

NO. 40366-8

COURT OF APPEALS
DIVISION II

10 DEC 21 PM 2:08

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY C.
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

JOHN GALDAMEZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 09-1-00905-0

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR</u>	1
1.	Has defendant failed to show that the trial court abused its discretion in giving the first aggressor instruction when the evidence showed that defendant threw the first punch and was the first to draw a weapon?.....	1
2.	Should this court reject defendant’s argument that the first aggressor instruction constitutes a comment on the evidence when that argument has been rejected by the Washington Supreme Court?.....	1
3.	Has defendant failed to show any deficiency in the “to convict” instruction for the attempted murder charge when it comports with the structure approved for attempt crimes by the Supreme Court in <i>State v. DeRyke</i> ?.....	1
4.	Has defendant failed to meet his burden of showing that the prosecutor engaged in misconduct or that he suffered any prejudice from such conduct?.....	1
5.	Has defendant failed to meet his burden under <i>Strickland</i> of showing both deficient performance and resulting prejudice necessary to succeed on a claim of ineffective assistance of counsel?.....	1
6.	Should this court vacate defendant’s conviction for unlawful possession of a firearm when the State’s proof that the defendant had a previous conviction was insufficient as a matter of law?.....	2

7.	Should this court summarily reject defendant’s challenge to his standard range sentence when he does not claim any error in the computation of his offender score or to the sentencing court’s determination of the relevant sentence, but only argues it abused its discretion in not giving greater weight to a proffered mitigating circumstance when such appeals are forbidden by statute?.....	2
B.	<u>STATEMENT OF THE CASE</u>	2
1.	Procedure.....	2
2.	Facts.....	4
C.	<u>ARGUMENT</u>	13
1.	DEFENDANT CHALLENGES TWO OF THE COURT’S JURY INSTRUCTIONS AND THE FOLLOWING PRINCIPLES ARE APPLICABLE TO BOTH CHALLENGES.....	13
2.	THE TRIAL COURT PROPERLY GAVE THE FIRST AGGRESSOR INSTRUCTION, WHICH DID NOT CONSTITUTE A COMMENT ON THE EVIDENCE....	14
3.	THE “TO CONVICT” INSTRUCTION FOR THE CRIME OF ATTEMPTED MURDER CONTAINED ALL THE NECESSARY ELEMENTS.....	19
4.	DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING THE PROSECUTOR ENGAGED IN MISCONDUCT OR THAT HE WAS PREJUDICED BY SUCH ACTIONS.....	22
5.	DEFENDANT HAS FAILED TO MEET HIS BURDEN UNDER STRICKLAND OF SHOWING DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.....	33

6. THE STATE DID NOT MEET ITS BURDEN OF PROVING THE IDENTITY OF THE PERSON NAMED IN A PRIOR JUDGMENT AS BEING THE SAME PERSON AS THE DEFENDANT IN ORDER TO PROVE THAT DEFENDANT HAD A PRIOR CONVICTION OF A SERIOUS OFFENSE; THE CONVICTION FOR UNLAWFUL POSSESSION OF FIREARM MUST BE VACATED AND DISMISSED.....39

7. DEFENDANT’S CHALLENGE TO THE COURT’S STANDARD RANGE SENTENCE IS NOT REVIEWABLE AS DEFENDANT DOES NOT ASSIGN ERROR TO THE COURTS DETERMINATION OF THE APPLICABLE LAW OR THE CALCULATION OF THE OFFENDER SCORE BUT ARGUES THE COURT ABUSED ITS DISCRETION IN NOT GIVING MORE WEIGHT TO A MITIGATING FACTOR ARGUED BY THE DEFENSE.....42

D. CONCLUSION.....44

Table of Authorities

State Cases

<i>Herring v. Department of Social and Health Servs.</i> , 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996)	13
<i>In re Davis</i> , 152 Wn.2d 647, 714, 101 P.3d 1 (2004)	36, 37
<i>State v. Ashby</i> , 77 Wn.2d 33, 38, 459 P.2d 403, 407 (1969)	30
<i>State v. Barberio</i> , 66 Wn. App. 902, 908, 833 P.2d 459 (1992)	42
<i>State v. Becker</i> , 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)	16, 17
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993)	35
<i>State v. Binkin</i> , 79 Wn. App. 284, 902 P.2d 673 (1995), <i>review denied</i> , 128 Wn.2d 1015 (1996)	22
<i>State v. Borboa</i> , 157 Wn.2d 108, 123, 135 P.3d 469 (2006)	29, 30
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 400, 945 P.2d 1120 (1997)	26, 27, 28
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), <i>cert. denied</i> , 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996)	34
<i>State v. Brown</i> , 132 Wn.2d 529, 561, 940 P.2d 546 (1997)	22
<i>State v. Bryant</i> , 89 Wn. App. 857, 950 P.2d 1004 (1998)	29
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988)	34
<i>State v. Chhom</i> , 128 Wn.2d 739, 742, 911 P.2d 1014 (1996)	20
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988)	34
<i>State v. Colwash</i> , 88 Wn.2d 468, 470, 564 P.2d 781 (1977)	14
<i>State v. Delarosa-Flores</i> , 59 Wn. App. 514, 517, 799 P.2d 736 (1990)	23

<i>State v. DeRyke</i> , 149 Wn.2d 906, 910, 73 P.3d 1000 (2003)	1, 20, 21, 22
<i>State v. Eastmond</i> , 129 Wn.2d 497, 502, 919 P.2d 577 (1996).....	20
<i>State v. Emmanuel</i> , 42 Wn.2d 799, 819-20, 259 P.2d 845 (1953).....	19
<i>State v. Farmer</i> , 116 Wn.2d 414, 425, 805 P.2d 200, 812 P.2d 858 (1991)	39
<i>State v. Fernandez-Medina</i> , 94 Wn. App. 263, 266, 971 P.2d 521, reversed on other grounds, 141 Wn.2d 448, 6 P.3d 1150 (2000)	13
<i>State v. Gregory</i> , 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).....	29
<i>State v. Harris</i> , 62 Wn.2d 858, 385 P.2d 18 (1963).....	14
<i>State v. Huber</i> , 129 Wn. App. 499, 502, 119 P.3d 388 (2005).....	40
<i>State v. Hughes</i> , 106 Wn.2d 176, 193, 721 P.2d 902 (1986).....	18, 19
<i>State v. Hunter</i> , 29 Wn. App. 218, 221-22, 627 P.2d 1339 (1981)	40
<i>State v. Jackman</i> , 156 Wn.2d 736, 744,132 P.3d 136 (2006)	17
<i>State v. Jackson</i> , 137 Wn.2d 712, 727, 976 P.2d 1229 (1999).....	20
<i>State v. Jackson</i> , 70 Wn.2d 498, 424 P.2d 313 (1967).....	14
<i>State v. Jacobsen</i> , 78 Wn.2d 491, 495, 477 P.2d 1 (1970)	17
<i>State v. King</i> , 113 Wn. App. 243, 269, 54 P.3d 1218 (2002), review denied, 149 Wn.2d 1015 (2003)	40
<i>State v. Korum</i> , 157 Wn.2d 614, 652, 141 P.3d 13 (2006).....	24
<i>State v. Lampshire</i> , 74 Wn.2d 888, 892, 447 P.2d 727 (1968).....	17
<i>State v. Levy</i> , 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).....	16, 17
<i>State v. Lewis</i> , 130 Wn.2d 700, 707, 927 P.2d 235 (1996).....	29, 32
<i>State v. Litzenberger</i> , 140 Wash. 308, 248 P. 799 (1926)	30

