

NO. 40820-1

COURT OF APPEALS
DIVISION II

11/20/08 4:50:03

BY *Ka*

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

STATE OF WASHINGTON, RESPONDENT

v.

LAMAR BARNES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 08-1-03257-6

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

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

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Did the trial court properly instruct on both alternative means of committing third degree assault when each was supported by evidence adduced at trial? 1

 2. Did the trial court reasonably refuse to declare a mistrial after the prosecutor made argument in opening statement when the argument was supported by the evidence and the potential for prejudice was cured by the court's instructions? 1

 3. Has defendant failed to prove the prosecutor's closing argument improperly expressed personal opinions about witness credibility and misstated the law when the prosecutor appropriately argued witness credibility from the evidence in accordance with the court's instructions? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts..... 2

C. ARGUMENT..... 4

 1. THE TRIAL COURT PROPERLY INTRUCTED ON BOTH ALTERNATIVE MEANS OF COMMITTING THRID DEGREE ASSAULT BECAUSE EACH WAS SUPPORTED BY EVIDENCE ADDUCED AT TRIAL ... 4

 2. THE TRIAL COURT REASONABLY REFUSED TO DECLARE A MISTRIAL AFTER THE PROSECUTOR MADE ARGUMENT IN OPENING STATEMENT BECAUSE THE ARGUMENT WAS SUPPORTED BY THE EVIDENCE AND THE POTENTIAL FOR PREJUDICE WAS CURED BY THE COURT'S INSTRUCTIONS 10

3. DEFENDANT HAS FAILED TO PROVE THE PROSECUTOR’S CLOSING ARGUMENT IMPROPERLY EXPRESSED PERSONAL OPINIONS ABOUT WITNESS CREDIBILITY AND MISSTATED THE LAW BECAUSE THE PROSECUTOR APPROPRIATELY ARGUED WITNESS CREDIBILITY FROM THE EVIDENCE IN ACCORDANCE WITH THE COURT’S INSTRUCTIONS. 15

D. CONCLUSION..... 26

Table of Authorities

State Cases

<i>In re Davis</i> , 152 Wn.2d 647, 712, 101 P.3d 1 (2004)	14
<i>In re the Matter of the Detention of Michael R. Sease</i> , 140 Wn. App. 66, 201 P.3d 1078 (2009).....	15
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	5
<i>State v. Adams</i> , 76 Wn.2d 650, 458 P.2d 558, <i>rev'd on other grounds by</i> , 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971).....	18
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <i>review denied</i> , 111 Wn.2d 1033 (1988).....	5
<i>State v. Brett</i> , 126 Wn.2d 136, 174, 892 P.2d 29 (1995).....	10, 15, 16, 18
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)	6
<i>State v. Campbell</i> , 103 Wn.2d 1, 16, 691 P.2d 929 (1984)	11
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987)	6
<i>State v. Copeland</i> , 130 Wn.2d 244, 290, 922 P.2d 1340 (1996).....	18
<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	6
<i>State v. Davenport</i> , 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).....	22
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	6
<i>State v. Estill</i> , 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972).....	22
<i>State v. Finch</i> , 137 Wn.2d 792, 839, 975 P.2d 967 (1999).....	10
<i>State v. Fry</i> , 153 Wn. App. 235, 220 P.3d 1245 (2009)	5, 8, 9
<i>State v. Furman</i> , 122 Wn.2d 440, 455, 858 P.2d 1092 (1993).....	15

<i>State v. Gentry</i> , 125 Wn.2d 570, 640, 888 P.2d 1105 (1995)	11
<i>State v. Gotcher</i> , 52 Wn.App. 350, 355, 759 P.2d 1216 (1988).....	22
<i>State v. Grisby</i> , 97 Wn.2d 493, 499, 647 P.2d 6 (1982).....	11
<i>State v. Hoffman</i> , 116 Wn.2d 51, 93, 804 P.2d 577 (1991).....	11, 15, 18
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	5
<i>State v. Hudson</i> , 73 Wn.2d 660, 662, 440 P.2d 192 (1968).....	19
<i>State v. Hughes</i> , 106 Wn.2d 176, 195, 721 P.2d 902 (1986).....	16
<i>State v. Jefferson</i> , 11 Wn. App. 566, 524 P.2d 248 (1974)	19
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	5
<i>State v. Kroll</i> , 87 Wn.2d 829, 834-35, 558 P.2d 173 (1976).....	11
<i>State v. Lord</i> , 117 Wn.2d 829, 887, 822 P.2d 177 (1991).....	10
<i>State v. Luoma</i> , 88 Wn.2d 28, 40, 558 P.2d 756 (1977).....	19
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	5
<i>State v. McChristian</i> , 158 Wn. App. 392, 400, 241 P.3d 468 (2010).....	16, 22
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	5
<i>State v. McKenzie</i> , 157 Wn.2d 44, 57, 134 P.3d 221 (2006)	14, 17
<i>State v. Millante</i> , 80 Wn. App. 237, 250, 908 P.2d 374 (1995).....	18, 22
<i>State v. Ortega-Martinez</i> , 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994).....	5
<i>State v. Parker</i> , 74 Wn.2d 269, 274-75, 444 P.2d 796 (1968), <i>overruled on other grounds in State v. Gosby</i> , 85 Wn.2d 758, 767, 539 P.2d 680 (1975).....	11
<i>State v. Reed</i> , 102 Wn.2d 140, 145, 684 P.2d 699 (1984).....	16, 18

