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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Grubham's claim that the State presented insufficient evidence that he acted with the intent to inflict great bodily harm and to disprove self defense is without merit when, viewing the evidence in a light most favorable to the State, the evidence showed that: (1) Grubham told Mr. Phillips that he was going to kill him and stabbed him eleven times; and (2) Grubham did not lawfully act in self-defense because he used more force than was reasonably necessary and because Grubham was not entitled to claim self defense since he was the first aggressor who struck the first blow?

2. Whether the trial court did not err in giving the aggressor instruction when: (1) such an instruction is proper if a jury could have reasonably determined from the evidence that the defendant provoked the fight; the evidence conflicted as to whether the defendant's conduct provoked the fight; or the evidence showed that the defendant made the first move by drawing a weapon; and, (2) there was evidence presented below that Grubham provoked the fight and struck the first blow by drawing a weapon and stabbing the victim?

3. Whether Grubham's claim of ineffective assistance of counsel must fail when Grubham has failed to show that his attorney's performance was deficient and that the deficient performance was prejudicial?

4. Whether Grubham's claim of prosecutorial misconduct must fail when: (1) he has failed to show that the prosecutor made any improper comments during closing argument; and, (2) even if any of the comments were improper when viewed in isolation, Grubham has failed to show that the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Bradley Grubham was charged by amended information filed in Kitsap County Superior Court with one count of assault in the first degree and one count of assault in the second degree, both with deadly weapon enhancements. CP 7. A jury found Grubham guilty of the charge of assault in the first degree with a special finding that he was armed with a deadly weapon. CP 56, 57.¹ The trial court then imposed a standard range sentence. CP 69.² This appeal followed.

B. FACTS

Grubham was convicted in the present case of assault in the first degree stemming as a result of an incident in which Grubham repeatedly

¹ The jury found Grubham not guilty of the charge of assault in the second degree. CP 58.

² In his brief, Grubham states that he was "facing a third strike for the assault in the first degree." App.'s Br. at 26. The record is quite clear, however, that Grubham was not sentenced as a persistent offender and his conviction in the present case was not his "third strike." CP 69.

stabbed a victim named Ron Phillips on the night of July 16, 2009.

Mr. Phillips explained that he didn't really know Grubham, but had seen him around a couple of times. RP 28.³ Mr. Phillips's home is next door to the apartment of Isabella Armour (and her boyfriend, Timothy Bautista). RP 72-73, 81. Mr. Phillip's front porch is approximately 10 feet from Ms. Armour's front porch. RP 45. On the morning of July 16, Ms. Armour had had an unspecified surgery, and she described that she had a long day. RP 74.

Late at night on July 16th, 2009, Ron Phillips was outside his Bremerton home working on some automobile parts. RP 27. Mr. Phillips saw Grubham approach Ms. Armour's home and knock on the front door. RP 28. Mr. Phillips knew that Ms. Armour had been in the hospital that day, so he told Grubham that he should come back later because Ms. Armour wasn't feeling well. RP 28.⁴

Grubham and Phillips then exchanged words. RP 29. Mr. Phillips

³ Sometime earlier in the day on the day of the assault, Mr. Phillips had loaned Grubham a tire iron, as Grubham was working on a car. RP 28. Later that evening, Grubham was near the back door of Phillips's home and was listening to a conversation that was taking place between Phillips and his girlfriend. RP 28-29. Phillips explained that Grubham was mocking them and was repeating the conversation back to Phillips and his girlfriend. RP 28-29. Mr. Phillips responded by closing and locking his door. RP 29.

⁴ Ms. Armour explained that she heard the knocking on the door, but that she had had a long day and was tired and wanted to go to sleep and thus she wasn't going to answer the door. RP 74. She also heard Mr. Phillips telling Grubham that she had had surgery that morning and that he should leave her alone because she was trying to sleep. RP 74.

walked towards Grubham, as the exchange of words continued, but Mr. Phillips then walked back to working on his car parts. RP 28. Grubham, however, continued to talk to Mr. Phillips RP 28, 45. Grubham admitted that when Phillips walked away, he (Grubham) responded by saying “That’s what I thought.” RP 196.