<i>State v. Luther</i> , 157 Wn.2d 63, 77, 134 P.3d 205, <i>cert. denied</i> , 127 S. Ct. 440 (2006).....	39
<i>State v. Madison</i> , 53 Wn.App. 754, 763, 770 P.2d 662 (1989)	37
<i>State v. Mail</i> , 121 Wn.2d 707, 714, 854 P.2d 1042 (1993).....	42
<i>State v. Mak</i> , 105 Wn.2d 692, 726, 718 P.2d 407, <i>cert. denied</i> , 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).....	22
<i>State v. Manthie</i> , 39 Wn. App. 815, 820, 696 P.2d 33 (1985).....	22
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....	34
<i>State v. McNeal</i> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002)	37
<i>State v. Pavelich</i> , 150 Wash. 411, 420, 273 P. 182 (1928)	29, 30
<i>State v. Pirtle</i> , 127 Wn.2d 628, 656, 904 P.2d 245 (1995)	16
<i>State v. Rahier</i> , 37 Wn. App. 571, 575, 681 P.2d 1299 (1984)	14
<i>State v. Ranicke</i> , 3 Wn. App. 892, 897, 479 P.2d 135 (1970)	29
<i>State v. Reed</i> , 150 Wn. App. 761, 208 P.3d 1274 (2009)	21
<i>State v. Riley</i> , 137 Wn.2d 904, 976 P.2d 624 (1999)	15, 16, 19
<i>State v. Russell</i> , 125 Wn.2d 24, 87, 882 P.2d 747 (1994).....	29, 32
<i>State v. Sampson</i> , 40 Wn. App. 594, 599-600, 699 P.2d 1253 (1985)	19
<i>State v. Scott</i> , 20 Wn.2d 696, 698, 149 P.2d 152 (1944)	23
<i>State v. Staley</i> , 123 Wn.2d 794, 803, 872 P.2d 502 (1994).....	13
<i>State v. Sweet</i> , 138 Wn.2d 466, 980 P.2d 1223 (1999).....	30
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	33, 34, 36
<i>State v. Thompson</i> , 47 Wn. App. 1, 7, 733 P.2d 584 (1987)	15, 19
<i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976).....	26
<i>State v. Townsend</i> , 147 Wn.2d 666, 679, 57 P.3d 255 (2002).....	39

<i>State v. Varga</i> , 151 Wn.2d 179, 201, 86 P.3d 139 (2004)	39
<i>State v. Weekly</i> , 41 Wn.2d 727, 252 P.2d 246 (1952).....	22
<i>State v. Williams</i> , 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003).....	42
<i>State v. Wingate</i> , 155 Wn.2d 817, 822-23, 122 P.3d 908 (2005)	15

Federal and Other Jurisdictions

<i>Beck v. Washington</i> , 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).....	22
<i>Campbell v. Knicheloe</i> , 829 F.2d 1453, 1462 (9th Cir. 1987), <i>cert. denied</i> , 488 U.S. 948 (1988)	35
<i>Cuffle v. Goldsmith</i> , 906 F.2d 385, 388 (9th Cir. 1990).....	36
<i>Harris v. Dugger</i> , 874 F.2d 756, 761 n.4 (11th Cir. 1989).....	35
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	33, 36
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).....	35
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	1, 33, 34, 35, 36, 39
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	33
<i>United States v. Layton</i> , 855 F.2d 1388, 1419-20 (9th Cir. 1988), <i>cert. denied</i> , 489 U.S. 1046 (1989).....	35
<i>United States v. Molina</i> , 934 F.2d 1440, 1447-48 (9th Cir. 1991)	36
<i>Yarborough v. Gentry</i> , 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).....	35

Constitutional Provisions

Article IV, section 16, Washington State Constitution16
Fifth Amendment, United States Constitution29, 32
Sixth Amendment, United States Constitution.....33, 35

Statutes

RCW 9.94A.58542, 43
RCW 9A.28.020(1).....20

Rules and Regulations

CrR 3.5.....2
CrR 6.15.....13, 14
ER 611(c).....23
ER 61338
RAP 2.520

Other Authorities

11 Washington Pattern Jury Instructions;
Criminal 16.04 (3rd ed. 2008)18
WPIC 100.0220, 21

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

1. Has defendant failed to show that the trial court abused its discretion in giving the first aggressor instruction when the evidence showed that defendant threw the first punch and was the first to draw a weapon?
2. Should this court reject defendant's argument that the first aggressor instruction constitutes a comment on the evidence when that argument has been rejected by the Washington Supreme Court?
3. Has defendant failed to show any deficiency in the "to convict" instruction for the attempted murder charge when it comports with the structure approved for attempt crimes by the Supreme Court in *State v. DeRyke*?
4. Has defendant failed to meet his burden of showing that the prosecutor engaged in misconduct or that he suffered any prejudice from such conduct?
5. Has defendant failed to meet his burden under *Strickland* of showing both deficient performance and resulting prejudice necessary to succeed on a claim of ineffective assistance of counsel?

6. Should this court vacate defendant's conviction for unlawful possession of a firearm when the State's proof that the defendant had a previous conviction was insufficient as a matter of law?

7. Should this court summarily reject defendant's challenge to his standard range sentence when he does not claim any error in the computation of his offender score or to the sentencing court's determination of the relevant sentence, but only argues it abused its discretion in not giving greater weight to a proffered mitigating circumstance when such appeals are forbidden by statute?

B. STATEMENT OF THE CASE.

1. Procedure

On February 23, 2009, the Pierce County Prosecutor's Office charged appellant, John Alexander Galdamez ("defendant"), with assault in the first degree and unlawful possession of a firearm in the first degree. CP 1-2. The State alleged a firearm enhancement on the assault. *Id.* The information was amended to add a charge of attempted murder in the second degree, also with a firearm enhancement. CP 13-15.

The matter proceeded to trial before the Honorable Ronald E. Culpepper. RP 5. After a CrR 3.5 hearing the court found the defendant's custodial statements to be admissible at trial. RP 50-51.

At the close of the State's case in chief, the court denied the defense motion to dismiss the unlawful possession of a firearm charge for insufficient proof that the defendant had a prior conviction for a serious offense. RP 474-475.

After hearing the evidence the jury rejected the defendant's claim of self defense and found him guilty of attempted murder in the second degree with a firearm enhancement, assault in the first degree with a firearm enhancement, and unlawful possession of a firearm in the first degree. CP 81, 82, 84, 85-86.

At sentencing the court vacated the conviction of assault in the first degree for double jeopardy reasons. CP 100. The parties agreed that defendant had an offender score of 2. 2/19/10 RP 4. The court imposed a higher end standard range sentence on the attempted murder conviction of 175 months plus an additional 60 months for the firearm enhancement and a concurrent 41 months on the unlawful possession of firearm charge for a total term of confinement of 235 months. CP 104-117. It also imposed a term of community custody and other legal financial obligations. *Id.*

Defendant filed a timely notice of appeal from entry of this judgment. CP 87-99.

