

COURT OF APPEALS
DIVISION II
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40366-8-II

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

State of Washington
Respondent

v.

JOHN A. GALDAMEZ
Appellant

40366-8-II

On Appeal from the Superior Court of Pierce County

Cause No. 09-1-00905-0

The Honorable RONALD E. CULPEPPER

BRIEF OF APPELLANT

Law Office Of Jordan McCabe
P.O. Box 6324, Bellevue, WA 98008
425-746-0520~jordan.mccabe@yahoo.com

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I. **ASSIGNMENTS OF ERROR AND ISSUES**

A. **Assignments of Error**

1. The jury instructions relieved the State of its burden to prove all the elements of attempted murder in violation of Const. art. 1, § 22 and the Fifth and Fourteenth Amendments.
2. The court violated Const. art. 1, § 22 and the Fifth and Fourteenth Amendments by giving a “first aggressor” instruction that relieved the State of its burden to prove the absence of self-defense beyond a reasonable doubt after Appellant established that sufficient evidence supported his claim.
3. The court’s “first aggressor” instruction commented on the evidence in violation of Const. art 4, § 16.
4. Appellant was convicted of unlawful possession of a firearm on insufficient evidence.
5. The State infringed on Appellant’s Fifth Amendment right to remain silent by commenting on the fact that he did not testify.
6. Appellant was denied a fair trial and the presumption of innocence when the prosecutor implied that the State’s witnesses were afraid of him.
7. Appellant was denied the effective assistance of counsel in violation of Wash. Const. art 1, § 22 and the Sixth Amendment.
8. The prosecutor committed reversible misconduct.
9. The sentencing court abused its discretion by relying on inadmissible evidence and failing to consider a key mitigating factor.

B. Issues Pertaining to Assignments of Error

1. The jury was not correctly instructed as to the essential element of intent to kill.
2. The “first aggressor” instruction deprived Appellant of his right to have a jury decide his self-defense claim and constituted a comment on the evidence.
3. The evidence was insufficient to prove the predicate felony to support his conviction for unlawful possession of a firearm.
4. The prosecutor commented on Appellant’s exercise of his right not to testify.
5. The prosecutor unlawfully implied that the State’s witnesses were reluctant to testify out of fear of Appellant.
6. Appellant was denied a fair trial and received ineffective assistance of counsel when defense counsel failed to object to the wholesale admission of damaging hearsay.
7. Appellant was denied a fair trial and received ineffective assistance of counsel when defense counsel failed to object to the prosecutor’s direct examination of a key State’s witness that was impermissibly leading and introduced unsubstantiated and inflammatory innuendo.
8. The prosecutor’s flagrant disregard for the rules of evidence constituted reversible misconduct.
9. The sentencing court failed to consider a key mitigating factor.

II. STATEMENT OF THE CASE

Appellant John A. Galdamez was convicted by jury of attempted second degree murder (Count I), and first degree assault (Count II), both committed while armed with a firearm, and one count of first degree unlawful possession of a firearm (Count III). CP 81-86; RP 6.

The charges arose out of a bar fight at a club called Latitude 84 in Tacoma that culminated in Galdamez's shooting Steven Ruth once in the middle of the chest with a .25 caliber gun. Ruth survived. The premises of Latitude 84 were monitored by 24 security video cameras, several of which recorded various aspects of the shooting and the events leading up to it. These videos featured prominently in the trial.

Galdamez pleaded self-defense. RP 16. Galdamez also asserted the alternative defense of general denial to Count I. On Count II, the jury was instructed on the lesser included offense of second degree assault. RP 17-18; CP .

The evidence at trial consisted of testimony from several eye-witnesses, two police officers who interviewed people at the scene, and a detective who later conducted a half-hearted investigation.¹

Counsel signaled early on that both regarded the rules of evidence as optional. Defense counsel Lapin, anticipating that the State would

¹ The inadequacy of this investigation was one of the few undisputed facts. See RP 586.

present its police witnesses first, announced his intention to ask the officers about “prior inconsistent” statements by alleged victim Steven Ruth and Ruth’s girlfriend Teuila Johnson, both of whom would testify later. RP 19-20. Lapin reasoned that Ruth’s and Johnson’s out-of-court statements to police would be admissible if they had already testified, as either prior consistent or inconsistent statements, and that pretending their testimony had already occurred would spare the officers the trouble of having to return to court. The prosecutor had no objection, because he suspected there were several exceptions to the hearsay rule that applied. RP 21.

The police witnesses testified freely about the substance of oral and written statements they took at the scene. Both counsel questioned the lay witnesses about their out-of-court statements to the police.

Both counsel walked the lay witnesses through various video clips showing different locations inside and outside the bar and in the parking lots. Counsel stopped and started the video, usually stating the precise minute and second for the record, and asked the witnesses what they thought was happening at that point. There was no audio.

Despite being documented from several camera angles, the story of how the confrontation developed was disputed.

It appeared Ruth and Galdamez were regulars at Latitude 84. RP 121, 383. Galdamez was sitting at the inside sipping a beer when the video showed Ruth walk up and start saying something to him. RP 389. Ruth claimed he merely made an innocuous comment about that night's bar population in general and Galdamez took it personally. The video showed an associate of Ruth's known as "T Reed" put a restraining hand on Ruth and pushed him back, while Galdamez looked away, seemingly indifferent. RP 391, 397-98. Ruth conceded he was more aggressive than Galdamez during this initial interaction. RP 398. Then the video showed Ruth walk outside to the smoking area where Ms. Johnson and Reed tried to calm Ruth down. RP 393.

Later, Ruth headed outside with two other men, and Galdamez signaled for two men to follow him outside also. RP 402. The two took the dispute outside by mutual agreement. RP 106, 352-53.

Outside the front door, the video again shows Reed restraining Ruth. Ruth appears to be saying something to Galdamez, and some jawing back and forth takes place between the two. RP 403-04. Shortly after that, Ruth and Cutta walked to the corner of the building, followed by Galdamez. This was a 'dead zone' where an awning blocked the camera's view, but their feet were visible and it appeared some physical activity was going on which could possibly have been a physical

altercation. RP 304. Ruth testified that things did “get physical” at the corner. RP 405, 406. Kila also testified that there was some sort of physical altercation here. RP 102.