Eventually Mr. Phillips again walked over near Grubham again. RP 28, 45. Mr. Phillips testified that Grubham started the physical confrontation and testified that the physical confrontation started when Grubham “just stepped off” the porch and started stabbing Grubham in the chest. RP 28, 40.⁵

Mr. Phillips then backed up towards some nearby trees and fell down. RP 32. Mr. Phillips explained that he fell down to his knees and that Grubham then started stabbing him in the back and the top of the head. RP 33. Phillips explained that he did not have a weapon and did not punch Grubham. RP 32-33. Mr. Phillips explained that he told Grubham to quit stabbing him, and that Grubham was saying that he was going to kill him. RP 33.⁶

⁵ Specifically, Mr. Phillips testified at several points about how the physical confrontation started, and that testimony including the following:

And as I walked up to him he was standing up on the porch, and he just stepped off, started stabbing me. RP 28.

I walked back over, and he stepped off the porch, started stabbing me. RP 28.

See also, RP 40.

⁶ When Grubham eventually testified at trial he did not deny saying that he was going to kill Mr. Phillips, Rather, Grubham admitted it was possible but that he didn’t know or didn’t

Ms. Armour testified that after she had heard the knock at her door and heard Mr. Phillips and Grubham exchange words, she then heard people wrestling around outside and so she looked outside and saw Mr. Phillips and Grubham on the ground together. RP 75. Ms. Armour saw the two rolling around on the ground and saw that Grubham was on top of Mr. Phillips. RP 75-76. She also saw that it appeared that Grubham was punching Mr. Phillips, but then due to the way Grubham was gesturing Ms. Armour thought that Grubham might actually have been stabbing Mr. Phillips. RP 75-76. She further stated that,

And he looked like to me like he attacked, like he was stabbing him. I mean, he was on top of him. [Mr. Phillips] couldn't even get up.

RP 78. Soon after she saw the motions that caused her to think that Grubham was stabbing Mr. Phillips, Ms. Armour heard another female screaming, "Oh my God. He's stabbing him, he's stabbing him." RP 78. Grubham then tried to get up and yelled "Get off my leg, get off my leg." RP 78, 80-81.

Ms. Armour, however, stated that she never saw Mr. Phillips hit Grubham at all. RP 76. She also described that Mr. Phillips "was being attacked the whole time," and she never saw Mr. Phillips on top of Grubham. RP 80.

remember saying that. RP 237.

Another neighbor of Mr. Phillips, Robert Frederick, heard the events and got out of bed and opened his door. RP 58. Mr. Frederick said that the lighting wasn't "all that good," but that he saw Mr. Phillips and Grubham locked up on the ground, RP 58-59. He then heard someone say, "He's got a knife, he's got a knife," and then another voice said "My God, quit stabbing him." RP 60, 65. Mr. Frederick then looked closer and saw Grubham's arm rise and fall at least three times, although he couldn't see Grubham's hand (and thus couldn't see if he had a weapon). RP 60.⁷ Mr. Frederick described that although the two were "locked up," there were no blows being thrown and it appeared that Mr. Phillips was trying to let go of Grubham as Frederick saw Grubham's "forearm coming down." RP 60.

Tim Bautista, Ms. Armour's boyfriend, came out of his residence and witnessed part of the confrontation. RP 94. Mr. Bautista described that when he came outside he saw that Mr. Phillips was "laying pretty motionless face first down into the ground." RP 94. He also saw that Grubham was holding Mr. Phillips down and Mr. Bautista initially thought that Grubham was

⁷ Grubham testified at trial and did not deny stabbing Mr. Phillips, although he claimed he didn't realize at the time that he was stabbing Mr. Phillips. RP 201. Grubham also claimed that he didn't bring a weapon that night and that he must have grabbed some weapon off an air conditioner on Ms. Armour's porch, but that he didn't "really remember." RP 197. This testimony, however, was disputed by Ms. Armour and Mr. Bautista, who both explained that they did not keep knives or similar sharp objects on their porch, as they had small children. RP 84, 100.

punching Mr. Phillips, but he then got closer and saw that Grubham had a weapon and was stabbing Mr. Phillips. RP 94-95. Mr. Bautista described that Mr. Phillips was not fighting back. RP 94. Mr. Bautista then tried to pull Grubham off of Mr. Phillips and eventually was able to push Grubham off of Mr. Phillips. RP 95.