2. Facts

Latitude 84 is a bar located at 8401 South Hosmer, Tacoma, Washington. RP 62, 120-122. The bar has between 16 to 24 security cameras throughout the facility. RP 122. Defendant, who has the nickname "Cuban," was a regular at this establishment as were several of his friends. RP 120-121, 138. Steve Ruth was a semi-regular at the bar, but had friends who were regulars. RP 121. Some of Ruth's friends were also acquainted with defendant and his group of friends. RP 121-122.

Steven Ruth went to Latitude 84 with a friend, Anthony, or "T," Reed, after he got off work one night in February, 2009. RP 337-339, 385. He called his girlfriend, Teuila Johnson, to ask her to join them which she later did. RP 338-342. At the bar Mr. Ruth met up with other acquaintances, Cutta and Jared, who also goes by "Junior." RP 340-341. While he was in the bar Mr. Ruth got into a verbal dispute with the defendant. RP 342-343. Mr. Ruth had had no previous conflicts or disputes with defendant. RP 386. One of Mr. Ruth's friends stepped in to diffuse the situation and things calmed down temporarily. RP 343, 391. Mr. Ruth testified that the defendant continued to antagonize him and they exchanged words several times; at some point defendant called Mr. Ruth "outside" and Mr. Ruth went outside. RP 343-346. Mr. Ruth testified that he was not armed with a weapon at any point that day. RP 348. Mr. Ruth indicated that his girlfriend tried to get him to leave to avoid any problems. RP 352.

Mr. Ruth testified that there was only one fistfight between he and defendant that night. RP 346, 376. Mr. Ruth testified that the defendant threw the first punch, which hit him, then he hit the defendant twice. RP 350, 379. Mr. Ruth testified that he didn't see a gun or hear it fire but that he realized he had been shot by defendant. RP 352-353, 380. He stated that after the shooting, the defendant kicked him in the face as he was falling. RP 353. At no point did the defendant indicate that he wanted to stop fighting or warn Mr. Ruth that he had a gun and would shoot him. RP 353. Mr. Ruth testified that he was taken to the hospital, where he stayed for about ten days. RP 376-377. Mr. Ruth indicated that the bullet is still in his body and that he has some nerve damage from being shot. RP 377.

Teuila Johnson testified that she is the girlfriend of Steven Ruth and that on February 19-20, 2009, he called her to join him at Latitude 84. RP 431-433. She arrived around 11:00 p.m., after Mr. Ruth and defendant had exchanged some words. RP 434-436. She did not see any verbal altercation between them inside of the bar. RP 437. She did not hear Mr. Ruth make any threats or do anything antagonistic toward defendant. RP 437. She could tell that both Mr. Ruth and defendant were angry and did not want Mr. Ruth to get in a fight. RP 435-440. At one point in the evening, Ms. Johnson went to the defendant, who was sitting in his car, to try to arrange a "truce," but he would not open the door to his car so that she could talk to him. RP 445-447. She testified that later she and Mr.

Ruth went outside to leave; defendant was outside as well and threw a punch, hitting Mr. Ruth. RP 441-442. She testified that Mr. Ruth did not have a gun and did not threaten or antagonize the defendant. RP 442-443. She did not hear the defendant issue any warnings to “stay back” or “stop” or announce that he was armed with a gun. RP 444. Ms. Johnson testified that the next thing she heard was a gunshot and saw that Mr. Ruth had been shot. RP 444-445.

Sesilia Thomas works as the manager of Latitude 84. RP 120. She testified that the bar has a security guard working the front door who is supposed to check for weapons when patrons enter the bar. RP 128-129. If an altercation occurs at the bar, the security guard is supposed to notify the manager and kick out both parties involved in the altercation. RP 130. Ms. Thomas was working at Latitude 84, primarily in the main bar area, into the early morning hours of February 20, 2009. RP 125. She recalled seeing defendant at the bar when she first arrived as well as later on in her shift. RP 126. She testified that defendant was with his girlfriend at the first part of her shift but was with his friends “T” and St. Louis later on. RP 126-127. Ms. Thomas recalled seeing Mr. Ruth at the bar interacting with his friends T Reed, Jared and his girlfriend Tueila. RP 125-126. Ms. Thomas testified that she saw the defendant, “T”, St. Louis, T Reed and Steve Ruth and Thor Kila, his security guard all go out the front door, only to return about five to ten minutes later. RP 129-130. On February 20, 2009, she did not get a report from Mr. Kila of any altercation having

occurred between defendant and Mr. Ruth. RP 130.¹ Later that night, Ms. Thomas become aware that there had been a shooting at the bar when two patrons came running through the bar telling her to call 911 as there had been a shooting. RP 132-133. Ms. Thomas got a cell phone and made the call to 911 as she walked outside in the back; she saw Mr. Ruth laying on the ground; Mr. Ruth's girlfriend, Tueila, was also on the phone to 911. RP 133-34. Ms. Thomas saw Cutta, T Reed, and Jared outside as well. RP 134. Ms. Thomas did not see anyone with any weapons. RP 134. She stayed there until the police arrived and then showed the officers the security videos taken by the cameras that night. RP 134. Copies of these videos were given to the police. RP 137-138, 215-223. Ms. Thomas watched the videos with the officers; she did not see any tape evidencing an altercation at the front of the building that night prior to the incident that ended in the shooting between the defendant and Mr. Ruth. RP 137.

Thor Kila works as a security officer at Latitude 84 and was working on February 19-20, 2009. RP 62-63, 66. He identified the defendant as being a regular at this bar. RP 65-66. Mr. Kila recalls the defendant being at the bar when he started his shift on February 19, 2009. RP 66. Mr. Kila testified that he heard a "screaming match" occur outside the front of the bar with profanities being exchanged between the

¹ The first time Ms. Thomas heard from Mr. Kila about an altercation having occurred between defendant and Mr. Ruth while they were out front was on the same day she testified in court. RP 130.

defendant and Mr. Ruth, but no threats. RP 70-71. He walked closer and the two began to fight, throwing punches. RP 72-73. He testified that he separated them and they walked away but a minute later they started fighting again in the parking lot. RP 74. Mr. Kila testified that the second altercation was caught on video tape as he had watched it. RP 74-80. He recalls hearing a pop and seeing a gun in the defendant's hand and then deciding that he needed to step in and stop the fight. RP 80-84. The defendant was approaching Mr. Ruth and tried to kick him when Kila stepped in. RP 84. Mr. Kila testified that defendant did not make any statements indicating that he had been afraid for his life. RP 85-87. On direct, Mr. Kila testified initially that the confrontation was between Mr. Ruth and the defendant, but he indicated later that he did have some concerns that some of Ruth's friends might be getting ready to jump someone. RP 74, 79-80. Kila testified that he was concerned that some of Mr. Ruth's friends were going to jump the defendant, although none of Ruth friends took any steps toward the defendant. RP 80, 82. On cross examination, Kila recalled hearing someone saying "I'm going to whip your ass." RP 103-104. The night of the incident, Kila wrote out a statement for the police stating "I witnessed an altercation between two patrons which were arguing and proceeded to fight in which one took a pistol out of his pocket and then shot the other one, then fled the scene." RP 90. Mr. Kila admitted talking to the defendant about the incident several months after it occurred. RP 464. The defendant gave him one of

the reports about the case to read, which included Kila's handwritten statement. RP 465. His written statement differed from his trial testimony in that it indicated that there was one fight as opposed to two and that he saw the defendant pull a gun from his pocket as opposed to not seeing this. RP 91-92, 465-468, 471.

