1797.

Beaudine had a blood alcohol level of .18 at the time of death, which indicated he had consumed more than 10 drinks. 28RP 1767, 1785. The medical examiner opined this amount of alcohol could lead to poor decision-making and lowered inhibitions. 28RP 1768, 1789-90, 1807-08.

Department of Licensing records for license plate 750RCW revealed an owner, Sally Mickelson, with an Olympia address. 24RP

1221. Early the following morning, Smith greeted officers outside at that address. 24RP 1223-24. While on Smith's property, they observed the car in question inside a shed. 24RP 1232-33; 26RP 1534.

Smith agreed to go to the Pierce County Sheriff's office for questioning. 24RP 1233-34. At the police station, officers observed Smith had scrapes on his face and a swollen nose. Smith also told officers he had been struck on the back of the head and felt dizzy. 30RP 2104-06.

Smith called Nolan from the police station, and Nolan soon arrived and provided a statement. 26RP 1548-49, 1561-63; 30RP 2127-28. Officers noticed Nolan had a swollen knuckle and photographed his hand. 26RP 1549-50. The medical examiner testified the swelling was consistent with an injury and infection Nolan suffered a few months before the incident. 27RP 1695; 28RP 1792-94. Nolan also had a small abrasion to his eye. 30RP 2029-30. Detectives also talked to McCreven and Ford later that day. 30RP 2031-33.

Police also eventually searched each of the codefendants' homes. 24RP 1254; 25RP 1323, 1230; 28RP 1728. Contrary to an pretrial order barring testimony regarding weapons found at the codefendants' homes, Detective Timothy Donlin testified he found "several knives and vehicles" in Smith's outbuildings. 27RP 1596. The court denied the defense motion

for dismissal or a mistrial but instructed jurors to disregard the answer. 27RP 1596-1604.

3. Nolan's closing argument and theory of the case

Neither Nolan nor the codefendants testified. In closing, Nolan's counsel argued the jury should not find Nolan an accomplice simply because he was associated with a motorcycle club.¹¹ 35RP 2874-77. He also pointed out that the prosecutor's claim that the defense had the burden of proof on self-defense and defense of others was erroneous.¹² 35RP 2877. Instead, it was the State's burden to prove Nolan did not act lawfully in defending another. 35RP 2889.

Counsel also asserted the sap was not a deadly weapon in the manner in which it was used against James. 35RP 2879-83. Moreover, there was no evidence Nolan hit *Beaudine* with the sap, which the medical examiner testified was unlikely to have caused the head wound. 35RP 2883, 2892.

Nolan's counsel reiterated Smith's theory that Beaudine was drunk, belligerent and looking for a fight and that he brought the knife into

¹¹ The court instructed the jury that the defendants' association with the Hidalgos motorcycle club was a protected constitutional right and that the jury's consideration of club clothing (as depicted in various photographs) was limited to identification. CP 941-42 (Instructions 8 and 9).

¹² Indeed, the State had previously argued defendants had the burden of proof on defense of self and others. This matter is discussed below.

the altercation with Smith. 35RP 2852-53, 2884. Consistent with certain witnesses' testimony, Beaudine was not "jumped" by a number of men. Rather, a fight erupted between Beaudine and Smith. 35RP 2885. While Nolan eventually joined the fray, his phone records showed he was on the phone between 9:47 and 9:49, only four to six minutes before 911 had been called. 35RP 2885-86; see also Ex. 330 (phone records); 30RP 2123-27 and 31RP 2190-91 (testimony regarding phone records). Based on the timing of the call, counsel contended, the likely inference was that while on the phone, Nolan saw Smith in danger and came to Smith's aid by hitting James over the head. 35RP 2887-90, 2894. No witnesses, even Shannon Ford, placed Nolan in the fight before that. 35RP 2890, 2895. The fight ended shortly after James was struck. 35RP 2887. Counsel therefore urged the jury to find Nolan not guilty on both counts or, at the most, guilty only of the lesser degree crime of fourth degree assault of James. 35RP 2895.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE DECEDENT'S REPUTATION FOR VIOLENCE.

The trial court excluded Hutt's proposed testimony as to Beaudine's reputation for threatening behavior and belligerence when intoxicated because Nolan and his codefendants did not establish they

knew of Beaudine's reputation. Yet the trial court failed to consider the other permissible basis for admitting Beaudine's reputation for violence: that it tended to prove Beaudine was the aggressor. The court's refusal to permit the reputation testimony undermined the theory Nolan acted in defense of another and denied Nolan a fair trial.

- a. The court erred as a matter of law in excluding evidence regarding Beaudine's reputation for violence.

A court abuses its discretion if it bases its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). The interpretation of an evidentiary rule is reviewed de novo as a question of law. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

“Evidence of a person's character is generally inadmissible “for the purpose of proving action in conformity therewith on a particular occasion[.]” ER 404(a). A victim's reputation for violence is admissible, however, when the accused alleges self-defense and shows that knowledge of the victim's reputation for violence contributed to his reasonable apprehension. State v. Callahan, 87 Wn. App. 925, 934, 943 P.2d 676 (1997); see also State v. Adamo, 120 Wn. 268, 269, 207 P. 7 (1922). When the defendant is unaware of an alleged victim's reputation for violence, the reputation may nevertheless be admissible to support a claim

the victim was the aggressor. Callahan, 87 Wn. App. at 934; State v. Cloud, 7 Wn. App. 211, 217-18, 498 P.2d 907, review denied, 81 Wn.2d 1005 (1972); see also United States v. Burks, 470 F.2d 432, 434 (D.C. Cir. 1972) (where a defendant claims self-defense, evidence of the victim's violent character is admissible on the issue of who was the aggressor), cited in State v. Alexander, 52 Wn. App. 897, 900, 765 P.2d 321 (1988); Commonwealth v. Davis, 14 S.W.3d 9, 14 (Ky.1999) (same); State v. Hernandez, 133 Idaho 576, 990 P.2d 742, 749-50 (1999) (same).