Grubham then got up and took off running. RP 96.⁸ Grubham did not stop and ask anyone for help and did not ask anyone to call the police. RP 81. Others at the scene, however, were screaming, “Oh my God, call 911.” RP 81. Mr. Phillips remained on the ground. RP 65.

Mr. Bautista went to assist Mr. Phillips and had to carry him to the front porch. RP 98.⁹ Mr. Phillips was bloody, and when his shirt was removed Mr. Bautista saw that Phillips was bleeding from his back, side, and chest. RP 98. One of the wounds near Mr. Phillip’s heart was bleeding “really bad,” so Mr. Bautista put a towel on this wound. RP 98. The wound near Phillips’s his heart was “squirting” blood. RP 82, 99. Mr. Bautista continued “hugging” Mr. Phillips with towels until an ambulance arrived. RP 82, 98.

⁸ See also, RP 81, where Ms. Armour described that when the confrontation ended, Grubham got up and “kind of stood there for a second,” and then took off running out of Ms. Armour’s driveway.

⁹ Mr. Bautista affirmed that Mr. Phillips was not “altogether there” at this point, and when asked if he was disoriented or weak, Mr. Bautista explained that he had to carry Mr. Phillips to the porch. RP 98, 100.

Officers from the Bremerton Police Department arrived at the scene and secured the scene so that an aid crew could attend to Mr. Phillips. RP 145-45. Officers also went to Grubham's residence looking for him and knocked on the door loudly several times and announced that they were there. RP 147-48. The officers, however, got no response from inside the house. RP 148. Officers later went to the residence again at 6:30 in the morning and at noon and knocked on the door and announced their presence, but got no response. RP 157-58, 164. Later, at approximately 2:45, the officer returned to the apartment and found Grubham. RP 165.¹⁰

Dr. Timothy Dahlgren, an emergency physician at Harrison Medical Center, treated Mr. Phillips for his injuries on the night of the assault. RP 117-20. Dr. Dahlgren found that Mr. Phillips had ten "penetrating injuries" to his chest and abdomen and one to his scalp. RP 121-29. These injuries were consistent with a knife wound, and the deepest wound measured 6 centimeters. RP 129-30. Dr. Dahlgren also stated that wounds of this nature were "absolutely" capable of causing death. RP 130.

¹⁰ Several knives were obtained from Grubham's residence, but at the time of trial the police were unable to determine if any of them had been used in the crime, as the knives had not yet been returned from the crime lab. RP 166-67.

III. ARGUMENT

- A. GRUBHAM'S CLAIM THAT THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT HE ACTED WITH THE INTENT TO INFLICT GREAT BODILY HARM AND TO DISPROVE SELF DEFENSE IS WITHOUT MERIT BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE SHOWED THAT: (1) GRUBHAM TOLD MR. PHILLIPS THAT HE WAS GOING TO KILL HIM AND STABBED HIM ELEVEN TIMES; AND (2) GRUBHAM DID NOT LAWFULLY ACT IN SELF-DEFENSE BECAUSE HE USED MORE FORCE THAN WAS REASONABLY NECESSARY AND BECAUSE GRUBHAM WAS NOT ENTITLED TO CLAIM SELF DEFENSE SINCE HE WAS THE FIRST AGGRESSOR WHO STRUCK THE FIRST BLOW.**

Grubham argues that the evidence was insufficient to show that he intended to inflict great bodily harm or that he did not act in self-defense. App.'s Br. at 7. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's

evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The relevant inquiry, therefore, is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), citing *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

Grubham first argues that the State failed to prove that he acted with intent to inflict great bodily harm. App.’s Br. at 8-9. In support of this claim, Grubham argues that his own testimony showed that: he was unaware that he himself was holding a weapon; he was only trying to get away; and, that Mr. Phillips was the aggressor. App.’s Br. at 9. In reviewing the sufficiency of the evidence, however, a reviewing court must review the evidence in a light

most favorable to the State. Grubham's arguments fail because his assessment of the evidence views the evidence in a light most favorable to the defense.