Officers Jensen and Johnson responded to a dispatch call regarding a shooting at Latitude 84 approximately 45 minutes after midnight on February 20, 2009. RP 173-176. They responded to the scene within minutes and found a small crowd of people standing over an injured person on the ground in the parking lot for Latitude 84. RP 176. The injured man was Mr. Ruth. RP 178-179. The officer did a pat down of Mr. Ruth and the others in the parking lot to check for weapons and found none. RP 179. Mr. Ruth told him that he had been shot by another bar patron; he indicated that he and this other person had an argument inside the bar and this guy followed him out and shot him in the parking lot. RP 179. Officer Jensen could not get more information from Mr. Ruth at that time because Ruth was focused on his injuries and whether he was going to live. RP 179-180. Officer Jensen reviewed the security tapes and saw the shooting documented in the tapes; he broadcast a description of the shooter based upon what he viewed in these tapes. RP 180-181. Based upon the security tapes, Officer Jensen could see that the security guard Thor Kila had witnessed the shooting. RP 182. Officer Jensen contacted Mr. Kila to obtain a witness statement. RP 182. Ultimately Mr. Kila gave

him a statement that indicated that Mr. Ruth had left the bar and that the defendant followed him out; the defendant threw a punch at Mr. Ruth who responded by taking a couple swings at the defendant; the two then separated but acted as if the fight would continue when the defendant pulled a gun out of his pocket and shot Mr. Ruth. RP 185-186. Officer Jensen indicated that Mr. Kila had told him there had been an earlier verbal argument between the defendant and Mr. Ruth inside the bar, but that he never mentioned seeing any previous physical altercation between the two. RP 186-187. Mr. Kila did not express any concern to Officer Jensen that he thought the defendant was going to be “jumped” by friends of Mr. Ruth. RP 187-188. Officer Jensen could see on the video that defendant left the scene in a gold Chevy Malibu. RP 187. Officer Jensen located this vehicle later on that morning parked behind a house several blocks away from Latitude 84. RP 189. He secured the vehicle then had it impounded. RP 189-191. In a nearby recycle bin, Officer Jensen located a shirt that matched the one defendant had been wearing in the security video at the time of the shooting. RP 191-194.

Detective Shipp responded to the dispatch regarding the shooting at Latitude 84 on February 20, 2009. At the scene he learned that witnesses were identifying the shooter as John Galdamez a 27 year old Hispanic male driving a gold Chevy Malibu. RP 234-235. He located a possible address for the defendant and went to do an area check in the vicinity. RP 236-237. At approximately 1:00 a.m., Detective Shipp

located a Hispanic male walking in the area of Park and South 90th street and stopped to identify the man; it was the defendant who was about to knock at the door of a house. RP 237-238. Detective Shipp testified that the defendant was perspiring- despite it being around 40 degrees - and had a heavy odor of intoxicants coming from his person. RP 238. Detective Shipp took the defendant into custody. RP 239. The defendant's car was found parked behind the house where defendant was arrested. RP 239. Detective Shipp did not locate any weapons on the defendant. RP 242.

A forensic specialist with the Tacoma Police Department arrived at Latitude 84 on February 20, 2009, to process the scene. RP 141-143. She saw that the scene was photographed and measured so that a scale diagram could be produced. RP 143-144. She collected items of evidence including a RP² .25 caliber auto casing. RP 145.

Dr. David Patterson is a trauma surgeon who was working at St. Joseph's Hospital in Tacoma on February 20, 2009, when Mr. Ruth was brought to the emergency room with a gunshot wound to his chest. RP 155-158. Dr Patterson testified that the bullet entered near Mr. Ruth's right nipple, caused a partial collapse of Mr. Ruth's lung, traveled through the liver, then lodged in his spine. RP 159-160. Dr Patterson described the injuries as "pretty severe" and potentially life threatening. RP 161-

² "RP" is the brand of this ammunition. RP 145.

165. Dr. Patterson did not remove the bullet, but repaired the other damage. RP 165-166.

On February 21, 2009, Detective Nist was assigned to the case for follow-up investigation. RP 243-247. She participated in the search of defendant's impounded vehicle; the search did not turn up a firearm. RP 248-249. She obtained a statement of the victim. RP 252-253. She also interviewed Ms. Thomas and Ms. Johnson to get their version of events and reviewed the security videos from the bar. RP 253-255.

The State admitted a certified copy of a judgment showing that a person named John Alexander Galdamez had been convicted of burglary in October 2000. RP 472-476; EX 27A.

The security videos were admitted into evidence; they were shown to many witnesses while testifying so questions could be asked about what was depicted; the videos document the defendant sat in his car several minutes then got out, located Mr. Ruth in the parking lot, threw the first punch at Mr. Ruth, who responds by throwing a couple of punches back, to which the defendant responds by pulling out a gun and shooting Mr. Ruth. EXs 46, 47; RP 75-89, 323-325, 369-376, 386-417, 438-449; *see also* RP 498-499.

C. ARGUMENT.

1. DEFENDANT CHALLENGES TWO OF THE COURT'S JURY INSTRUCTIONS AND THE FOLLOWING PRINCIPLES ARE APPLICABLE TO BOTH CHALLENGES.

Defendant challenges the giving of a "first aggressor" instruction and the sufficiency of the "to convict" instruction on the attempted murder. The following law is applicable to both claims, each of which will be discussed in more detail later in the brief. The law concerning the giving of jury instructions may be summarized as:

[An appellate court] review[s] the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, reversed on other grounds, 141 Wn.2d 448, 6 P.3d 1150 (2000), citing *Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is

to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

2. THE TRIAL COURT PROPERLY GAVE THE FIRST AGGRESSOR INSTRUCTION, WHICH DID NOT CONSTITUTE A COMMENT ON THE EVIDENCE.
 - a. Defendant did not take exception to the trial court's decision to give the first aggressor instruction on the basis that it was unsupported by the evidence and therefore did not preserve this issue for review.

As noted in the previous section, CrR 6.15 requires a party to take an exception to an instruction in the trial court in order to preserve the issue for appellate review and only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

In the trial court, the defendant objected to the giving of the first aggressor instruction on the grounds that it was a comment on the evidence. RP 478-484, 492-493. Defendant did not object on the grounds that it was unsupported by the evidence. *Id.* Now, on appeal, defendant tries to raise an objection that was not preserved below. The court should refuse to review this claim as it was not properly preserved.