After this, the video showed that Ruth withheld from his statements to the police an approximately five-minute gap that culminated in his going out with Cutta apparently to retrieve something from Cutta’s car. RP 312. Ruth and Cutta crossed the parking lot to Cutta’s car and opened the trunk. RP 407. The video did not show what they were doing and Ruth could not remember. Cutta did not testify. Cutta and Ruth sat in the car for a while before heading back toward the bar, which happened to be in the direction of Galdamez’s car. RP 415. The video shows Ruth pounding his fist into the palm of his hand. RP 416. Galdamez also had gone out to his own car a few minutes before and was sitting in his car as Cutta and Ruth men approached. RP 309-10, 325. Teuila Johnson went out and spoke briefly to Galdamez. Ruth and Cutta were joined by Reed, and the three went to the front of the building. RP 309-10.

Then the video showed Galdamez punch Ruth, knocking his hat off. Ruth threw a couple of punches of his own. RP 324, 333. Ruth reached to his waist two or three times, claiming his pants were falling down. RP 351, 413. The pair then staggered about eight feet apart, at which point, Galdamez took the gun from his waistband and fired one shot

at Ruth, hitting him in the chest. Ruth did not know he was hit, but fell down. Galdamez tried to kick him and was stopped by Kila. RP 108. Galdamez walked to his car and drove away. RP 187.

Latitude 84 bouncer, Thor Kila, testified that he “saw a fist flying” before other people got involved and separated the two. RP 64, 73. The combatants walked away from each other but started again a minute or so later. RP 74.

It was during this second confrontation that the shooting occurred. Kila testified that he was concerned that Ruth’s friends were going to “jump” Galdamez and Kila yelled that nobody should jump him. RP 79-80. also RP 105-06, 116. Kila agreed that the video showed Galdamez throwing a punch. RP 82. Kila heard the “pop” as the gun fired and saw a shiny object in Galdamez’s hand. He was not sure at the time it was a gun and did not see where it came from. RP 83-84. Galdamez then walked calmly to his car and drove away. RP 85, 87.

Without objection, the State’s direct examination of Kila took the form of asking a question and using the answer as a gateway to introduce into the record the evidence the prosecutor wanted from Kila’s out-of-court statements. The prosecutor first impeached Kila with a four-line statement he wrote at the scene. “Why don’t you read us what you wrote?” Kila read: “ I witnessed an altercation between two patrons

which were arguing and proceeded to fight which one took a pistol out of his pocket and then shot the other one, then fled the scene.” RP 90.

Confronted with the inconsistency, Kila explained that he saw the gun and just assumed Galdamez had taken it from his pocket, but upon reflection, he did not actually witness where the gun came from. RP 90-91.

The direct examination of Kila then drifted from his written statement to his oral statements to the officer at the scene. RP 91-92. Confronted with inconsistencies between the officer’s report and his trial testimony, Kila explained that he tried to be forthright during the interview but (a) he may not have expressed himself clearly, and (b) the officer’s report was not completely faithful to what he actually said. Kila’s manner of speaking bears witness that his explanation was plausible: “[T]here was, like, some discrepancies, which I don’t remember telling the police officer what he had wrote down on that too.” RP 91.

Despite Kila’s having admitted the prior statement and explained the inconsistencies, the prosecutor nevertheless proceeded to question Kila, without objection, about his prior statements. RP 92-93.

Specifically, the prosecutor asked Kila whether Galdamez and Ruth balled up their fists and appeared ready to continue the fist fight right before the shot. Kila denied having said this. RP 113. On cross, Kila explained that he had watched the video immediately before court in the

prosecutor's office for the first time in ten months, but that, in his testimony, he was trying to tell what he remembered before he saw the tape. RP 96.

The prosecutor opened his redirect examination of Kila with:

Q: Mr. Kila, you were reluctant to come in today, weren't you?

A: I can say yes. Yes, I was.

Q: You didn't want to come forward at all, did you?

A: ... no, I didn't want to be here.

Q: Why not?

RP 112. Defense counsel objected but, after a sidebar, the court invited the prosecutor to ask the question again, which he did. RP 113. Kila said he did not want to think about the incident again and have to point fingers at anybody. The prosecutor reemphasized that Kila did not want to point fingers. RP 113. The State also elicited, over a defense objection, that Ruth too was a reluctant witness. RP 337.

Kila testified that he was concerned for Galdamez because he was in a four-against-one situation. Ruth was backed by "T Reed", "Cutta", and a man known as both "Junior" and "Jared". Galdamez was alone. RP 98-100.

The State later recalled Kila to suggest that, when he spent a day and a night with Galdamez after the incident,² Galdamez showed him any discovery and they conspired to fix Kila's testimony. Kila denied this and said Galdamez showed him only his four-line written statement. Nevertheless, without objection, the prosecutor resumed impeaching Kila with the oral police interview, specifically his failure to mention the earlier physical altercation out front. RP 465-66.

The police circulated Galdamez's description, and Officer Christopher Shipp spotted him in the neighborhood a couple of hours later and took him into custody. Galdamez gave his true name and was cooperative. RP 237-38.

Tacoma Police Officer Nicholas Jensen responded to Latitude 84 ad 45 minutes past midnight. RP 175. He interviewed Ruth, Teuila Johnson, Kila, and the bar manager Sesilia Thompson. He did not tape these interviews. RP 182. He did not take notes. Forty-five minutes after concluding the initial investigation, Jensen sat in his patrol car and wrote up a report including his recollection of what the eye-witnesses had said. RP 202-03. Besides interviewing Kila, Jensen had secured the scene, talked to Ruth and Sesilia Thomas, identified other people, and watched

² In jail, but the jury was not told this.

the video before writing his report. Yet Jensen was positive his recollection of Kila's precise words was perfect. RP 209.

Jensen testified, without objection, to oral statements made to him by various participants. Most damaging, he testified that Ruth told him his initial contact with Galdamez was an innocuous remark that everybody seemed very emotional that night. RP 179-87. Jensen said that Kila definitely said he saw Galdamez pull a gun out of his pocket. RP 184. Jensen said Kila said he saw Galdamez swing at Ruth, and that Kila clearly understood they were talking about what happened in the parking lot, not at some earlier point. RP 184.