Viewing the evidence in a light most favorable to the State, the evidence was sufficient to show that Grubham acted with the intent to inflict great bodily harm. First, the uncontested evidence was that Grubham stabbed Mr. Phillips not once, not twice, but 11 times, causing ten "penetrating injuries" to his chest and abdomen and one to his scalp. RP 121-29. In addition, Mr. Phillips specifically testified that Grubham said that he was going to kill him. RP 33.¹¹ Given these facts, a reasonable juror could clearly infer that Grubham acted with the intent to inflict great bodily harm.

In addition, there was other sufficient evidence demonstrating that Grubham did not act in self-defense. First, the evidence below was such that a reasonable juror could have found that, even if Grubham was acting in self defense initially, the amount of force ultimately used by Grubham exceeded the amount of force that was reasonably necessary.¹² In short, a rational juror

¹¹ Furthermore, when Grubham eventually testified at trial he did not deny saying that he was going to kill Mr. Phillips, Rather, Grubham admitted it was possible but that he didn't know or didn't remember saying that. RP 237.

¹² RCW 9A.16.020 defines the lawful use of force:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

....

could have concluded that stabbing Mr. Phillips eleven times was unreasonable, especially in light of the testimony that:

Ms. Armour never saw Mr. Phillips hit Grubham at all, described that Mr. Phillips “was being attacked the whole time,” and she never saw Mr. Phillips on top of Grubham. RP 76, 80.

Mr. Phillips testified that he did not have a weapon and did not punch Grubham. RP 32-33.

Mr. Bautista testified that Grubham was stabbing Mr. Phillips during a time in which Phillips was “laying pretty motionless face first down into the ground,” that Grubham was holding Phillips down, and that Phillips was not fighting back. RP 94-95.

That the assault only stopped when Mr. Bautista pushed Grubham off of Mr. Phillips, and that by that time Mr. Phillips was in such a condition that he had to be carried to a nearby front porch. RP 95, 98, 100.

In addition, as explained in the next section, a rational juror could have concluded that State had disproved self-defense based on the fact that Grubham was the first to strike a blow and thus was the first aggressor (who

(3) Whenever 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 ... in case the force is not more than is necessary.

RCW 9A.16.010 defines “necessary”: “(1) ‘Necessary’ means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended.”

was not entitled to act in self-defense).¹³ Viewing the evidence in a light most favorable to the State, the evidence showed that Grubham was the aggressor and the one that initiated the physical fight. Mr. Phillips specifically testified that Grubham started the physical confrontation and testified that the physical confrontation started when Grubham “just stepped off” the porch and started stabbing Mr. Phillips in the chest. RP 28, 40. While the defense presented a contrary version of events, that fact is irrelevant when reviewing the sufficiency of the evidence, as the jury could simply have chosen not to believe the defense version of events.

Given all of these facts and viewing the evidence in a light most favorable to the State, the evidence was sufficient to show both that Grubham acted with the intent to inflict great bodily harm and did not act in self-defense.

¹³ Under Washington law, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

B. THE TRIAL COURT DID NOT ERR IN GIVING THE AGGRESSOR INSTRUCTION BECAUSE: (1) SUCH AN INSTRUCTION IS PROPER IF A JURY COULD HAVE REASONABLY DETERMINED FROM THE EVIDENCE THAT THE DEFENDANT PROVOKED THE FIGHT; THE EVIDENCE CONFLICTED AS TO WHETHER THE DEFENDANT'S CONDUCT PROVOKED THE FIGHT; OR THE EVIDENCE SHOWED THAT THE DEFENDANT MADE THE FIRST MOVE BY DRAWING A WEAPON; AND, (2) THERE WAS EVIDENCE PRESENTED BELOW THAT GRUBHAM PROVOKED THE FIGHT AND STRUCK THE FIRST BLOW BY DRAWING A WEAPON AND STABBING THE VICTIM.