The trial court may appropriately give a first aggressor instruction when there is credible evidence that the defendant made the first move by drawing a weapon. *State v. Riley*, 137 Wn.2d 904, 976 P.2d 624 (1999), citing *State v. Thompson*, 47 Wn. App. 1, 7, 733 P.2d 584 (1987). The instruction is also appropriate when there is “conflicting evidence as to whether the defendant’s conduct precipitated a fight.” *State v. Wingate*, 155 Wn.2d 817, 822-23, 122 P.3d 908 (2005), citing *State v. Riley*, 137 Wn.2d at 910. As defense counsel acknowledged in the trial court, there was evidence from which the jury could find that the defendant threw the first punch. RP 481-482; *see also* RP 350, 379. Defense counsel’s argument below was that this punch was not the start of the hostilities between the defendant and the victim and that the jury should be able to conclude that Mr. Ruth verbally provoked the defendant into throwing the first punch. RP 480-482. This argument concedes that there is at least conflicting evidence as to whose conduct precipitated the fight, so the trial court could properly give the instruction under *Wingate* and *Riley*. It

should be noted as well that the defense argument that verbal provocation can make a person the aggressor runs afoul of language in *Riley*:

Although language in some older cases suggest that words alone may justify the conclusion that the speaker is an aggressor, we hold that words alone do not constitute sufficient provocation.

Riley, 137 Wn.2d at 910-11.

As recognized by the trial counsel there was evidence adduced at trial that the defendant was the first person to throw a punch and the only person to draw a weapon. With this evidence before the jury, the trial court did not abuse its discretion in giving the first aggressor instruction.

- b. It is well settled that the first aggressor instruction does not improperly comment on the evidence.

An appellate court reviews a challenged jury instruction de novo, within the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). A judge is prohibited by article IV, section 16 from “conveying to the jury his or her personal attitudes toward the merits of the case” or instructing a jury that “matters of fact have been established as a matter of law.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). A judge need not expressly convey his or her personal feelings on an element of the offense; it is sufficient if they are merely

implied. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

A judicial comment in a jury instruction is not a structural error or prejudicial per se. *State v. Levy*, 156 Wn.2d at 725. It is an error that is presumed prejudicial, and the State bears the burden of showing the absence of prejudice, unless the “record affirmatively shows no prejudice could have resulted.” *Levy*, 156 Wn.2d at 725. The State makes this showing when, without the erroneous comment, no one could realistically conclude that the element was not met. *See Levy*, 156 Wn.2d at 726-27. On the other hand, the burden is not carried, and the error therefore prejudicial, where the jury conceivably could have determined the element was not met had the court not made the comment. *See Jackman*, 156 Wn.2d at 745.

The Supreme Court has found certain instructions to constitute improper comments. A jury instruction referencing a victim’s birth date is an improper judicial comment when an element of the crime is the victim’s minority. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). Nor may a court instruct a jury that a certain program was a school when that fact was highly contested by the parties. *Becker*, 132 Wn.2d at 64. A court may instruct a jury that a revolver is a deadly weapon as a matter of law. *State v. Levy*, 156 Wn.2d 722. The Court also held that it was “not inappropriate” for a court to instruct that “jewelry” constitutes personal property. *Id.* In *Levy* there was no dispute as to

whether jewelry was personal property; the only question was related to whether jewelry had been taken from the victims. *Id.* The court also noted that the pattern instructions allow for the insertion of a descriptive term appropriate to the context of the case. *Id.* The court found that because a victim's name was not an element of the offense of robbery that inclusion of the victim's name in the "to convict" is not improper. *Id.*

"An instruction does not constitute an impermissible comment on the evidence where it is sufficient evidence in the record to support it and where the instruction is an accurate statement of the law." *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986).

In the case before the court the jury was given the following first aggressor instruction:

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.

CP 38-80, Instruction 32. *See* 11 Washington Pattern Jury Instructions; Criminal 16.04 (3rd ed. 2008) (WPIC). Defendant asserts that this instruction is an impermissible comment on the evidence arguing the "jury could have perceived the first aggressor instruction as incorporating a particular view of the evidence[.]" Appellant's brief at p. 20.

This instruction has been found to be an accurate statement of the law. *State v. Riley*, 137 Wn.2d at 908-09. Defendant acknowledges that this instruction is a correct statement of the law in his brief. Brief of Appellant at p. 17. Three opinions have held that this language does not constitute an improper comment on the evidence. *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986); *State v. Thompson*, 47 Wn. App. 1, 8, 733 P.2d 584 (1987); *State v. Sampson*, 40 Wn. App. 594, 599-600, 699 P.2d 1253 (1985).

The Supreme Court in *Hughes* determined that the first aggressor instruction does not constitute an improper comment on the evidence and that case is controlling here. Although defendant cites to *Hughes* in his brief for another proposition, he does not make any argument as to why the rule of stare decisis should not be applied on this issue. This court should dismiss this claim as meritless.

3. THE “TO CONVICT” INSTRUCTION FOR THE
CRIME OF ATTEMPTED MURDER
CONTAINED ALL THE NECESSARY
ELEMENTS.

A “to convict” instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence” and “an instruction purporting to list all of the elements of a crime must in fact do so.” *State v. Emmanuel*, 42 Wn.2d 799, 819-20, 259 P.2d 845 (1953). The failure to

instruct the jury as to every element of the crime is constitutional error. *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). A reviewing court may not rely on other instructions to supply the element missing from the “to convict” instruction. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). A “to convict” instruction that omits an element of a crime is per se reversible error. *State v. Jackson*, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999); *Eastmond*, 129 Wn.2d at 503. Thus, this is an issue that may be raised for the first time on appellate review. RAP 2.5. An appellate court makes a de novo review of the adequacy of a “to convict” instruction. *DeRyke*, 149 Wn.2d at 910.

“An attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime.” *State v. DeRyke*, 149 Wn.2d at 910, citing RCW 9A.28.020(1) and *State v. Chhom*, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996). The challenged instruction in the case now at issue listed the following elements:

- (1) That on or about 20th day of February, 2009, 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; and
- (3) That the act occurred in the State of Washington.

CP 38-80, Instruction No. 13. This instruction followed WPIC 100.02, which recommends a “to convict” instruction setting forth the essential

elements of the attempted crime and a separate instruction delineating the elements of the substantive crime. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 100.02, note on use at 386 (3d ed. 2008) (WPIC).³ In defendant's case the trial court set forth the elements of the crime of murder in the second degree in a separate instruction, including the intent to cause the death of another. CP 38-80, Instruction 11. Additional instructions accurately defined "intent" and "substantial step." CP 38-80, Instruction Nos. 10, 12. The Washington Supreme Court approved this approach in *State v. DeRyke*, rejecting the DeRyke's claim that the "to convict" instruction for attempted first degree rape was deficient because it did not include all of the elements of first degree rape. 149 Wn.2d at 911; *see also State v. Reed*, 150 Wn. App. 761, 208 P.3d 1274 (2009)(approving similarly formatted instructions for crime of attempted murder in the first degree).

The court below complied with *DeRyke* and the WPIC Note on Use. The challenged instruction set forth the essential elements of an attempt crime. Defendant fails to cite any authority to support the arguments in his brief regarding the alleged deficiency of the instructions.