In response to a leading question, Jensen testified that Kila told him the two men separated after punching each other and that they then "balled up their fists like they were going to continue to fight." Again, Jensen claimed to know that there was no confusion in Kila's mind about this, and again, there was no objection. RP 185.³ Jensen said Kila mentioned a short argument inside the bar but did not say Galdamez and Ruth physically connected except for the shooting incident. RP 186. He continued reciting hearsay from Kila without objection through page RP 187.

³ Jensen thought that because he was not confused, nobody could have been confused, which indicated the hearsay was reliable. RP 184, 185.

Lead detective Louise Nist testified that she viewed most of the video in fast forward mode. She interviewed Ruth in the hospital and repeated for the jury, without objection, Ruth's version of the shooting according to what he told her. RP 251.

After the State rested, defense counsel moved to dismiss Count III, the unlawful possession of a firearm charge. RP 474. The State reopened its case and produced a Judgment and Sentence in the name of John Alexander Galdamez to prove the firearm possession was unlawful. Defense counsel argued there was no evidence that the Judgment and Sentence referred to the same Galdamez. RP 474. The Court denied the motion and suggested counsel could argue identity to jury. RP 475.

The jury found Galdamez guilty on all charges. CP 81-86. At sentencing, the court dismissed Count II. 2/19 RP 3. The court sentenced Galdamez to the high end of the standard range. That was 175 months on Count I with a 60- months weapon enhancement, for a total of 235 months plus a concurrent high end standard range sentence of 41 months on Count III. 2/19 RP 14.⁴

Galdamez timely appealed. CP 87.

⁴ The verbatim report of proceedings is in four continuously paginated volumes containing pretrial motions on January 26 and 27, 2010, and the trial dates of February, 1, 2, 3, and 5, 2010. These are denoted RP. The sentencing hearing on February 19, 2010, is denoted 2/19 RP.

III. ARGUMENT

1. THE JURY WAS RECEIVED AN INSUFFICIENT INSTRUCTION ON THE ESSENTIAL ELEMENT OF INTENT TO KILL.

The court instructed the jury as follows:

Instr. 9: A person commits the crime of attempted murder in the second degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

Instr. 10: A substantial step is conduct, that strongly indicates a criminal purpose and which is more than mere preparation.

Instr. 11: A person commits the crime of murder in the second degree when 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 unless the killing is excusable or justifiable.

Instr. 12: A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

Instr. 13: To convict the defendant of the crime of attempted murder in the second degree... the following elements must be proved...

(1) that... the defendant did an act that was a substantial step toward the commission of murder in the second degree;

(2) that the act was done with the intent to commit murder in the second degree....

CP 49-52.

From Instr. 11, the jury would understand that the act of firing a gun at Ruth would constitute the completed crime of murder only if Galdamez intended to cause the death of Ruth when he fired the gun. But Instruction 9 tells them he is guilty of the attempt merely by doing an act that constituted a substantial step toward causing the death of Ruth with no mention of intent. Instr. 10 defines a substantial step as conduct, which the prosecutor repeatedly defined as firing the gun. RP 499-500.

Taken together, Instructions 9 and 10 can logically be read to say that Galdamez is guilty of the crime of attempted murder if he fired the gun, without regard to his intent. This erroneous statement of the law is reinforced by Instr. 12, which also leads to the conclusion that the intent element is satisfied by intentionally firing the gun.

And the prosecutor reinforced this erroneous interpretation of the law by specifically telling the jurors (twice) that the intent element was satisfied merely by a finding that Galdamez intended to fire the gun. The court sustained a defense objection that the prosecutor was misstating the intent element by saying Galdamez was guilty if firing the shot was intentional, rather than the injury. RP 585. The prosecutor immediately repeated the error, and counsel objected again, but the court overruled the second objection without explanation. So the prosecutor again stated:

“Well, I think you get the point. He intended an act which cause [sic] or creates a probability of death. Of course he did. It’s clear as day, clear as day. And so if you have an abiding belief in that, then he’s guilty of those charges.” RP 585-86. Read together with Instr. 9–12, the to-convict instruction, Instr. 13, does not mitigate the error. CP 53. It simply reiterates Instr. 9.

We know the jurors struggled with this during deliberations, because they sent out a note asking for the court’s help in figuring out whether firing a gun at someone implies intent to kill as a matter of law. CP 36-37. Instead of providing the sorely needed instruction, the court merely referred the befuddled jurors to the “instructions previously provided.” But those instructions do not answer the question. What they needed to hear was: “No. Firing a gun is only a guilty act. You must also find it was done with the guilty state of mind of intent to cause death.”

The inadequate instructions diminish confidence in the verdict, because it is not clear that all the jurors found all the essential elements of attempted murder. Rather, the instructions allowed the jury to convict Galdamez without finding the requisite intent. And the State’s argument, coupled with the court’s overruling of a defense objection, encouraged them to do so. Therefore, the conviction cannot stand.

The remedy is to vacate the conviction and remand for a new trial.

2. THE “FIRST AGGRESSOR” INSTRUCTION DEPRIVED GALDAMEZ OF HIS RIGHT TO HAVE THE JURY DECIDE HIS SELF-DEFENSE CLAIM AND CONSTITUTED A COMMENT ON THE EVIDENCE.

Defense counsel challenged the propriety of the State’s proposed “first aggressor” instruction. RP 478-87. The question presented is whether the jury was properly instructed on what “first aggressor” actually means.

Instructions are sufficient when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). It is error to give an instruction that is not supported by the evidence. *Ager*, 128 Wn.2d at 93. The appellate court evaluates the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

The court instructed Galdamez’s jury as follows:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon use, offer or attempt to use force upon or toward another person.

Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Instr. No. 32, CP 72. This comes verbatim from II *Washington Pattern Jury Instructions; Criminal*, 16.04 (2d ed. 1994) (WPIC).

The question presented is whether the evidence supported the giving of this instruction or whether it impermissibly signals to the jury a particular view of the evidence.

The instruction correctly recites the general rule that the right of self-defense cannot be invoked by one who provokes an altercation. *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). Where there is credible evidence from which a jury could reasonably find that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. *State v. Hughes*, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986); *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). The instruction was appropriate, however, only if there was substantial evidence that Galdamez provoked the fight. *See, State v. Riley*, 137 Wn.2d 904, 906, 976 P.2d 624 (1999). That was lacking here.