Grubham next claims that he was denied his right to argue his theory of the case because the court gave a first aggressor instruction. This claim is without merit because the first aggressor instruction properly stated that law and was supported by the evidence. In addition, this issue may not be raised for the first time on appeal because Grubham did not object to the instruction below, nor can he show manifest constitutional error.

Jury instructions are sufficient if they are supported by substantial evidence, permit each party to argue his theory of the case, and properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002); *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Under Washington law, a court properly submits an aggressor instruction where (1) the jury can reasonably determine from the evidence

that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant's conduct provoked the fight; or (3) the evidence shows that the defendant made the first move by drawing a weapon. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999); *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

Grubham does not allege that the first aggressor instruction in the present case was an inaccurate statement of the law. Rather, Grubham argues that “there was no evidence that he provoked a fight.” App.’s Br. at 15. Grubham’s assessment of the evidence, however, is inaccurate as Mr. Phillips specifically testified that Grubham was the person who struck the first blow when he “just stepped off” the porch and started stabbing Mr. Phillips in the chest. RP 28, 40. The parties then fell to the ground and several witnesses reported that Grubham continued to stab Mr. Phillips even while Phillips was on the ground and not fighting back, as outlined above.

Given the evidence in the present case that Grubham initiated the fight by coming off the porch and drawing a weapon and stabbing Mr. Phillips, the trial court properly gave the aggressor instruction. Grubham’s assessment of the evidence and his conclusion that there was “no evidence that he provoked a fight” simply ignores the testimony of Mr. Phillips that Grubham was the one who started the fight. While the State concedes that there was conflicting evidence as to who struck the first blow, the aggressor

instruction is still proper even when the evidence is conflicting. *Riley*, 137 Wn.2d at 909-10. In addition, as long as there is some evidence that the defendant made the first move by drawing a weapon, the aggressor instruction is proper. *Id.*

Thus, in the present case the trial court did not err in giving the aggressor instruction because: the jury could have reasonably determined from the evidence that the defendant provoked the fight; the evidence conflicted as to whether the defendant's conduct provoked the fight; and the evidence showed that the defendant made the first move by drawing a weapon. As any one of these factors would have justified the aggressor instruction, the trial court did not err in giving the instruction below.

In addition, as Grubham acknowledges, he did not object to the aggressor instruction below. App.'s Br. at 13, citing CP 42. Grubham, therefore, is precluded from challenging this instruction for the first time on appeal unless he can show a manifest constitutional error. RAP 2.5(a)(3); *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). To determine whether an error is a manifest constitutional error, this court is to apply a four-step process: (1) the court must first determine whether the alleged error is in fact a constitutional issue; (2) next, the court is to determine whether the error is manifest, that is, whether it had "practical and identifiable consequences"; (3) the court then is to address the merits of the constitutional

issue; and (4) finally, the court is to pass upon whether the error was harmless. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); *See also, State v. Barr*, 123 Wn. App. 373, 381, 98 P.3d 518 (2004), *review denied*, 154 Wn.2d 1009 (2005). An error is “manifest” if it had “practical and identifiable consequences in the trial of the case.” *Lynn*, 67 Wn. App. at 345, 835 P.2d 251.

In the present case, Grubham cannot show a manifest constitutional error because, as outlined above, the trial court did not err in giving the aggressor instruction.

For all of these reasons, Grubham’s claim (that the trial court erred in giving the aggressor instruction) is without merit.

C. GRUBHAM’S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE GRUBHAM HAS FAILED TO SHOW THAT HIS ATTORNEY’S PERFORMANCE WAS DEFICIENT AND THAT THE DEFICIENT PERFORMANCE WAS PREJUDICIAL.

Grubham next claims that his trial counsel provided ineffective assistance of counsel by failing to object to the first aggressor instruction and by failing to object during the prosecutor’s closing argument. This claim is without merit because the instruction was an accurate statement of the law and failing to object to a jury instruction that is an accurate statement of the

law cannot be ineffective assistance, and because the prosecutor's statements in closing (when viewed in their proper context) were not improper. In addition, even assuming any of the comments were arguably improper, the failure to object was a legitimate trial strategy (that cannot support a claim of ineffective assistance), and the failure to object caused no prejudice.