Reputation evidence must be based on a “witness's personal knowledge of the victim's reputation in a relevant community during a relevant time period.” Callahan, 87 Wn. App. at 934. Furthermore, “the party seeking to admit the reputation evidence must show that the community is both neutral and general.” State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

Factors relevant to this determination include: “the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community.” Id. at 500. Whether a foundation for a valid community has been established lies within the trial court's discretion. Id.

For example, in Callahan the defendant offered evidence of the victim's reputation for violence with testimony from police officers, who based their opinions on the victim's encounters with the criminal justice system. This Court found that “[f]or purposes of reputation testimony, the criminal justice system is neither neutral nor sufficiently generalized to be classified as a community.” Callahan, 87 Wn. App. at 935 (citing State v. Lord, 117 Wn.2d 829, 874, 822 P.2d 177 (1991)).

Callahan also sought to have a witness who knew the victim two years before the shooting testify regarding the victim's reputation. This Court upheld the trial court's decision to exclude the witness's reputation testimony as too remote in time. Callahan, 87 Wn. App. at 935.

In Land, however, the prosecution established a proper foundation for reputation evidence where the record showed (1) the defendant worked as a salesman in the wooden box industry for several years; (2) those in the industry were a small and close-knit community; (3) the defendant had numerous personal contacts with members of the industry; and (4) from these contacts, his reputation was well known. Land, 121 Wn.2d at 500.

Here, Nolan sought to introduce evidence of Beaudine's reputation for violence and belligerence to show Beaudine was the aggressor against Smith, whom Nolan was seeking to aid. CP 1018; 16RP 81-97; 32RP 2395-2400; 33RP 2505-21; see also 17RP 162-67 (opening statements);

35RP 2885 (closing argument). The trial court excluded the proposed reputation testimony, reasoning that because Nolan and his codefendants did not establish they had personal knowledge of Beaudine's reputation, the reputation could not have contributed to their apprehension. 33RP 2521. But the trial court did not consider the other established basis for admitting Beaudine's reputation for violence. In short, the court based its ruling on an erroneous view of the law, thereby abusing its discretion. 33RP 2521.

Nolan anticipates the State may argue, as it did at trial, that Hutt's proposed testimony does not meet foundational requirements for reputation testimony. The trial court made no ruling on the subject. This Court should reject this assertion.

Defense counsel was prepared to call Hutt to testify that within a year of the parking lot melee, she had learned from more than 10 area tavern patrons and employees that Beaudine had a reputation for belligerence and threatening behavior when intoxicated. 33RP 2514-15. This group represents a community of similar size and breadth as the one held sufficient in Land. 121 Wn.2d at 500. In addition, unlike the group of police officers held too narrow in Callahan, bar patrons and employees represent a community of sufficient breadth and neutrality to provide the proper foundation for reputation evidence. Id.

Perhaps more significantly, however, the State opened the door to this testimony. The prosecutor asked Beaudine's fiancée, "How was [Beaudine] during the course of that period at the Bull's Eye, what was his demeanor like?" Ford responded, "He was happy and social, *that's how he is.*" 23RP 1000 (emphasis added). Ford's answer thus went beyond his demeanor that night to his demeanor in general.

Evidence of the victim's peaceful character is only admissible to rebut evidence that the victim was the first aggressor. ER 404(a)(2); State v. Bius, 23 Wn. App. 807, 811-12, 599 P.2d 16, review denied, 92 Wn.2d 1038 (1979). Ford told jurors Beaudine had a peaceful character. The defense was entitled to rebut this statement with reputation evidence to the contrary. Callahan, 87 Wn. App. at 934. The trial court's ruling was error.

b. The erroneous exclusion of the reputation evidence undermined the defense and prejudiced Nolan.

Evidentiary error is grounds for reversal if the error is prejudicial. State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009). The prejudice standard applicable to an evidentiary error, unlike evidentiary sufficiency, does not require that the evidence be considered in the light most favorable to the State. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), as amended (Jul. 19, 2002).

According to the defense theory, Smith merely acted to defend himself from Beaudine's aggressive assault, and Nolan, while not involved in the initial confrontation, perceived it was necessary and proper to defend Smith. 35RP 2883-84. The reputation evidence was crucial to the defense theory of the case: that Beaudine was drunk, belligerent, and looking for trouble even at the cost of singlehandedly confronting a group of men. While Hutt was permitted to testify as to certain by Beaudine in the bar, the reputation evidence was essential to the defense given that Shannon was permitted to testify Beaudine was generally good-natured and peaceful.

Because the court's error resulted in prejudice to Nolan, this Court should reverse. Asaeli, 150 Wn. App. at 579.

2. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO MOVE FOR A MISTRIAL FOLLOWING BLAIR'S EXPRESSION OF FEAR OF THE CODEFENDANTS.

Counsel was ineffective for failing to move for a mistrial following Reyna Blair's evasive testimony culminating in her exclamation that she was afraid to identify the "killer." 21RP 733. Because there was no valid tactical reason to fail to move for a mistrial, which likely would have been granted, Nolan can demonstrate he was denied effective assistance.

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. The accused is denied this right when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993). Nolan meets both requirements.

Here, counsel merely requested the testimony be stricken. 21RP 733. But given the likely devastating impact of the testimony, no competent attorney would have failed to move immediately for a mistrial. In light of the evidence at trial, this was a serious irregularity. Blair initially attributed her inability to remember to drunkenness. One could easily surmise Blair, like James, was merely reluctant to implicate a friendly acquaintance or other members of the community of motorcycle aficionados. Unfortunately, Blair's surprise interjection demonstrated her evasiveness was motivated by nothing less than fear, implying she had seen more than she was saying. While there was no evidence to support Blair's fear, such as a threat, the jury had no way of knowing that. See State v. Bourgeois, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997)

(evidence a witness is afraid to testify may lead jurors to conclude that the witness is fearful of the accused and that he is, therefore, guilty because the witness has been threatened, demonstrating a consciousness of guilt) (citing State v. Kosanke, 23 Wn.2d 211, 215, 160 P.2d 541 (1945)).

Nolan suffered prejudice because there is a "reasonable probability" that, but for counsel's error, the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693-94).

Trial courts must grant a mistrial where the irregularity may have affected the outcome of the trial, thereby denying the defendant his right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

As discussed above, Blair's surprise statement was serious and prejudicial. The irregularity did not involve cumulative evidence. No other witness testified similarly, nor would they have been permitted to. Finally, the testimony was stricken (although the jury was not told to

disregard the evidence) but striking the testimony did not cure the problem. Some testimony simply cannot be fixed by telling jurors to ignore it. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996). Moreover, juries are presumed to follow the trial court's instructions "absent evidence proving the contrary." State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). There was evidence to the contrary in this case.

Juror 7 informed the court and the parties he overheard a number of jurors talking about Blair's purported drinking and apparent unwillingness to remember what occurred. 21RP 776-80. Concerned the jurors were disregarding the pre-deliberation prohibition on discussing the evidence, the court and parties questioned the jurors individually. 21RP 785-817. Juror 13 heard the conversation and commented the consensus was that Blair was reluctant to testify because she was fearful. 21RP 811. Juror 11 also heard jurors' discussion of Blair's evasiveness and commented that other jurors remarked Blair was afraid to identify the people involved in the fight. 21RP 806. These candid statements reveal a clear disregard for the court's order striking the testimony. Nolan has rebutted the presumption articulated in Kirkman, and counsel's ineffective assistance in failing to move for a mistrial denied Nolan a fair trial.

3. THE TRIAL COURT ERRED IN DENYING NOLAN'S MOTION FOR A MISTRIAL AFTER AN OFFICER VIOLATED AN ORDER IN LIMINE.

Before trial, the State agreed it would not introduce evidence regarding weapons found at the codefendants homes and the court entered an order to that effect. CP 1017. In violation of the order and the State's agreement, Detective Donlin testified he found "several knives" in a building on Smith's property. 27RP 1596. The trial court denied the defense motion for dismissal or a mistrial but instructed jurors to disregard the answer. 27RP 1596-1604.

The court erred in denying the mistrial motion. In deciding whether a mistrial is warranted, courts examine (1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing it. Johnson, 124 Wn.2d at 76; Escalona, 49 Wn. App. at 254.

Here, the irregularity was serious. The defense theory, supported by the only DNA evidence introduced at trial, was that the instrument of Beaudine's death was his own knife and that the defendants acted in self-defense and defense of others. Testimony that Smith kept a number of knives at his residence severely undermined that theory. Given the strict order in limine, the evidence was clearly not cumulative.

And the court's curative instruction was, once again, incapable of erasing the prejudicial effect of the detective's interjection. Escalona, 49 Wn. App. at 255 (citing State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). While juries are presumed to follow a court's instructions, that presumption may be rebutted. In this case, the court was already on notice that jurors had proved unable to follow the court's direction to disregard testimony. As such, the court should have granted a mistrial, and a new trial is required.

4. PROSECUTORIAL MISCONDUCT DENIED NOLAN A FAIR TRIAL WHEN THE STATE SHIFTED THE BURDEN ON DEFENSE OF SELF AND ANOTHER AND, DESPITE MULTIPLE OBJECTIONS THE COURT FAILED TO CORRECT THE PROBLEM.

The trial court instructed the jury the jury on self-defense and defense of others. During closing and rebuttal arguments, the prosecutor stated the defense had the burden of proving self-defense, then declared that because self-defense instructions were unwarranted, the State had no burden to prove the absence of self-defense. Despite repeated defense objections, the court did nothing to correct the misapprehension left in jurors' minds. The State's argument, and the court's failure to correct the repeated misstatements of the law and the evidence, unconstitutionally shifted the burden of proof and denied Nolan a fair trial.

a. Applicable law

Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006).