There was no substantial evidence that Galdamez provoked the fight unless — as the State argued and the court's instruction presumes — the ultimate exchange of hostilities was an isolated incident with a discreet

starting point that occurred when Galdamez punched Ruth outside the club.

But the overwhelming evidence showed that Galdamez was minding his own business, sipping a beer in the bar, when Ruth initiated hostilities by approaching Galdamez and making an offensive remark. The security video has no audio, but the video portion clearly shows that, despite Ruth's self-serving testimony to the contrary, his remark and confrontational posture elicited an immediate defensive response from Galdamez. The video shows, and Ruth conceded, that Ruth was the one who was acting aggressively at the beginning and that he had to be restrained. The irrefutable video evidence showed that Ruth started out belligerent and remained belligerent until the episode's unfortunate conclusion.

The prosecutor exacerbated the prejudicial effect of the questionable instruction when, in closing argument, he repeatedly instructed the jury not to consider the entire course of events in deciding whether or not Galdamez's punch during the final phase was the first aggressive act. RP 580; 582-83. Defense counsel made a record that this argument misstated the law exactly the way counsel had argued it would when he objected to it during preparation of the instructions. RP 592.

Any evidence tending to show the defendant acted in self-defense triggers the State's burden to disprove self-defense beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). A defendant cannot be deprived of his right to assert that defense unless no credible evidence — as interpreted strongly in the defendant's favor — supports his self-defense claim. *State v. Williams*, 93 Wn. App. 340, 348, 969 P.2d 106 (1998). Accordingly, the aggressor instruction is disfavored and is never warranted where, as here, both sides can argue their theories of the case without it. *Riley*, 137 Wn.2d at 910, n.2, citing *State v. Arthur*, 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985). Our courts generally recognize that the aggressor instruction should be given only with great care because it impacts the defendant's claim of self-defense and relieves the State of its burden of disproving it beyond a reasonable doubt. *Riley*, 137 Wn.2d at 910, n.2.

This is especially true here, because it is debatable what constituted an aggressive act under the particular circumstances. The situation is analogous to that in *State v. Wasson*, 54 Wn. App. 156, 772 P.2d 1039 (1989), where giving the first aggressor instruction was held to have been error because it deprived the defendant of a viable self-defense claim that was supported by the evidence. *Wasson*, 54 Wn. App. at 160. Likewise, here, there was ample evidence from which the jury could have

found that Ruth, not Galdamez, was primarily — or at least equally — responsible for provoking and exacerbating the situation during the development phase. That evidence entitled Galdamez to have the jury consider all the facts in light of his claim of self defense and the State’s burden of proof. *McCullum*, 98 Wn.2d at 488. It was, therefore, reversible error to give the instruction.

Comment on the Evidence: Moreover, Const. art 4, § 16 prohibits a judge from communicating to the jury a personal attitude toward the case. (“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Const. art. 4, § 16. An impermissible comment on the evidence can occur when a judge inaccurately states the law applicable to an issue in the case. *City of Seattle v. Smiley*, 41 Wn. App. 189, 192, 702 P.2d 1206 (1985).

Here, the jury could have perceived the first aggressor instruction as incorporating a particular view of the evidence — namely, that the only way to provoke a belligerent response is to punch someone in the nose. This unfairly narrowed the disputed facts to whether the punches caught on camera were the only punches thrown that night. If so, then Galdamez was the first aggressor and the jury need not consider his claim of self-defense. But Galdamez had the right to have the jury decide whether Ruth

was spoiling for a fight and deliberately instigated hostilities with his words and belligerent attitude in the inside bar.

At sentencing, the same judge recognized that the incident took place over time, not just at the end, and that provocative words and injured pride were important considerations in understanding the events of that night, given the cultural milieu of Latitude 84. 2/19 RP 12-13.

Giving the first aggressor instruction was error because it short-circuited the jury's due consideration of all the evidence and thereby deprived Galdamez of a fair trial. Reversal is required.

3. THE EVIDENCE WAS INSUFFICIENT TO PROVE UNLAWFUL POSSESSION OF A FIREARM.

The evidence is sufficient to support a conviction only if a rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably to be drawn from it. *Thomas*, 150 Wn.2d at 874. Insufficient evidence requires dismissal of the charge with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

Here, viewed in the light most favorable to the State, the evidence is insufficient as a matter of law to establish the essential elements of unlawful possession of a firearm as charged in Count III.

The State offered a ten-year-old Judgment and Sentence for burglary in the name of a person called John Alexander Galdamez to prove that the defendant's possession of a gun was unlawful. RP 472.⁵ The defense moved to dismiss this count at the close of the evidence, because the State had not introduced any evidence that the defendant was the person named in the alleged Judgment and Sentence and had not, therefore, proved the elements of unlawful possession beyond a reasonable doubt. The court erroneously denied the motion to dismiss.

Where a prior conviction is an element of the substantive crime currently charged, identity of names alone is not proof of the identity of a person sufficient to warrant the court in submitting a prior judgment to the jury. Rather, the State must produce independent evidence that the person whose former conviction is proved is the defendant in the present action. *State v. Hunter*, 29 Wn. App. 218, 221, 627 P.2d 1339 (1981).

⁵ The State had to reopen its case in order to offer any evidence at all, apparently under the impression the unsupported allegation of a prior conviction was sufficient. RP 472.

Here, the court relied on the prosecutor's assertion that the jury should decide the identity question based solely on speculation, without any independent evidence. RP 476. This was error.

The court failed to distinguish between establishing the existence of criminal history for sentencing purposes, which does not require proof beyond a reasonable doubt, and establishing a prior conviction as an essential element of a charged offense, which does. *See, e.g., State v. Rivers*, 130 Wn. App. 689, 695, 128 P.3d 608 (2005) (at sentencing, prior convictions were not elements of a crime that must be found by a jury beyond a reasonable doubt.) The existence of a prior felony conviction is an essential element of the offense of unlawful possession of a firearm. RCW 9.41.040(1)(a).⁶

The standard of proof at sentencing is by a mere preponderance of the evidence. RCW 9.94A.110; *State v. Ammons*, 105 Wn.2d 175, 185, 713 P.2d 719 *as amended* (1986). Accordingly, the sentencing court may accept a Judgment and Sentence as sufficient evidence unless the defense affirmatively refutes it. But the State must prove every element of a crime

⁶ RCW 9.41.040(1)(a): A person...is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted ...of any serious offense as defined in this chapter.

beyond a reasonable doubt, and the defendant need refute nothing.