It is well settled that an appellate court is to give great judicial deference to trial counsel's performance and is to begin the analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant is prejudiced where there is a reasonable probability that, but for the deficient performance, the outcome of the case would have differed. *In re Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant must prove both prongs of the test in order to prove ineffective assistance of counsel. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, *review denied*, 150

Wn.2d 1024, 81 P.3d 120 (2003).

In addition, failing to object to a jury instruction that is an accurate statement of the law and is properly presented to the jury cannot be ineffective assistance. *State v. Davis*, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992); *State v. McGinley*, 18 Wn. App. 862, 865, 573 P.2d 30 (1977). Furthermore, “jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law.” *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999) (quoting *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990)).

As outlined in the previous section, the aggressor instruction in the present case was an accurate statement of the law and was supported by the evidence, thus the trial court properly gave the instruction to the jury. Failure to object to this instruction, therefore, cannot be ineffective assistance.

With respect to the prosecutor’s closing argument, Grubham alleges that defense counsel was ineffective for failing to object to certain arguments made by the prosecutor below. This argument is without merit, however, because a decision not to object during summation is within the wide range of permissible professional legal conduct, and legitimate trial tactics or strategy cannot be the basis of an ineffective assistance of counsel claim. In addition, Grubham has failed to show that the comments at issue were improper or that

an objection to the comments would have been sustained, and he also has failed to show any prejudice.

Under Washington law, legitimate trial tactics or strategy cannot be the basis of an ineffective assistance of counsel claim. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). A trial counsel's decision about whether to object is a classic example of trial tactics and only in egregious circumstances will the failure to object constitute incompetent representation that justifies reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show (1) the absence of legitimate strategic or tactical reason for not objecting, (2) that the trial court would have sustained the objection if made, and (3) the result of the trial would have differed if the evidence had not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

In addition, the Washington Supreme Court has held that attorneys do not commonly object during closing argument “absent egregious misstatements,” and that a decision not to object during summation is within the wide range of permissible professional legal conduct. *In re Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004), citing *United States v. Necochea*, 986 F.2d 1273, 1281 (9th Cir.1993).

Thus, in the present case defense counsel could have chosen not to object as a matter legitimate trial tactics or strategy. Such a decision, therefore, cannot support a claim of ineffective assistance of counsel. In addition, the comments that Grubham now complains of were not improper, which further explains why counsel did not object.

Grubham essentially identifies three topics raised during the State's closing that he now claims were objectionable. First, Grubham argues that the prosecutor improperly encouraged the jury to not "over emphasize" the demeanor of the witnesses. The actual argument, in its full context was as follows:

And when you are looking at all of the witnesses, you should consider—you can consider what they say and how they say it, but what I want you to make sure you don't do is overweigh one thing versus the other. People have a tendency to think, well, you know, I saw that witness, I think I know something about that witness, kind of play Dr. Phil. If you go back into the jury room and say, wait, I don't think Witness X is the type of person to do Y, then I think you have overplayed demeanor and not considered what was said. You have seen a very small portion of each one of these people. You don't know them. You can't sit there and say I don't think this is the type of person to lie. You don't know them. I want you to consider what they say.

RP 269. This argument, given its proper context, did little more than encourage the jury to consider the actual testimony of each witness when the jury makes its determinations about each witness's credibility. There is

simply nothing improper about such an argument. The prosecutor did not tell the jury that demeanor could not be considered, rather the prosecutor specifically said that the jury “can consider what they say and how they say it.” The thrust of the prosecutor’s argument was merely that the jury should not speculate as to the character of the witnesses and base their assessment of a witnesses credibility on feelings that the “know” the witness. Rather, the jury should consider both the demeanor and the actual statements of the jury in assessing credibility. Nothing about this argument is improper.