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). When a prosecutor commits misconduct, she may deny the accused a fair trial. Id. at 518; U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. Boehning, 127 Wn. App. at 519. However, a prosecutor may not make statements that are unsupported by the evidence. State v. Ray, 116 Wn.2d 531, 550, 806 P.2d 1220 (1991). Moreover, a prosecutor who misstates the law of a case commits a serious irregularity that has the potential to mislead the jury. Davenport, 100 Wn.2d at 763. For example, a prosecutor commits misconduct by shifting the burden of proof to the defendant during closing argument. State v. Miles, 139 Wn. App. 879, 889, 162 P.3d 1169 (2007); United States v. Perlaza, 439 F.3d 1149, 1171 (9th Cir. 2006).

In general, prosecutorial misconduct compels reversal where there is a substantial likelihood it affected the verdict. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). But because prosecutorial burden shifting affects a constitutional right, reversal is required unless the error is harmless beyond a reasonable doubt. State v. Moreno, 132 Wn. App. 663, 671, 132 P.3d 1137 (2006). Under this standard, the reviewing court should reverse unless convinced beyond a reasonable doubt that the evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. (citing State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)); see also State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999) ("The state's burden to prove harmless error is heavier the more egregious the conduct is.").

- b. The State prejudicially misled the jury and despite repeated objections, the trial court did nothing to remedy the misconduct.

In closing, the State first conflated the law of self-defense, which the State must prove the absence of beyond a reasonable doubt, and the statutory defense to second-degree felony murder by an accomplice under RCW 9A.32.050,¹³ which the defense must prove by a preponderance of the evidence. The prosecutor stated,

¹³ RCW 9A.32.050 is attached as Appendix A. See also CP 964 (Instruction 31).

The defense that is set forth in one of the instructions, that you have that tells you, that each of the Defendants if they want you to believe that they were defending themselves, or defending others, they want to put forth that statutory defense to the murder of [Beaudine], have to prove to you by a preponderance of the evidence that it's more likely that not that the defendant did not aid in the --

35RP 2816-17. When Nolan's counsel correctly objected that the defense did not have the burden to prove self-defense by a preponderance of the evidence, the court stated only that, "The jury has been instructed on the law." 35RP 2817. The prosecutor went on listing the statutory defense requirements but did not return to the matter of self-defense. 35RP 2817-18.

In closing, McCreven and Nolan's counsel correctly pointed out the State, not the defense, had the burden to prove the absence of self-defense. 35RP 2835-36, 2847, 2877-78.

On rebuttal, the colleague of the prosecutor who made the first erroneous argument acknowledged the State has the burden on self-defense and defense of others. 36RP 2934-35. She continued, however, "What I want to say is this, for the State to disprove self-defense, first there must be proof of self-defense." 36RP 2935. Defense counsel immediately objected. The court stated, "my ruling is always the same. The jury has been instructed on the law of this case." 36RP 2935. The prosecutor continued,

How does the State disprove when there is no evidence the Defendant reasonably believed that [Beaudine] was going to commit a felony, or he was going to inflict death or personal injury? How do I disprove it when there is no evidence of it? How do I disprove that the Defendant reasonably believed that there was imminent danger, when there has been no evidence that the Defendant reasonably believed that there was imminent danger?

Ladies and gentlemen, *there is nothing to disprove because there is no evidence of it.*

36RP 2936 (emphasis added).

The prosecutor then inquired rhetorically whether Smith was defending himself when he walked toward Beaudine with his fist cocked or if the second man was defending himself when he held Beaudine from behind. 36RP 2936-37. She continued, “So if there’s no evidence of self-defense, *how is it that [the defendants] even get to argue it?*” 36RP 2937 (emphasis added). When counsel promptly objected, the court stated only “the jury has been instructed on the law of the case, and the jury will decide the facts of this case. 36RP 2937.

The prosecutor continued, “The defense, so that they can argue that Smith was defending himself, that Nolan was defending another, and that McCreven was defending himself, they want you to make assumptions. Assumptions of fact that was not introduced, that no one testified about.” 36RP 2937. When counsel again objected, the prosecutor stated “Your honor, this is closing arguments. There is nothing inappropriate about my

argument.” 36RP 2937. The court reiterated that the “jury has been instructed on the law of the case.” 36RP 2938.

Later, in denying a defense motion for a mistrial based on misconduct in closing argument, the court explained it did not give a curative instruction because it feared commenting on the evidence and that while some of the rebuttal argument “concerned the court” it was not misconduct when taken in context. 36RP 2957-59. The court also stated no curative instruction was necessary and, curiously, that any misconduct was not so flagrant that an instruction could not have cured it. 36RP 2960.

c. The misconduct denied Nolan a fair trial.

Whether the defendant has produced sufficient evidence to raise a claim of self-defense is a matter of law for the trial court. State v. Janes, 121 Wn.2d 220, 238 n. 7, 850 P.2d 495 (1993). It is proper to refuse a self-defense instruction when there is no evidence to justify a reasonable inference that the defendant acted in self-defense. State v. Currie, 74 Wn.2d 197, 198, 443 P.2d 808 (1968). However, a self-defense instruction must be given when the accused produces some evidence of self-defense. Janes, 121 Wn.2d at 237. Once he produces such evidence, the State's burden is to prove the absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); Janes, 121 Wn.2d at 237. It is “unassailable” that the burden of

proof remains with the prosecution, and any attempt to shift that burden onto the defendant is flagrant and ill intentioned. Miles, 139 Wn. App. at 889.