Ammons, 105 Wn.2d at 185; *Winship*, 397 U.S. at 364.

Specifically, in a proceeding to establish the crime of felon in possession of a firearm, in which the prior conviction was an essential element, the State must prove the existence of the predicate felony beyond a reasonable doubt. *Ammons*, 105 Wn.2d at 187; *State v. Gore*, 101 Wn.2d 481, 486, 681 P.2d 227, 39 A.L.R.4th 975 (1984).

Counsel argued that mere commonality of names is not sufficient to establish identity, especially here, because the club patrons all used nicknames. RP 475.

The Court should vacate this conviction. And, since retrial following reversal for insufficient evidence is ‘unequivocally prohibited,’ dismissal with prejudice is appropriate. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

4. THE PROSECUTOR UNLAWFULLY COMMENTED ON GALDAMEZ’S EXERCISE OF HIS RIGHT TO REMAIN SILENT.

A prosecutor may not comment on a defendant’s exercise of his right not to testify. *Hunter*, 29 Wn. App. at 220; *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); U.S. Const. Amend V. A violation occurs if the prosecutor uses language of which either the

manifest intent or the inherent character was such that a jury would naturally and necessarily perceive the statement as a comment on the fact that the defendant has not testified. *Hunter* 29 Wn. App. at 220. The Court reviews this claim of error in the context of the surrounding circumstances. *Hunter* 29 Wn. App. at 220; *State v. Scott*, 93 Wn.2d 7, 13, 604 P.2d 943 (1980). The court has discretion to grant a mistrial if defense counsel asks for one. *State v. Wilson*, 3 Wn. App. 745, 747, 477 P.2d 656, 657 (1970).

Here, the prosecutor commented in closing argument:

“You heard no evidence about what Mr. Galdamez knows, none, zero. Not one witness testified — ” Defense counsel objected that this was “dangerously close to the line.” RP 581-82. The court warned the prosecutor, but to no avail. The prosecutor repeated the impermissible comment. “What evidence have you heard that Mr. Galdamez believed that Mr. Ruth had a weapon?” This time, the court sustained the defense objection. The prosecutor appeared clueless as to what the problem was. The judge said he would explain later, but never did. RP 582.

In another instance of ineffective assistance, defense counsel did not move for a mistrial. Please see Issue 6.

The prosecutor’s remarks unambiguously referred to the fact that the defense had presented no evidence as to the defendant’s state of mind

at any time during the evening of February 19-20, 2010. The jury could only construe this as a comment on the fact that Galdamez did not testify.

The Court may view the prosecutor's display of innocent confusion as evidence of lack of manifest intent. But, assuming the jurors were reasonably intelligent and alert, the nature of the comments was such that they would naturally and necessarily have assumed the prosecutor was referring to the fact that Galdamez had denied them the benefit of his testimony, with the inherent implication that this attenuated his right to be presumed innocent and somehow reduced the State's burden to prove a guilty state of mind.

This is reversible error.

**5. GALDAMEZ WAS DENIED A FAIR TRIAL
AND THE PRESUMPTION OF INNOCENCE
WHEN THE PROSECUTOR IMPLIED THAT
STATE'S WITNESSES WERE IN FEAR OF HIM.**

The fundamental right to a fair trial is guaranteed by Wash. Const. art. 1, § 22, and U.S. Const. amends. VI and XIV. The presumption of innocence is considered a "basic component" of a fair and impartial trial. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

A witness's reluctance to testify can be admitted to evaluate the witness's credibility if his credibility has been impeached. *State v.*

Bourgeois, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997). But evidence that a witness is reluctant to testify may not be admitted as substantive evidence of the defendant's guilt unless there is some evidence the defendant threatened the witness about testifying. *Bourgeois*, 133 Wn.2d at 400. The witness need not explicitly say he is afraid; if evidence of a witness's reluctance could lead jurors to conclude the witness is fearful of the defendant, that constitutes substantive evidence of guilt, because threatening witnesses is generally associated with guilt. *Bourgeois*, 133 Wn.2d at 400. Where the State suggests no connection between the defendant and the reluctance of a witness to testify, the trial court must instruct the jury to limit its consideration of the witness's reluctance solely for the purpose of evaluating his credibility.

Here, the prosecutor elicited from Kila that he was reluctant to come in and testify. Defense counsel requested a sidebar (which was never put on the record) after which the court invited the prosecutor to repeat the question. RP 112-13. This was error. The same error was repeated with Steven Ruth. The prosecutor elicited that Ruth did not want to be there. Again, defense counsel objected and the court again overruled. RP 337. In neither case was a limiting instruction requested or given.

This is manifest constitutional error that can be raised for the first time on appeal. RAP 2.5(a)(3). But defense counsel also was ineffective in failing to request a limiting instruction when his objection was overruled. Please see Issue 6. The error clearly prejudiced Galdamez because the inevitable impermissible inference of guilt tarnished the presumption of innocence.

Reversal is required.

6. THE PROSECUTOR'S DIRECT EXAMINATION OF KILA WAS IMPERMISSIBLY LEADING AND INTRODUCED UNSUBSTANTIATED AND INFLAMMATORY INNUENDO.

Kila testified that he observed Ruth and Galdamez yelling at each other in the bar. The prosecutor asked: "As part of the screaming did you hear anybody say "I'm going to shoot you?" Kila answered, "No, not at all." The prosecutor again asked Kila whether he heard anybody say "I'm going to kill you," and again Kila said, no. RP 71. And yet again, Kila had to deny hearing any threats. RP 72-73. And one more time, the prosecutor returned to this theme, asking if Galdamez had threatened to kill Ruth. RP 118.

This inflammatory innuendo was utterly unsupported by a single iota of evidence.