Grubham next complains that the prosecutor improperly argued that Grubham had a motive to lie. App.’s Br at 6. This claim, however, is without merit because a prosecutor has the right to draw reasonable inferences from the evidence, including that a witness's testimony was not credible and that he had a motive to lie. *State v. Adams*, 76 Wn.2d 650, 660, 458 P.2d 558 (1969)(prosecutor may remark that jury should consider a witness's interest in a case in evaluating the witness's credibility and that a person charged with a crime has a good motive to lie), *rev'd on other grounds*, 403 U.S. 947, 91 S. Ct. 2273, 29 L. Ed. 2d 855 (1971). A defendant who chooses to testify places his credibility at issue, and the prosecutor should be at liberty to impeach a testifying defendant's credibility in the same manner in which he could impeach any witness's credibility by drawing the jury's attention to the fact that the witness has an interest in the outcome of

the case. In short, Grubham has failed to show that the remarks at issue were improper.

Grubham next argues that the prosecutor improperly argued that Grubham's flight from the scene was evidence of his guilt. Grubham, however, has again failed to show that the prosecutor's remarks were objectionable, because under Washington law the State may properly argue that the evidence of flight following the commission of a crime is evidence of consciousness of guilt. *See, e.g., State v. Porter*, 58 Wn. App. 57, 62, 791 P.2d 905 (1990).

Finally, Grubham argues that the prosecutor improperly stated that he personally believed that Grubham was guilty when he stated "I think you should find the defendant guilty of assault in the first degree. I think that what's he did." App.'s Br. at 30-31, citing RP 285. When the full context of this statement is reviewed, however, it is clear that the prosecutor's intent was not to express a personal opinion, but rather the comment was merely a brief aside made when the prosecutor was explaining to the jury how it was to deal with the rather complicated instructions regarding a lesser included offense (after having just explained the special verdict forms for the weapon enhancement):

To complicate things even more, on Count I, you first look at assault in the first degree. I think you should find the

defendant guilty of assault in the first degree. I think that's what he did. But if you think he's not guilty of assault in the first degree or if you can't agree, then you say, okay, well, is it assault in the second degree?

RP 285. This comment also came after the prosecutor had gone through the evidence at trial in great detail explaining why the evidence supported a finding of guilt without ever stating or implying that the jury should base its verdict on any personal feelings of the prosecutor. See RP 256-85. In addition, the Washington Supreme Court has also addressed remarks similar to the remark at issue in the present case and found no error.

For instance, in *State v McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006), the Court explained that it has long recognized that a prosecutor may not properly express an independent, personal opinion as to the defendant's guilt. The Court noted, however, that,

While it is improper for a prosecuting attorney, in argument, to express his individual opinion that the accused is guilty, independent of the testimony in the case, he may nevertheless argue from the testimony that the accused is guilty, and that the testimony convinces him of that fact.

In other words, there is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.

McKenzie, 157 Wn.2d at 53, citing *State v. Armstrong*, 37 Wash. 51, 54-55, 79 P. 490 (1905). The Court then went on to explain that to determine

whether the prosecutor is expressing a personal opinion of the defendant's guilt, independent of the evidence, a reviewing court views the challenged comments in context, and noted that,

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.

McKenzie, 157 Wn.2d at 53-54, citing *State v. Papadopoulos*, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983).

The Court in *McKenzie* went on to give an example of such a “clear and unmistakable” expression of a personal opinion, and cited to *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956), where the prosecutor made a personal appeal to the jury and explicitly acknowledged that he was offering his own opinion, stating, “I mean, that is my opinion about what this evidence shows and how clearly this evidence indicates that this girl has been violated.” *McKenzie*, 157 Wn.2d at 54, citing *Case*, 49 Wn.2d. at 68.

In the present case, the record below (when judged in the light of the total argument, the issues in the case, the evidence discussed during the

argument, and the court's instructions) shows that the prosecutor was merely trying to explain the lesser included instruction and make certain that the jury understood that the State was not conceding that Grubham had not committed the greater offense. In addition, the record as a whole shows that the prosecutor's argument regarding Grubham's guilt was not put forth as a personal opinion but rather was the argument of an advocate who was trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. The comments below did not constitute prejudicial error because it was never "clear and unmistakable that counsel [was] not arguing an inference from the evidence, but [was] expressing a personal opinion." *McKenzie*, 157 Wn.2d at 53-54.¹⁴

Grubham, therefore, cannot show that the prosecutor's arguments were improper or that an objection to the arguments would have been sustained, even if counsel had objected. In addition, because the arguments were proper, Grubham can show no prejudice.