The State's argument misstated the evidence, erroneously claiming there was none, and shifted the burden of proof, suggesting the State was not required to prove beyond a reasonable doubt the absence of the elements of defense of self or others. But "[a]rguments concerning questions of law must be confined to the instructions given by the court." State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59 (1983), abrogated on other grounds by State v. Brown, 36 Wn. App. 549, 555-56, 676 P.2d 525 (1984).

Here, after repeatedly stating there was no evidence to support a self-defense claim — which was patently incorrect — the prosecutor informed the jury it need not even consider the court's instructions to that effect. 36RP 2936-37. By informing the jury it was not required to consider those instructions, and thus Nolan's claim, the State did nothing less than shift the burden on Nolan's claim he acted to defend another. Yet a jury need only find the State failed to meet its assigned burden beyond a reasonable doubt in order to acquit. Miles, 139 Wn. App. at 890.

The State cannot prove the improper argument was harmless beyond a reasonable doubt. Witness accounts of the incident diverged

widely, from Beaudine being jumped and brutally beaten by a number of men, to Beaudine and James versus the Hidalgos, to a fight between Smith and Beaudine that began with mutual yelling and ended with finger pointing. The bartender testified Beaudine acted belligerently that night. The only DNA found in the knife was Beaudine's. A possible, even likely, inference from this evidence was that Beaudine introduced the knife into the fight, making Nolan's defense of another both objectively and subjectively reasonable and necessary.

To make matters worse, although the trial court found some of the self-defense related argument "concerning," it pronounced a blanket refusal to give an appropriate curative instruction, fearful that any such instruction could constitute a comment on the evidence. Yet a curative instruction as to the law — that the defendants were, indeed entitled to the self-defense/defense of others instructions, and the State must be held to its burden — may have cured the error. Cf. State v. Warren, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008) (repeated misstatement of burden of proof during closing argument did not require reversal only because court gave curative instruction). Unfortunately, however, Nolan did not receive that benefit.

Finally, while the jury was presented instructions pertaining to defense of self and others, the State, with the last word, told the jury to

ignore them. Thus even proper written instructions would have been incapable of obviating the prejudice.

For these reasons, the State cannot prove beyond a reasonable doubt the misconduct was harmless. Reversal is therefore required.

5. PROSECUTORIAL MISCONDUCT DENIED NOLAN A FAIR TRIAL WHEN THE STATE ARGUED THAT TO REACH A VERDICT THE JURY WAS REQUIRED TO DISCERN THE "TRUTH" AND NOLAN'S THEORY WAS INCOMPATIBLE WITH THIS REQUIREMENT BECAUSE IT INVOLVED "GAME PLAY" AND "TRICKERY."

The prosecutor compounded the effect of the above argument when she — again incorrectly — argued Nolan raised inconsistent defenses (that he was not involved and/or that he acted in defense of self or another). The prosecutor then argued an accused "couldn't have it both ways" and that the jury was responsible for determining "the truth" of what happened that night. 36RP 2925-26. After McCreven's counsel objected that the State was shifting the burden, the court again stated, "The jury has been instructed on the law of the case." The prosecutor continued, "That word truth, it's in the instructions. The law that you have been given, and truth doesn't involved game play, or loopholes or trickery. It's the law." 36RP 2926.

In Miles, after telling the jury it heard "mutually exclusive" versions of events, the prosecutor committed misconduct by arguing:

What do I mean by that? To simplify it as much as possible, if one is true, the other cannot be, as I'm sure you all know. If the State's witnesses are correct, the defense witnesses could not be and vice versa . . . [I]n this case you have no choice because you have two conflicting versions of events. One is not being candid with you . . . You are being asked to use your experience and your common sense to decide which version of events that you have heard over in this courtroom over the course of this trial is more credible.

139 Wn. App. at 889. Here, while the State did not explicitly call on the jury to compare the State's witnesses' testimony with that of defense witnesses, it did inform the jury the court's instructions required it to discern "the truth" and the defense theory was incompatible with the truth.

The State's argument that the jury was required to determine "the truth" was misleading. "[A] jury does not necessarily need to resolve which, if any, of the witnesses is telling the truth in order to conclude that one version is more credible or accurate than another." State v. Wright, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995), overruled on other grounds, State v. Aten, 130 Wn.2d 640, 657-58, 927 P.2d 210 (1996). The jury did not need to arrive at the truth of what occurred to reach a verdict in favor of the defense; all it needed to do was to entertain a reasonable doubt regarding any element of the State's case. Miles, 139 Wn. App. at 890; Wright, 76 Wn. App. at 825-26.

Moreover, not only did the foregoing argument misstate Nolan's theory and argument, it improperly disparaged defense counsel in general. "[L]awyers in criminal cases are necessities not luxuries," Bruno v. Rushen, 721 F.2d 1193, 1194 (9th Cir. 1983) (quoting Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 796, 9 L. Ed. 2d 799 (1963)), and disparagement of defense counsel may also constitute reversible misconduct. Bruno, 721 F.2d at 1195; Walker v. State, 790 A.2d 1214, 1220 (Del. 2002). "In our adversarial system, defense counsel is not only permitted but is expected to be a zealous advocate for the defendant." Id. at 1218. "Accusations of deception and trickery by defense counsel serve no purpose except to prejudice the jury." People v. Thompson, 730 N.E.2d 118, 122 (Ill. App. 2000). It is improper to argue defense counsel is intentionally misleading jurors and witnesses. State v. Negrete, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030 (1994); United States v. Rodrigues, 159 F. 3d 439, 449-50 (9th Cir. 1998); United States v. McLain, 823 F.2d 1457, 1462 (11th Cir. 1987), overruled on other grounds, United States v. Watson, 866 F.2d 381, 385 n.3 (11th Cir. 1989).