A leading question is one that suggests the desired answer. *State v. Scott*, 20 Wn.2d 696, 698, 149 P.2d 152 (1944); *Stevens v. Gordon*, 118 Wn. App. 43, 55, 74 P.3d 653 (2003). The trial court may permit leading questions subject to review for abuse of discretion. *State v. Delarosa-Flores*, 59 Wn. App. 514, 517, 799 P.2d 736 (1990). The asking of leading questions may be reversible error under some circumstances. *State v. Torres*, 16 Wn. App. 254, 258, 554 P.2d 1069 (1976); *Stevens*, 118 Wn. App. at 55-56.

Again, this presumes defense counsel preserved the issue for review with a timely objection, which did not happen here. Effective counsel would have been on his feet with smoke pouring out of his ears at the prosecutor's blatant use of leading questions to implant in the minds of the jury that Galdamez threatened to kill Ruth, a proposition for which the State had absolutely zero evidence.

“A prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable.” *State v. Lopez*, 95 Wn. App. 842, 855, 980 P.2d 224 (1999), citing *State v. Babich*, 68 Wn. App. 438, 444, 842 P.2d 1053 (1993), quoting *United States v. Silverstein*, 737 F.2d 864, 868 (10th Cir. 1984). It is improper for a prosecutor to appeal to the passions and prejudices of the jury. *In re Det.*

of Gaff, 90 Wn. App. 834, 841, 954 P.2d 943 (1998); *State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984).

As happened here, the prosecutor in *Silverstein* exploited his impeachment questions to imply the existence of a fact the prosecutor knew he could not support by evidence. *Silverstein*, 737 F.2d at 868. The court reversed and remanded because the evidence of guilt was not so overwhelming as to overcome the prejudice of the misconduct. *Id.*

The misconduct in Galdamez's trial is analogous to the situation with a witness's own prior inconsistent statements. One reason the rules require the cross-examiner to produce extrinsic evidence of the alleged statement is to prevent cross-examination from being abused by making insinuations about statements that were never made but that could mislead the jury into thinking the imaginary statements were evidence. *Babich*, 68 Wn. App. at 443-44, citing 5A K. Teglund, § 258(2), at 315.

Here, the violation was more prejudicial than in *Silverstein*. The idea that one of two mutual combatants, Galdamez, was over-the-top aggressive and planning to shoot Ruth from the outset was essential to the State's case. On the admissible evidence, however, one or all of the jurors very easily could have found that the entire episode was a pointless clash of egos between a couple of hot-heads who were equally responsible for needlessly precipitating a fight for the sake of fighting.

The State further abused its already illegitimate impeachment of Kila to imply that Galdamez threatened to kill Ruth during the initial exchange that started the whole incident and then gratuitously escalated the terms of the fight from fists to bullets. There was absolutely no evidence, admissible or inadmissible, to support this inflammatory innuendo. These violations were all the more prejudicial because of the prosecutor's strategy of implying that Kila was a less than forthright witness who was inclined to omit from his testimony facts that were damaging to Galdamez.

Accordingly, this violation was highly prejudicial and may well have determined the verdict in the mind of some jurors. Reversal is required.

7. GALDAMEZ WAS DENIED A FAIR TRIAL AND RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO THE WHOLESALE ADMISSION OF DAMAGING HEARSAY AND OTHER PREJUDICIAL EVIDENCE.

Throughout the trial, the prosecutor freely introduced out-of-court statements with no objection from the defense. By this means, the State repeatedly place inadmissible and unreliable evidence before the jury. Counsel's failure to interpose a hearsay objection was defective performance that prejudiced Galdamez.

The fundamental right to a fair trial is guaranteed by the United States and Washington Constitutions. U.S. Const. amends. VI and XIV; Const. art. I, § 22. This right includes the right to the effective assistance of counsel.

To prevail on a claim that counsel was ineffective, an appellant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). The review process is set forth in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Appellant must show (1) that his lawyer's representation was deficient and (2) that the deficient conduct affected the outcome of the trial. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *Strickland*, 466 U.S. at 693-94. Representation that falls sufficiently below an objective reasonableness standard overcomes the otherwise strong presumption that counsel's representation was effective. *Thomas*, 109 Wn.2d at 226.

Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Conduct that can be characterized as legitimate trial tactics or strategy cannot be the basis for an ineffective assistance of counsel claim. *Aho*, 137 Wn.2d at 745. But,

as happened throughout Galdamez's trial, failing to preserve an issue for review with a timely objection is per se deficient and prejudicial if an objection likely would have been sustained. *State v. DeSantiago*, 149 Wn.2d 402, 413, 68 P.3d 1065 (2003); *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Counsel waives any objection to the erroneous admission of damaging evidence unless a timely objection is made. *DeSantiago*, 149 Wn.2d at 413; *State v. Coria*, 146 Wn.2d 631, 641, 48 P.3d 980 (2002). In egregious circumstances, however, where testimony central to the State's case is erroneously admitted, the failure to object constitutes incompetence justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Deficient performance is established if the Court can discern no legitimate reason not to object. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245, 262 (2010).

The conduct of Galdamez's trial counsel was both deficient and prejudicial in allowing the prosecutor to introduce voluminous damaging hearsay through the testimony of police witnesses. The hearsay included evidence that was central to the State's case and its admission affected the outcome of the trial and was thus reversible error. By failing to object,

counsel failed to preserve this error for appeal and thereby rendered ineffective assistance.

(a) Officer Nicholas Jensen interviewed several witnesses at the scene. He obtained cryptic written statements of four or five lines as well as extensive oral statements. These statements were not taped, and Jensen did not take notes. When he returned to his vehicle after completing his investigation, he wrote up his recollections of what the witnesses had told him. The prosecutor repeatedly elicited from Jensen testimony he could not elicit from security guard Thor Kila on the stand.

Jensen testified without objection about his notes of these oral statements. He testified that Ruth told him his initial contact with Galdamez was an innocuous remark that everybody seemed very emotional that night. RP 179-87. He said that Kila definitely said he saw Galdamez pull a gun out of his pocket. RP 184. He said Kila said he saw Galdamez swing at Ruth and that Kila knew Jensen was talking about the parking lot, not some earlier interaction. RP 184. He testified that Kila told him the two men separated after punching each other and that they then “balled up their fists like they were going to continue to fight?” Again, Jensen claimed to know that there was no confusion in Kila’s mind about this. There was no objection. RP 185. This was the only evidence on this point. This was extremely damaging because the jurors easily

could have concluded from this that Ruth did nothing during the final confrontation to put Galdamez in fear of serious injury.