³ That note states in the relevant part: "If attempt to commit the crime is being submitted to the jury along with the crime charged, the jury will be receiving instructions defining and setting out the elements of the crime charged. If the basic charge is an attempt to commit a crime, a separate elements instruction must be given delineating the elements of that crime. This may require a modification of the instruction in WPIC that defines that particular crime so that the elements of that crime are delineated as separate elements necessary to constitute that crime." WPIC 100.02, at 219.

As his argument is contrary to the holding in *DeRyke*; it should be summarily rejected.

4. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING THE PROSECUTOR ENGAGED IN MISCONDUCT OR THAT HE WAS PREJUDICED BY SUCH ACTIONS.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985)(citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). Before an appellate court should review a claim based on prosecutorial misconduct, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the prosecutor's actions were improper and that they prejudiced the defense. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); *State v. Binkin*, 79 Wn. App. 284, 902 P.2d 673 (1995), *review denied*, 128 Wn.2d 1015 (1996). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *Binkin*, at 293-294. Where the defendant did not object or request a curative instruction,

the error is considered waived unless the court finds that the remark or conduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.*

- a. Defendant has failed to show that the allegedly leading questions were improper or that the prosecutor’s actions were so flagrant and ill-intentioned that no instruction could have eliminated the prejudice.

A leading question is one that suggests the desired answer. *State v. Scott*, 20 Wn.2d 696, 698, 149 P.2d 152 (1944).

The principal test of a leading question is: Does it suggest the answer desired? In order to elicit the facts, a trial lawyer may find it necessary to direct the attention of a witness to the specific matter concerning which his testimony is desired, and, if the question does not suggest the answer, it is not leading. Even though the question may call for a yes or a no answer, it is not leading for that reason, unless it is so worded that, by permitting the witness to answer yes or no, he would be testifying in the language of the interrogator rather than in his own.

Scott, 20 Wn. 2d at 698-99. ER 611(c) provides that leading questions should not be used in direct examination “except as may be necessary to develop the witness’ testimony.” The trial court has broad discretion to permit leading questions and will not be reversed absent abuse of that discretion. *State v. Delarosa-Flores*, 59 Wn. App. 514, 517, 799 P.2d 736 (1990).

Defendant contends that the prosecutor committed misconduct by asking impermissibly leading questions when examining a security guard who was an eyewitness to the fistfight and the shooting; he cites to the report of proceedings at RP 71, 72-73 and 118 as being where this alleged misconduct occurred. Appellant's brief at p. 28. There were no objections lodged to any of these allegedly leading questions. RP 71, 72-73, 118. Consequently, defendant must show that the prosecutor committed flagrant and ill-intentioned misconduct by asking these questions and that it resulted in enduring prejudice and an unfair trial. *State v. Korum*, 157 Wn.2d 614, 652, 141 P.3d 13 (2006). Petitioner cannot meet his burden of showing misconduct.

First, the questions asked were not leading as they did not suggest the desired answer. The witness had testified that he heard a screaming match; the prosecutor began the following exchange:

Prosecutor: As part of the screaming did you hear anybody say "I'm going to shoot you"?

Witness: No, not at all.

Prosecutor: Did you hear anybody say "I'm going to kill you"?

Witness: No, not at all.

Prosecutor: Did you hear anybody threaten anybody's life?

Witness: No.

...

Prosecutor: Did you hear anybody in that group threaten anybody with a weapon?

Witness : No.

RP 71-72. None of these questions suggest that the prosecutor desires a particular answer. While the questions may be answered with a “yes” or a “no,” that does not render them leading.

Moreover the questions are designed to adduce relevant information as to the circumstances at issue. The “group” referred to in the above exchange that was engaged in the “screaming match” included both the defendant and the victim. RP 72. If the witness had heard a threat to someone life’s it would have been relevant to the State’s case if such a threat had been made by the defendant and relevant to defendant’s self-defense claim had such a statement been made by Mr. Ruth or one of his friends. This is no doubt why defense counsel engaged in a similar line of cross-examination with Mr. Kila which prompted Mr. Kila to recall that he had heard someone saying something about “whipping your ass.” RP 103-104. The prosecutor was trying to adduce relevant information, which is not improper. Having failed to show that the prosecutor’s questions were leading or aimed at introducing irrelevant information, defendant has failed to meet his burden of showing any prosecutorial misconduct, much less conduct that was so flagrant and ill-intentioned that no curative instruction could have eliminated the prejudice.

Defendant cites to *State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976), to support his claim that the asking of leading questions can constitute not only misconduct but also a basis for reversible error. In *Torres*, the prosecutor persisted in asking leading questions despite the court sustaining numerous objections on this basis. The court noted that “[w]hile the asking of leading questions is not prejudicial error in most instances, the persistent pursuit of such a course of action is a factor to be added in the balance.” *Torres*, 16 Wn. App. at 258. In *Torres*, the court found many instances of prosecutorial misconduct, some of which “standing alone, would require a retrial.” *Id.* at 263. It reversed for cumulative error. *Id.* In defendant’s case there was no persistent improper conduct in the face of numerous warnings from the court such as occurred in *Torres*. Defendant’s reliance on *Torres* is misplaced. This claim is without merit and should be rejected.

- b. Defendant has not shown the prosecutor acted improperly when he adduced from the victim and a witness that neither wanted to be present in court.

Evidence that a witness is fearful or reluctant to testify because of threats is relevant if the witness’s credibility has been challenged. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997). In *Bourgeois*, the State elicited testimony on direct examination from several witnesses that they feared testifying and had only shown up because the State had

arrested them on material witness warrants. *Bourgeois*, 133 Wn.2d at 393-96. On appeal, the Supreme Court found no connection between Bourgeois and the witnesses' reluctance to testify. *Bourgeois*, 133 Wn.2d at 400. In addition, the court held that most witnesses' testimony was inadmissible because Bourgeois had not and likely would not have attacked their credibility. *Bourgeois*, 133 Wn.2d at 400-01. But the court found one witness's testimony admissible because Bourgeois had attacked his credibility on cross-examination. *Bourgeois*, 133 Wn.2d at 402. The court held that "[a]lthough the attack occurred after [the witness] was directly examined by the State, it was reasonable for the State to anticipate the attack and 'pull the sting' of the defenses cross-examination." *Bourgeois*, 133 Wn.2d at 402.

Here the defendant asserts that the prosecutor improperly adduced that two prosecutions witnesses were afraid to testify. Appellant's brief at pp 26-27. He cites to the report of proceedings at RP 112-13 and 337.

The first instance occurred on the re-direct examination of Mr. Kila. Mr. Kila's trial testimony differed from his statements to the police the night of the incident; his trial testimony was more favorable to defendant's claim of self defense. The prosecutor began his redirect asking the defendant if he were reluctant to come to court. RP 112. Mr. Kila responded that he did not want to be in court and when asked why that was he stated that he did not want to be involved:

Witness: Because I knew you guys had the tape and I didn't want to come in here and, like, you know, have to start thinking about the shit again and how to get everything right or whatever, you know point no fingers at nobody or none of that shit.

Prosecutor: You said earlier you didn't want to point the finger at anybody, right?

Witness: Pretty much. I knew I was going to start getting questions because I've done this shit before and I just didn't want to go through it again.