The foregoing prosecutorial misconduct seeking to align the prosecutor with truth seeking and the defense with trickery denied Nolan a fair trial. Again, despite objection, the court provided no curative

instruction to the State's "truth" comment. While there was no objection to the "trickery" comment, it immediately followed the truth comment, and, as demonstrated by the Court's repeated and consistent failure to intervene in the State's misconduct, such an objection would have been futile. This Court should reverse on this ground as well.

6. THE COURT ERRED IN REFUSING TO GIVE NOLAN'S PROPOSED DEFENSE OF ANOTHER INSTRUCTION, WPIC 17.02, AS TO THE SECOND DEGREE FELONY MURDER CHARGE.¹⁴

When deciding which instructions apply to a claim of defense of self and others, the crucial issue is the defendant's mental state in committing the crime. Because the charge was second-degree felony murder based on assault, the court erred in refusing to give Nolan's proposed self-defense/defense of others instruction, WPIC 17.02. CP 914.

This Court reviews a trial court's choice of jury instructions for abuse of discretion but reviews alleged errors of law in jury instructions de novo. State v. Fleming, __ Wn. App. __, __ P.3d __, 2010 WL 1445664 *6 (2010). Instructions that do not permit parties to argue their theories of the case are erroneous. Id.

The general statute regarding defense of self and others provides that the "use, attempt, or offer to use force upon or toward the person of

¹⁴ Instructions 24-30 and 32 are attached as Appendix B. CP 957-63, 965.

another” is permitted when “used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person.” RCW 9A.16.020. In contrast, under RCW 9A.16.050, homicide is “justifiable” when committed either:

(1) In the lawful defense of the slayer . . . or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or

(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence

The Washington Pattern Jury Instructions are consistent with the statutes. WPIC 16.02 requires that the slayer "reasonably believed the person slain intended to commit a felony or to inflict death or great personal injury[.]" 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 16.02, at 234-35 (3rd ed. 2008). WPIC 17.02, in contrast, requires that the person "reasonably believes that he is about to be injured" or that he is "lawfully aiding a person who he reasonably believes is about to be injured." 11 WPIC 17.02, at 253. A defendant claiming justifiable homicide must therefore make a much greater showing to establish he acted with a reasonable belief of impending harm.

When deciding which of these instructions to apply, "the important issue is the defendant's mental state in committing the crime, not whether the victim in fact died." State v. Cowen, 87 Wn. App. 45, 53, 939 P.2d 1249 (1997) (applying WPIC 16.02 to attempted murder); see also State v. Bolar, 118 Wn. App. 490, 502, 504, 78 P.3d 1012 (2003) (the mens rea for felony murder is based solely on the mens rea for the predicate offense), review denied, 151 Wn.2d 1027 (2004). Thus, in a case such as this one, where second-degree felony murder is predicated on second-degree assault, the Court of Appeals has held that the self-defense instruction is directed towards the assault, which defines the mens rea element of the charge. State v. Goodrich, 72 Wn. App. 71, 77, 863 P. 2d 599 (1993) (in second-degree felony murder case predicated on second-degree assault, holding WPIC 17.02 was correct instruction), abrogated on other grounds by State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004); see also Walden, 131 Wn.2d at 479-80 (Talmadge, J., dissenting, noting that all justices agree that an instruction based on WPIC 17.02 was correct in a case of second-degree assault).

But in State v. Ferguson, the defendant was charged with assault of one man and felony murder predicated on assault for stabbing a second man during a fistfight initiated by the decedent. 131 Wn. App. 855, 129 P.3d 856, review denied, 158 Wn.2d 1016 (2006). The trial court refused

the defense request to give WPIC 17.02 as to the murder charge and, as here, gave WPIC 16.02. Id. at 859-60. This Court affirmed on appeal, holding that the trial court properly gave a justifiable homicide instruction rather than a general self-defense instruction. In fact, “WPIC 17.02 can never be given in a felony murder case where assault is the predicate felony because it can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm.” Id. at 862.

But Nolan respectfully asserts that Ferguson does not preclude use of the general self-defense/defense of others instruction in every felony murder case predicated on assault. State v. Slaughter, 143 Wn. App. 936, 946-47, 186 P.3d 1084, review denied, 164 Wn.2d 1033 (2008). In particular, Ferguson does not address the situation here, which appears to be an issue of first-impression in Washington, whether WPIC 17.02 may be the proper instruction where the state of mind of the slayer’s co-participant, not the slayer, is at issue, and where in the light most favorable to the co-participant, he did not use “a deadly weapon in a deadly manner.”