Contradicting Kila's testimony of an earlier physical altercation, Jensen said Kila mentioned a short argument inside the bar but not that Galdamez and Ruth physically connected before the shooting incident. RP 186. This line of questioning continued with more questions about what Kila said to Jensen. The prosecutor asked whether Kila told Jensen he saw Galdamez throw an uppercut and hit Ruth in the face. Jensen: Yes. "Q: When he said that, were you speaking about what happened in the parking lot or somewhere else? A: In the parking lot." RP 184. Jensen actually testified to the Kila's supposed state of mind by asserting that he was not confused about the precise point in time Jensen was referring to. Jensen testified that this was clear from the question and response, as though because he was not confused, nobody could have been confused. RP 184, 185. But whether Kila understood that they were talking about the parking lot is known only to the declarant, Kila.

(i) This was unmitigated hearsay. ER 801(c). An out-of-court statement is inadmissible hearsay if it is offered to prove the truth of the matter asserted, even though it was made by a person who is now an in-court witness, presently under oath, observable by the trier of fact, and

subject to cross-examination. *State v. Sua*, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003).

Counsel's failure to object was deficient performance. Competent counsel is expected to know and argue the law. *Kyllo*, 166 Wn.2d at 865-69 (case law); *State v. McGill*, 112 Wn. App. 95, 100-02, 47 P.3d 173 (2002) (authority for an exercise of discretion).

Because Jensen's testimony was unchallenged, the prosecutor suggested no evidentiary rule under which Kila's on-scene statements to Jensen were admissible. We do know that defense counsel erroneously believed that witnesses' statements to police could come in under ER 801(d)(1). RP 19-20. That rule provides:

Prior Statement by Witness. A statement is exempt from the hearsay rule and is admissible as substantive evidence if:

the declarant "testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement —

(i) is inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or —

(ii) is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or —

(iii) is one of identification of a person made after perceiving the person.

ER 801(d)(1). Kila's statements to Jensen were none of these.

His trial testimony may not have jibed with what Jensen thought he said at the scene, but his prior statements were not given under oath under (i).⁷ Neither were they offered as prior consistent statements under (ii) for the purpose of rehabilitation following impeachment. Accordingly, Kila's statements to Jensen were not admissible as substantive evidence and the jury should have received a limiting instruction telling them that.

Counsel was ineffective (a) for not challenging the statements in the first place, and (b) for not attempting to stanch the bleeding with a limiting instruction.

(ii) Hearsay may be admissible under another court rule or a statute. ER 802. But Kila's alleged statements to Jensen were not admissible under any other evidence rule.

- Under some circumstances, a prior inconsistent statement may be admissible under ER 613, which governs the admissibility of impeachment evidence. *State v. Dixon*, 159 Wn. 2d 65, 76, 147 P.3d 991 (2006). That rule provides:

In the examination of a witness concerning a prior statement made by the witness, whether written or

⁷ Jensen's testimony about the report he wrote of what he thought Kila had said 45 minutes earlier is double hearsay. Jensen as witness is testifying to what Jensen as once-removed declarant in the report stated about what twice-removed declarant Kila stated to him.

not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

ER 613(a). But:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

ER 613(b).

This requirement to afford the witness a chance to refute or agree with the prior statement is there because, if the witness responds to foundation questions by acknowledging the prior inconsistent statement and explaining the inconsistency, then extrinsic evidence of the statement is inadmissible. ER 613(b), comment; *Dixon*, 159 Wn.2d at 76. Only if the witness denies the prior inconsistent statement is it admissible, even for impeachment. *State v. Spencer*, 111 Wn. App. 401, 409-10, 45 P.3d 209 (2002).

Here, Kila admitted making prior inconsistent statements to Jensen, but gave a couple of plausible explanations. One was that he saw the gun and merely assumed Galdamez had taken it from his pocket. Another was that Jensen wrote down some things that were incorrect.

- As to Kila's written statement, the prosecutor may have had in mind ER 803(a)(5), which permits the admission of a recorded recollection where the witness cannot remember the substance, made when memory was fresh. "If admitted, the memorandum may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

But Kila never said he could not remember what happened. He just said that, upon reflection, his memory of the events at trial differed either from what he said to Jensen or from what Jensen mistakenly wrote in his report. RP 91. The prosecutor asked Kila: "You indicated earlier that you didn't see who threw the first punch. Did you tell the officer that you saw Mr. Galdamez throw an upper cut and hit Mr. Ruth in the face?" Kila answered: "Yes. And that's where some of the discrepancies lie, because when I turned around and saw them start fighting, I don't know if that was the first punch or the second punch. It could have been a counter to his punch." RP 92.

This explained discrepancies between what really happened and what Kila told Jensen. The first punch Kila saw was by Galdamez, but he could not say that that was the first punch thrown. Kila went on to explain: There was a "whole nother altercation" before the one in the video happened. The prosecutor asked whether he told the officer that.

Kila said, yes, he told the officer there were two fighting episodes. The pair fought, separated, and came back at each other again. RP 92. This explained the prior inconsistent statement and rendered extrinsic evidence of it — i.e. Jensen’s testimony — inadmissible.

The prosecutor then asked whether Kila told Jensen he saw Galdamez reach into his right pocket and pull out a handgun and shoot Ruth. Kila denied making this statement. But he explained that what he did tell Jensen was that he saw Galdamez holding the gun after the shot was fired. RP 92-93. Again, once the witness explained the discrepancy, extrinsic evidence of the prior statement was inadmissible for impeachment, which was its sole legitimate purpose.

Besides that, extrinsic evidence of a prior inconsistent statement is not admissible if it concerns a collateral matter. *Babich*, 68 Wn. App. at 443. The video evidence was irrefutable that Galdamez fired a gun at Ruth. Whether he pulled the gun out of his pocket or his belt, and whether or not Kila saw where he pulled it from is about as peripheral as it gets.

Accordingly, this entire examination of Kila should have been conducted outside the presence of the jury as a voir dire in the context of an offer of proof that the prior statements were admissible. Instead, this evidence was elicited in front of the jury with no limiting instruction that it was not substantive evidence of guilt.