¹⁴ In addition, even if the prosecutor's brief comment was objectionable, Grubham has failed to show that his counsel may have simply chosen, as a legitimate trial strategy, not to interrupt the prosecutor's closing argument to object to this brief comment. Stated another way, defense counsel may have decided that the prosecutor's comment was not meant to be an expression of his personal opinion to the extent that it would have had any influence on the jury, and that objecting may have called undue attention to an offhand remark. Further, defense counsel may have reasonably concluded that the jury might have been displeased with such an objection when it was clear from the whole of the State's closing that the prosecutor was not asking the jury to convict just because the prosecutor personally believed that Grubham was guilty. Thus, given the entirety of the State's closing, such an objection could well have been viewed as silly or petty.

For all of these reasons, Grubham's claim of ineffective assistance of counsel must fail.

D. GRUBHAM'S CLAIM OF PROSECUTORIAL MISCONDUCT MUST FAIL BECAUSE: (1) HE HAS FAILED TO SHOW THAT THE PROSECUTOR MADE ANY IMPROPER COMMENTS DURING CLOSING ARGUMENT; AND, (2) EVEN IF ANY OF THE COMMENTS WERE IMPROPER WHEN VIEWED IN ISOLATION, GRUBHAM HAS FAILED TO SHOW THAT THE MISCONDUCT WAS SO FLAGRANT AND ILL INTENTIONED THAT NO CURATIVE INSTRUCTION WOULD HAVE OBIATED THE PREJUDICE IT ENGENDERED.

Grubham next claims that the prosecutor committed misconduct. This claim is without merit because Grubham has failed to show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial.

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). The defendant bears the burden of proving improper conduct and prejudice. *Hughes*, 118 Wn. App. at 727. Furthermore, a prosecuting attorney has wide latitude in closing argument to draw reasonable inferences

from the evidence. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986). On appeal, a court is to view the allegedly improper statements within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established if there is a substantial likelihood that the misconduct affected the verdict, thereby denying the defendant a fair trial. *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). In general, a reviewing court is to presume that juries follow instructions to disregard improper evidence. *State v. Russell*, 125 Wn.2d 24, 84, 882 P.2d 747 (1994).

As outlined above, all of the comments that Grubham challenges were entirely proper, and Grubham has failed to show any instances of prosecutorial misconduct or prejudice.

In addition, Grubham failed to object at trial to any of the comments at issue. When a defendant fails to make a proper objection at trial, a defendant cannot then raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). The fact that defense counsel did not object to the prosecutor's statement also "suggests that it was of little moment in the trial." *State v. Rogers*, 70 Wn. App. 626, 631, 855 P.2d 294

(1993).

In short, Grubham has failed to show that the prosecutor made any improper remarks in his closing argument. In addition, even if any of the comments was arguably improper in isolation, the comments when viewed in the proper context demonstrate no error or prejudice, and this conclusion is bolstered by the fact that defense counsel raised no objections below.

Furthermore, even if any of the comments had been improper, Grubham has failed to show so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered. Rather, the jury in the present case was instructed that they were the sole judges of credibility and that the lawyer's statements were not evidence and could be disregarded if not supported by the evidence. CP 22, *McKenzie*, 157 Wn.2d at 57, n. 3. Thus, even if this court were to consider any of the prosecutor's comments improper, when placed in the context of the whole argument and the court's prior instructions to the jury, the challenged comments do not rise to the level of prejudice required for a new trial. *McKenzie*, 157 Wn.2d at 57.

For all of these reasons, Grubham's claim of prosecutorial misconduct is without merit.

IV. CONCLUSION

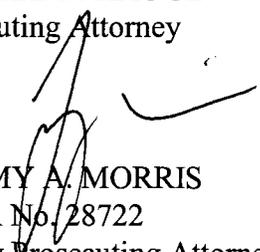
For the foregoing reasons, Grubham's conviction and sentence should

be affirmed.

DATED August 6, 2010.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
WSBA No. 28722
Deputy Prosecuting Attorney

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