The Ferguson Court’s rationale for prohibiting use of WPIC 17.02 does not apply under the facts here. For the jury to find Nolan guilty, it was not required to find he was aware that Smith was armed with a knife

or to know what degree of assault Smith intended to accomplish. See, e.g., State v. Rice, 102 Wn.2d 120, 125, 683 P.2d 199, 203 (1984) (State is required to prove only the accomplice's general knowledge of his co-participant's substantive crime); State v. Davis, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984) (person could be liable as an accomplice to first degree robbery even though he did not know his principal possessed a gun); see also Bolar, 118 Wn. App. at 502 (the mens rea for accomplice liability is knowledge). The State so argued. 35RP 2815-16; CP 222. Correspondingly, in the light most favorable to Nolan, the evidence showed Nolan's involvement did not involve lethal force. See Callahan, 87 Wn. App. at 933 (in determining whether there is sufficient evidence to instruct the jury on self-defense, the trial court must view the evidence in the light most favorable to the defendant).

As a result, RCW 9A.16.020, not RCW 9A.16.050, is the controlling statute, and reveals the appropriate instruction is WPIC 17.02. Finally, the WPIC comments for both 16.02 and 17.02 suggest that in the case of felony murder, the appropriate instruction or whether a self-defense instruction should be given at all should be determined on a case-by-case basis. 11 WPIC 16.02, cmt. at 236; 11 WPIC 17.02, cmt. at 253.

The Ferguson rationale does not apply in this case and the court's erroneous instructions informed jurors Nolan was required to believe

another person was at risk of death or great personal injury to step in. This was not only incorrect it was also prejudicial. The jury could easily find that Nolan reasonably believed Beaudine, armed or not, threatened Smith with injury but did not present a threat of great personal injury or death, given that Smith had the support of a number of associates. Because the trial court's refusal to give the appropriate instruction prejudiced Nolan, reversal is required. See Cowen, 87 Wn. App. at 51 (error prejudicial if jury could have accepted defendant's version but found him guilty because of the court's legal misstatement).

7. THE COURT ERRED IN FAILING TO GIVE
EXCUSABLE HOMICIDE INSTRUCTION WPIC 15.01
AND, CORRESPONDINGLY, WPIC 17.02.

As a preliminary matter, Nolan has preserved this error because codefendant McCreven's counsel proposed such an instruction. CP 189 (McCreven's proposed instructions); RAP 2.5(a).

Washington's excusable homicide statute states:

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

RCW 9A.16.030; see also WPIC 15.01 (so stating). The instruction further states the State has the burden of proving the absence of this

defense. McCreven's counsel proposed this instruction, but the court declined to give it.

The Court of Appeals' opinion in Slaughter is, again, instructive. Slaughter was, like Nolan, charged with second-degree felony murder for a stabbing. Slaughter's theory was that the decedent came at him with a knife and he reasonably responded with an assault (struggling over the knife), which resulted in an accidental stabbing death. The trial court therefore properly gave a modified version of WPIC 17.02. 143 Wn. App. at 946-47. Slaughter thus distinguished Ferguson's statement that a WPIC 17.02 instruction can never be given when a felony murder charge is predicated on an assault. See also State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) (a self-defense instruction may be appropriate when the defense is excusable homicide if the defendant could argue that his action that precipitated the accidental killing amounted to non-homicide self-defense); Callahan, 87 Wn. App. at 930-33 (accident and self-defense claims are not mutually exclusive). The theory articulated by the Slaughter court was consistent with Smith's theory of the case¹⁵ and therefore Nolan's, who argued he was reasonably acting to defend Smith. The court erred in failing to give the proposed instructions WPIC 15.01 and 17.02 under the rationale set forth in Slaughter.

¹⁵ See 35RP 2851-73 (Smith's closing argument).

8. ALTERNATIVELY, DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE ERROR REGARDING THE PROPOSED WPICs 17.02 AND 15.01.

In the event this Court finds the above instructional issues were not properly preserved, Nolan's counsel was ineffective for failing to preserve error regarding the courts refusal to give proposed WPICs 17.02 and 15.01 as to the second degree felony murder charge.

Defense counsel is ineffective when (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); see also Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000); Wiggins v. Smith, 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); and State v. Grier, 150 Wn. App. 619, 640, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017 (2010) (so holding).

The question of whether counsel's performance was ineffective is not amenable to per se rules, but requires case-by-case analysis. State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). Counsel is ineffective based on failure to request a jury instruction where the party (1) was entitled to the instruction, (2) counsel's performance was deficient

in failing to request the instruction, and that (3) the failure to request the instruction prejudiced the accused. State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003). Nolan satisfies these criteria.

Slaughter, which represents a factual scenario similar to the defense theory here, was decided in April 2008, months before the discussion of jury instructions in this case. Slaughter, like Brightman and Callahan, would have benefited Nolan. Thus, Nolan's counsel was responsible for knowing about those cases. See State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (effective assistance includes duty to research the relevant law regarding self-defense).

Counsel's failure to propose an excusable homicide instruction and, correspondingly, WPIC 17.02 — which the Slaughter court found warranted under similar facts — prejudiced Nolan because it prevented him from arguing he was entitled to act based on a reasonable belief that Beaudine presented a risk of injury rather than a risk of death or great bodily harm. Slaughter and its precursors, in effect, would have allowed Nolan to avoid Ferguson's straight jacketing of his defense. There was no reasonable basis for Nolan's counsel to fail to request such instructions or fail to continually object to the court's refusal to give the proposed instructions.