RP 113. The witness's answer does not indicate any fear of the defendant or fear of testifying, only of general reluctance to be involved in the trial proceeding. The jury was entitled to know that Kila had a general reluctance "to point a finger at anybody" in assessing the reliability of his testimony. There was no effort by the prosecutor to bolster Kila's credibility with the jury by arguing that Kila was testifying in spite of his fears; on the contrary the prosecutor tried to discredit Kila's credibility. *See* RP 523-527.

The second instance of claimed misconduct occurred when the victim, Mr. Ruth was testifying. After a preliminary greeting, the prosecutor asked Mr. Ruth if he wanted to be here, to which Mr. Ruth responded "No." RP 337. The prosecutor went onto other topics. RP 337. Again, there was no indication that Mr. Ruth was fearful of testifying or of the defendant, only of a general reluctance to be present. Thus, the general rule set forth in *Bourgeois* prohibiting the prosecution from adducing that its witnesses are fearful of testifying as a means of

bolstering their credibility is inapplicable to defendant's case. Defendant has failed to meet his burden of showing misconduct on this record

- c. The prosecutors rebuttal argument was not improper comment on the right not to testify under **Russell, Borboa, and Pavelich**.

Allegedly improper comments are reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Bryant*, 89 Wn. App. 857, 950 P.2d 1004 (1998). It is not misconduct to argue based on the evidence and the reasonable inferences. *State v. Ranicke*, 3 Wn. App. 892, 897, 479 P.2d 135 (1970). A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). A prosecutor is allowed to argue that the evidence doesn't support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

A comment on a defendant's right to remain silent occurs when the State uses the defendant's exercise of his Fifth Amendment rights as either substantive evidence of guilt or to suggest that the silence was an admission of guilt. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). Not every reference to silence constitutes a "comment on

silence.” *Id.*, 130 Wn.2d 706-707; *State v. Sweet*, 138 Wn.2d 466, 980 P.2d 1223 (1999).

In *State v. Pavelich*, 150 Wash. 411, 420, 273 P. 182 (1928), the Washington Supreme Court held that a prosecuting attorney may comment on a lack of defense evidence so long as the prosecuting attorney does not directly refer to the defendant’s decision not to testify. Accord *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006). Similarly, a “prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it, and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his’ is still good law.” *State v. Ashby*, 77 Wn.2d 33, 38, 459 P.2d 403, 407 (1969), quoting *State v. Litzenberger*, 140 Wash. 308, 248 P. 799 (1926).

Defendant asserts that the prosecutor engaged in improper argument during rebuttal with the following argument:

Prosecutor: [Defendant] must have believed, it was [defense counsel’s] inference that Mr. Ruth had a weapon. Okay. Well. If he believed Mr. Ruth had a weapon, then why did he get out of that car? If he believed Mr. Ruth had a weapon, why didn’t he drive away? Because he didn’t think Mr. Ruth had a weapon and wasn’t afraid of Mr. Ruth.

[Defense Counsel] said, well, my client knows –you can infer my client knows that Mr. Ruth went to that car. Based on what? I heard no evidence, no witness, no reasonable circumstance to suggest that Mr. Galdamez even

knew where Mr. Ruth was. So for him to stand up here and argue my client must have known this, based on what?

What piece of evidence—in jury instruction I, you must base your opinion solely on the evidence presented at trial, exhibits admitted. What evidence do we have to indicate that Mr. Galdamez knew anything, that Mr. Galdamez was even aware that Mr. Ruth was there? None, right?

And [defense counsel] is asking you, well, we can infer this and we can speculate this. Well, the jury instruction says you can't speculate, you must decide the case on the evidence presented. You heard no evidence about what Mr. Galdamez knows, none, zero. Not one witness testified—

[defense counsel objected but the court overruled the objection]

... You can decide the facts solely on what's presented at trial. No evidence about what Mr. Galdamez knew.

[Defense counsel] says, well, there's no rules in fighting; it was a fight. Well, that's why you have the self-defense instruction, because yes, it's a fistfight; you get to use your fists. What evidence have you heard that Mr. Galdamez believed Mr. Ruth had a weapon?

RP 580-582. At this point there was another objection which was sustained. RP 582. The record shows that this argument was responding to the defense closing argument where there were repeated arguments about what the defendant knew, was thinking or intended. RP 552-574. The clear focus of the prosecutor's rebuttal argument is to get the jury to focus on the instructions and how it is to decide the case on the evidence and the reasonable inferences that flow from that evidence. The thrust of

this argument was that the defense theory was asking the jury to speculate rather than decide the case on evidence and reasonable inferences. It is not improper to argue that the evidence doesn't support the defense theory. *See Russell, supra.* The prosecutor's comments do not reference the defendant's failure to testify. The prosecutor discussed that the jury had "no evidence, no witness, no reasonable circumstance" on which to make a determination as to what the defendant knew about the victim's actions at a particular point in time. This directs the jury to persons or information other than the defendant who might provide such evidence. Finally, the argument does not ask the jury to interpret the lack of evidence as to what the defendant knew or was thinking as providing substantive evidence of his guilt. Rather the argument asks the jury to reject the defense arguments that are unsupported by evidence. It is the use of a defendant's exercise of his Fifth Amendment rights *as either substantive evidence of guilt or to suggest that the silence was an admission of guilt* which makes it an improper comment on the right to remain silent. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The prosecutor's arguments did not violate this rule. Defendant has failed to show improper comments.

As defendant has not met his burden of showing misconduct and prejudicial effect, this court should reject his claims of prosecutorial misconduct.

5. DEFENDANT HAS FAILED TO MEET HIS BURDEN UNDER **STRICKLAND** OF SHOWING DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is

a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*,

120 Wn.2d 631, 633, 845 P.2d 289 (1993). As the Supreme Court has stated “The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and “so admissions of deficient performance by attorneys are not decisive.” *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial’s outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel’s failure to

litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Defendant argues that his attorney was deficient for failing to object to leading questions and inadmissible evidence. As discussed in a previous section of the brief, the challenged questioning was not, in fact, leading and sought relevant information. Consequently, there was not reason for defense counsel to object.

To prove that counsel was ineffective for failing to object to evidence, a defendant must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted. *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). “The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute

incompetence of counsel justifying reversal.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A reviewing court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *Davis*, 152 Wn.2d at 714 (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)).