Even if Kila's statements had been properly admitted under some impeachment provision, it was essential for effective counsel to request an instruction limiting the jury's consideration of the prior statements solely to show that Kila was an unreliable witness. Counsel did not do that here, and there was nothing to keep the jury from considering the inadmissible statements as substantial evidence of guilt.

Prejudice. This was highly prejudicial to Galdamez.

Improperly admitted evidence is not harmless if it affected the verdict. *State v. Allen*, 50 Wn. App. 412, 423, 749 P.2d 702 (1988). A showing of a "reasonable probability" the evidence affected the verdict is sufficient to undermine confidence in the conviction and demonstrate prejudice. *Thomas*, 109 Wn.2d at 226; *Strickland*, 466 U.S. at 693-94.

Here, unsworn hearsay statements were admitted to disprove sworn testimony. And, without a limiting instruction, the jury would have considered Kila's statements to Jensen as substantive evidence. This could have influenced the verdict.

The jury was able to evaluate the credibility of many of Kila's statements from the video. For example, Jensen said Kila told him that Ruth threw jabs at Galdamez, which the video shows. RP 185. But the prosecutor's primary purpose in eliciting Kila's alleged on-scene statements was as substantive evidence to convince the jury that no

unrecorded episode occurred that would cast Ruth, not Galdamez, as the first aggressor. This was central the State's case.

(b) On cross examination, defense counsel himself elicited inadmissible hearsay from Jensen regarding what Ruth told him, specifically, the helpful information that Ruth told Jensen there was an argument inside the bar. RP 206. But then, instead of shutting up, counsel pursued the inquiry as to what Ruth said to Jensen, and the jury learned that Jensen got the idea that Ruth was in the process of leaving with his girlfriend after the initial argument in the bar until he was "confronted again in the parking lot." RP 207.

This was extremely damaging, because it sounded like Ruth was trying to retreat. Until Jensen said this, all the evidence, including the video, indicated the two men came outside almost at the same time and mutually continued the argument.

Additional instances of ineffective conduct of the defense are discussed below. The cumulative effect of these errors deprived Galdamez of a fair trial, and the appropriate remedy is to reverse and remand.

**8. THE PROSECUTOR'S FLAGRANT
DISREGARD OF THE EVIDENCE RULES
CONSTITUTED MISCONDUCT.**

In order to prevail on a claim of prosecutorial misconduct, Appellant must show both improper conduct and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). If Appellant shows that the prosecutor's conduct was both improper and prejudicial, reversal is appropriate if "there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict." *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992); *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). Comments that encourage the jury to render a verdict on facts not in evidence are improper. *State v. Stover*, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992). It is also improper for the State to mislead the jury. *State v. Belgarde*, 110 Wn.2d 504, 507-09, 755 P.2d 174 (1988).

The appropriate remedy is to reverse for prosecutorial misconduct when there is a substantial likelihood it affected the verdict. *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986).

Defense counsel's failure to object to the misconduct does not waive the issue on appeal if the misconduct is sufficiently "flagrant and ill-intentioned" that it results in prejudice that would not be curable by a jury instruction. *Gregory*, 158 Wn.2d at 841, quoting *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

Here, the prosecutor took advantage of defense counsel's ignorance and flouted the evidence rules outrageously throughout the trial. He paraded reams of inadmissible hearsay and unsupported innuendo before the jury to be considered without limitation as substantive evidence of guilt, including alleged facts the State could not otherwise have elicited from the witness stand. The prosecutor knew or should have known that he could not prove his case with the admissible evidence, and made a flagrant and ill-intentioned decision to prove it with inadmissible hearsay and inflammatory innuendo.

Even with no objection, the prosecutor's conduct was sufficiently flagrant and deliberate that this Court may address the issue and grant the defendant the appropriate remedy of a new trial.

9. THE SENTENCING COURT ABUSED ITS DISCRETION IN FAILING TO CONSIDER RUTH'S SHARED RESPONSIBILITY FOR THE FIGHT.

The sentencing court may consider as a mitigating factor that, "to a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident." RCW 9.94A.535(1)(a).

Defense counsel argued, and the video clearly showed, that, although Galdamez threw the first punch in the final denouement of the dispute, it was Ruth who provoked the incident in the first instance. And

the video showed that, at minimum, he was a willing participant throughout. Despite self-serving testimony from Ruth and Johnson that they intended to leave at one point, the video shows that Ruth made no attempt to leave, even when he was sitting in Cutta's car in the parking lot.

No error can be assigned to the court for admitting the reams of inadmissible evidence in this case where there was no defense objection. Nevertheless, the court abused its discretion in relying on the inadmissible evidence at sentencing in support of the State's claim that Mr. Galdamez was exclusively to blame and therefore deserving of the maximum standard range sentence.

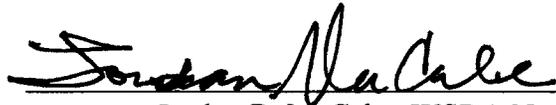
On remand, a new trial based solely on the admissible evidence will provide the sentencing court with sufficient evidence to support the mitigating factor that both parties freely sought out an environment in which fighting was an accepted way of resolving conflicts and that the video evidence clearly showed that they mutually agreed to step outside and duke it out in this instance.

IV. CONCLUSION

For the foregoing reasons, Galdamez asks this Court to reverse his convictions and vacate the judgment and sentence. He seeks a new trial

on the attempted murder/assault charge and dismissal with prejudice of the
unlawful possession of a firearm charge.

Respectfully submitted this 30th day of August, 2010.

A handwritten signature in black ink, reading "Jordan B. McCabe", written over a horizontal line.

Jordan B. McCabe, WSBA No. 27211
Counsel for John A. Galdamez

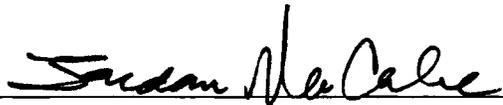
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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

Kathleen Proctor, Prosecutor's Office
City-County Building
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171

John A. Galdamez DOC # 817189
Washington Corrections Center, R4 9HU
P.O. Box 900
Shelton, WA 98584



Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington

Date: August 30, 2010