As discussed above, Nolan's counsel initially proposed a self-defense instruction under the less onerous general standard on the felony murder charge, although the matter was not mentioned during the on-the-record discussion of jury instructions. 34RP 55-56; 35RP 2772-88; CP 914. It is difficult to conceive of a reason to volunteer a client for a more onerous burden. Again, the jury could easily have decided that Nolan reasonably believed Beaudine created a reasonable fear Smith would be injured but did not represent a threat of great personal injury or death given that Smith had the support of a number of associates.

9. CUMULATIVE ERROR DENIED NOLAN A FAIR TRIAL.

Under Article 1, section 3 and the Fifth and Fourteenth Amendments, every criminal defendant has the due process right to a fair trial. State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Braun, 82 Wn.2d 157, 166, 509 P.2d 742 (1973). Moreover, this Court may reverse a defendant's conviction when the combined effect of errors during trial effectively denies the defendant his right to a fair trial, even if each error standing alone would be harmless. State v. Venegas, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 1445673 at *5 (2010).

In this case, each of the errors asserted above individually requires reversal of Nolan's convictions. Should this Court determine, however,

that these issues do not individually require reversal, in combination they require reversal.

D. CONCLUSION

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

DATED this 19th day of April, 2010.

Respectfully submitted,

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JENNIFER M. WINKLER
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Attorneys for Appellant

APPENDIX A

INSTRUCTION NO. 24

It is a defense to a charge of murder in the second degree that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the defendant or any person in the defendant's presence or company when:

(1) the defendant reasonably believed that the person killed or others whom the defendant reasonably believed were acting in concert with the person killed intended to commit a felony or to inflict death or great personal injury;

(2) the defendant reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the defendant employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the defendant, taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25

A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another 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 a homicide to be justifiable.

INSTRUCTION NO. 26

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 kill another person. Therefore, if you find beyond a reasonable doubt that a 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.

INSTRUCTION NO. 27

One who acts in defense of another, reasonably believing the other to be the innocent party and in danger, is justified in using force necessary to protect that person even if, in fact, the person whom the actor is defending is the aggressor.

INSTRUCTION NO. 28

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

INSTRUCTION NO. 29

“Great personal injury” means an injury that the defendant reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the defendant or another person.

INSTRUCTION NO. 30

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

INSTRUCTION NO. 32

It is a defense to a charge of Assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured or by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

ALC

APPENDIX B

RCW 9A.32.050
Murder in the second degree.

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030 (1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the second degree is a class A felony.

[2003 c 3 § 2; 1975-76 2nd ex.s. c 38 § 4; 1975 1st ex.s. c 260 §9A.32.050.]

Notes:

Findings – Intent – 2003 c 3: "The legislature finds that the 1975 legislature clearly and unambiguously stated that any felony, including assault, can be a predicate offense for felony murder. The intent was evident: Punish, under the applicable murder statutes, those who commit a homicide in the course and in furtherance of a felony. This legislature reaffirms that original intent and further intends to honor and reinforce the court's decisions over the past twenty-eight years interpreting "in furtherance of" as requiring the death to be sufficiently close in time and proximity to the predicate felony. The legislature does not agree with or accept the court's findings of legislative intent in *State v. Andress, Docket No. 71170-4 (October 24, 2002)*, and reasserts that assault has always been and still remains a predicate offense for felony murder in the second degree.

To prevent a miscarriage of the legislature's original intent, the legislature finds in light of *State v. Andress, Docket No. 71170-4 (October 24, 2002)*, that it is necessary to amend RCW 9A.32.050. This amendment is intended to be curative in nature. The legislature urges the supreme court to apply this interpretation retroactively to July 1, 1976." [2003 c 3 § 1.]

Effective date – 2003 c 3: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [February 12, 2003]." [2003 c 3 § 3.]

Effective date – Severability – 1975-76 2nd ex.s. c 38: See notes following RCW 9A.08.020.

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39598-3-II
)	
TERRY NOLAN,)	
)	
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 20TH DAY OF APRIL, 2010, 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
930 TACOMA AVENUE SOUTH
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TACOMA, WA 98402

- [X] TERRY NOLAN
DOC NO. 332925
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

FILED
COURT OF APPEALS
10 APR 21 AM 11:52
STATE OF WASHINGTON
BY _____
CLERK

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF APRIL, 2010.

x Patrick Mayovsky

FILED
COURT OF APPEALS

10/27/19 PM 12:02

STATE OF WASHINGTON

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

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 39598-3-II
)	
vs.)	NOTICE OF
)	ERRATA
TERRY NOLAN,)	
)	
Appellant.)	
_____)	

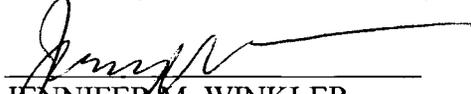
Comes now Terry Nolan, by and through his attorney of record, Jennifer Winkler, and notifies the Court and opposing counsel and co-defendants' counsel of the following possible errata:

The contents of Appendices A and B appear to be switched on undersigned counsel's copy of the brief. The contents of Appendix A should be RCW 9A.32.050 and Appendix B should be jury instructions 24-30 and 32 (CP 957-63, 965).

DATED this 18th day of May, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



 JENNIFER M. WINKLER
 WSBA No. 35220
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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
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vs.)	COA NO. 39598-3-II
)	
TERRY NOLAN,)	
)	
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 18TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **NOTICE OF ERRATA** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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FILED
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10 MAY 19 PM 12:02
STATE OF WASHINGTON
BY _____

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF MAY, 2010.

x *Patrick Mayovsky*