Here, the defendant cannot overcome the presumption that his attorney had a trial tactic for not objecting. The case before the court is one where not only was the crime caught on videotape, but almost the entirety of the interactions between the defendant and victim over the course of the evening were caught on videotape. As such several defenses were essentially off the table for defense counsel. The video tapes showed the defendant took the first punch and then after receiving a couple of responding blows, pulled out his gun and fired at the chest of the victim at close range, then tried to kick the victim as he fell. With such evidence to contend with it was clear that alibi, mistaken identity, and general denial defenses were unlikely to succeed. The defense counsel opted to defend this case by highlighting a poor police investigation into the shooting which resulted in a rush to judgment based upon a cursory viewing of the tapes coupled with his primary defense: a self-defense claim which offered the jury an alternative interpretation of the events documented on the security tapes. *See* RP 533-579. The key focus of the defense case was the contents of the security videos and the alternative interpretation of

them offered by the defense. RP 535-536 (“I told you in opening that Mr. Galdamez was lucky that everything was captured on video...because all the witnesses called by the State ...weren’t credible about everything and couldn’t actively recall the evidence in this case.”). The challenged hearsay adduced concerned the out of court statements made by the security guard, Mr. Kila, to investigating officers the night of the shooting. *See* Appellant’s brief at pp. 34-41. Counsel acknowledges that some of these statements were inconsistent with his trial testimony, RP 38, and therefore, likely would be admissible as prior inconsistent statements. ER 613. Defendant fails to address that defense counsel had a reason for allowing this evidence to come in as it allowed him to highlight the relatively poor documentation of Kila’s version of the events close in time to when they occurred; the assigned detective did not conduct a taped follow-up interview with Kila. *See* RP 267-268, 534- 535. The detective was satisfied with a four line written statement from Kila and a summary of his brief interview with a responding officer despite the fact that he was an eyewitness to the shooting and likely to have considerable additional information. RP 267-268. In other words, defendant has failed to show that the introduction of this hearsay was harmful to the trial tactics and defense theory employed by trial counsel below. He must make this showing to overcome the presumption of effective representation.

Trial counsel had considerable evidence of his client’s guilt to contend with in defending him. While trial counsel efforts were

unsuccessful, defendant has failed to show that they were unreasonable tactical decisions or that such decisions would have a reasonable probability of a different outcome considering the overwhelming evidence of guilt.

Defendant has failed to meet his burden under *Strickland* of showing ineffective assistance of counsel.

6. THE STATE DID NOT MEET ITS BURDEN OF PROVING THE IDENTITY OF THE PERSON NAMED IN A PRIOR JUDGMENT AS BEING THE SAME PERSON AS THE DEFENDANT IN ORDER TO PROVE THAT DEFENDANT HAD A PRIOR CONVICTION OF A SERIOUS OFFENSE; THE CONVICTION FOR UNLAWFUL POSSESSION OF FIREARM MUST BE VACATED AND DISMISSED.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Luther*, 157 Wn.2d 63, 77, 134 P.3d 205 (quoting *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)), *cert. denied*, 127 S. Ct. 440 (2006). A sufficiency claim admits the truth of the State's evidence. *Luther*, 157 Wn.2d at 77-78. In considering the sufficiency of evidence, a court gives equal weight to circumstantial and direct evidence. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The reviewing court does not substitute its judgment for that of the jury on factual issues. *State v. Farmer*, 116 Wn.2d 414, 425, 805 P.2d 200, 812 P.2d 858 (1991); *State v.*

King, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1015 (2003).

To prove the crime of unlawful possession of a firearm, the state had to prove that the defendant “had previously been convicted of burglary in the second degree, a serious offense.” CP 38-80, Instruction No 36. It is well established in Washington that:

[W]hen criminal liability depends on the accused’s being the person to whom a document pertains[,] ... the State *must do more than authenticate and admit the document*; it also must show beyond a reasonable doubt “that the person named therein is the same person on trial.” Because “in many instances men bear identical names,” the State cannot do this by showing identity of names alone. Rather, it must show, ““by evidence independent of the record,”” that the person named therein is the defendant in the present action.

State v. Huber, 129 Wn. App. 499, 502, 119 P.3d 388 (2005)(emphasis added)(footnotes omitted).

The independent evidence need only establish prima facie that the defendant is the same person named in the document. *State v. Hunter*, 29 Wn. App. 218, 221-22, 627 P.2d 1339 (1981). Once the State has introduced this independent evidence, the evidence will be deemed sufficient to uphold the conviction. *See Hunter*, 29 Wn. App. at 222. If the State presents only a document bearing an identical name, the State produces insufficient evidence to support a criminal conviction beyond a reasonable doubt. *Hunter*, 29 Wn. App. at 221.

In defendant's case below, the State admitted a certified copy of a judgment of a burglary conviction belonging to a John Galdamez just prior to resting its case which was relevant to the charge of unlawful possession of a firearm in the second degree. RP 472. The defense brought a motion to dismiss the firearm charge arguing that there was insufficient evidence to prove that the Mr. Galdamez referenced in the judgment was the same Mr. Galdamez sitting in the courtroom. RP 474-475. The prosecutor argued that identity of names was sufficient and it was up to the jury to see if it was convinced that the person named in the judgment was the same person that was in the courtroom. RP 476. The court denied the motion to dismiss.

It is clear that under the above cited authority both the prosecutor and trial court were incorrect as to the sufficiency of the evidence to support the element of identity of the person who had been previously convicted of burglary in the second degree. The evidence that the State adduced on this issue was insufficient as a matter of law. The conviction must be reversed and dismissed with prejudice.

7. DEFENDANT’S CHALLENGE TO THE COURT’S STANDARD RANGE SENTENCE IS NOT REVIEWABLE AS DEFENDANT DOES NOT ASSIGN ERROR TO THE COURTS DETERMINATION OF THE APPLICABLE LAW OR THE CALCULATION OF THE OFFENDER SCORE BUT ARGUES THE COURT ABUSED ITS DISCRETION IN NOT GIVING MORE WEIGHT TO A MITIGATING FACTOR ARGUED BY THE DEFENSE.

A trial court has broad discretion to impose a sentence within the standard range in accordance with the correct offender score. *State v. Barberio*, 66 Wn. App. 902, 908, 833 P.2d 459 (1992). A trial judge is “under no obligation to explain his reason for imposing a sentence at the high end of the standard range.” *State v. Mail*, 121 Wn.2d 707, 714, 854 P.2d 1042 (1993). Generally, a party cannot appeal a standard range sentence. RCW 9.94A.585. This principle flows from the concept that “so long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence’s length.” *State v. Williams*, 149 Wn.2d 143, 146-47, 65 P.3d 1214 (2003). Thus, in the absence of a challenge to the offender score, a challenge to the trial court’s determination of what sentence is applicable, or an allegation that the sentencing court gave weight to a factor that would violate the defendant’s due process rights, a standard range sentence may not be appealed. *Williams*, 149 Wn.2d at 146.

At defendant's sentencing hearing, his offender score and standard range were not in dispute. 2/19/10 RP 4-5. The defense argued that the court should consider that the tapes showed defendant not to be the initial aggressor, at least as far as what happened inside the bar, and sentence defendant to the low end of the range. 2/10/10 RP 10. The court specifically disagreed with the defense perspective that the victim was the initial aggressor stating:

I certainly didn't see it that way at all in the various videos I saw. ...

...

All I saw is a guy who shot somebody for no particular reason, a guy who hadn't particularly done anything to him. So that's my view of it.

2/19/10 RP 12-14. The court then proceeded to sentence at the high end of the standard range. 2/19/10 RP 14-15.

On appeal, there are no challenges to the calculation of the offender score or arguments that the court did not apply the appropriate law at the sentencing hearing. There is only a challenge to the court exercise of its discretion in setting the standard range sentence. This type of claim is not reviewable and should be summarily rejected. RCW 9.94A.585.

10 DEC 21 PH 2:08

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the judgment and sentence below.

STATE OF WASHINGTON
BY [Signature]
DEPUTY

DATED: DECEMBER 20, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney

[Signature]
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

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

12/20/10 [Signature]
Date Signature