<i>State v. Russell</i> , 125 Wn.2d 24, 86, 882 P.2d 747 (1994).....	15
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	5
<i>State v. Sargent</i> , 40 Wn. App. 340, 343, 698 P.2d 598 (1985).....	19
<i>State v. Saunders</i> , 132 Wn. App. 592, 132 P.3d 743 (2006)	5, 8
<i>State v. Stenson</i> , 132 Wn.2d 668, 718, 940 P.2d 1239 (1997).....	10, 11
<i>State v. Swan</i> , 114 Wn.2d 613, 664, 790 P.2d 610 (1990).....	18
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)	5
<i>State v. Warrern</i> , 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008)	11, 19
 Statutes	
RCW 9A.36.031(1)(d), (f)	7

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

1. Did the trial court properly instruct on both alternative means of committing third degree assault when each was supported by evidence adduced at trial?
2. Did the trial court reasonably refuse to declare a mistrial after the prosecutor made argument in opening statement when the argument was supported by the evidence and the potential for prejudice was cured by the court's instructions?
3. Has defendant failed to prove the prosecutor's closing argument improperly expressed personal opinions about witness credibility and misstated the law when the prosecutor appropriately argued witness credibility from the evidence in accordance with the court's instructions?

B. STATEMENT OF THE CASE.

1. Procedure

On July 14, 2008, the Pierce County Prosecutor's Office filed an information in Pierce County Cause No. 08-1-03257-6, charging the appellant LAMAR BARNES ("defendant"), with: Count I (assault in the second degree, victim: Charlie Parrez); Count II (assault in the second degree, victim: Robert Ransom); and Count III (deadly weapon enhanced assault in the second degree, victim: Steve Hebert). CP 1-2. On May 6, 2010, Count II was amended to add a deadly weapon allegation. CP 52-53. On May 18, 2010, Count II was amended a second time to allege that the second degree assault was committed by alternative means, to wit: 1)

that defendant intentionally assaulted Robert Ransom and thereby recklessly inflicted substantial bodily harm; and 2) that defendant intentionally assaulted Robert Ransom with a deadly weapon. CP 119-121.

The Honorable Linda CJ Lee presided over the trial. RP 1. After considering the evidence, the jury found defendant guilty of the lesser included offenses of third degree assault (victim: Charlie Parrez), deadly weapon enhanced third degree assault (victim: Robert Ransom), and unlawful display of a weapon. CP 182, 185, 189, 191. On June 4, 2010, the court imposed a high-end sentence of 18 months in the Department of Corrections followed by 12 months of community custody. CP 241-251. Defendant filed a timely notice of appeal. CP 230.

2. Facts

Defendant arrived at Galloping Gertie's bar and grill in Lakewood, Washington, at approximately 2200 hours on July 10, 2008.¹ RP 231, 238, 324, 572. Before heading inside, defendant became involved in an argument with a woman named Angel² and a man named Charles Ford.³ RP 239, 422, 573. The argument continued inside and ended when bar employees responded to defendant's escalating physical aggression by

¹ The witnesses' accounts of the incident varied in detail.

² Angel was not called as a witness and her last name does not appear in the record.

³ Ford is also referred to in the record by the nickname "Hook," due to the prosthetic limb he began wearing after returning from military service abroad. RP 240.

asking him to leave. RP 251-252, 256, 353, 383, 431, 575, 580-581.

When defendant refused, Charles Parrez (“Parrez”) and Heliodoro Marshall (“Marshall”) physically escorted him from the premises. RP 255, 385, 436.

Defendant returned to Galloping Gertie’s several hours later and asked to speak with Parrez. RP 255-257, 386, 439, 585. As Parrez followed defendant into the parking lot, defendant abruptly turned and hit him in the mouth. RP 258, 440, 590. The unanticipated blow fractured Parrez’s jaw and broke several of his teeth. RP 260. Parrez ran back inside the bar to assess his injuries. RP 269, 387, 441, 590.

Meanwhile, Ransom had just finished singing karaoke inside the bar and was walking outside to catch a ride home. RP 272, 442, 473, 484, 591, 608. As Ransom stepped through the door leading to the parking lot defendant knocked him over with a sudden and unexpected punch to the nose. RP 272, 442, 473, 484, 591, 608. Defendant then lunged forward after Ransom with a serrated knife. RP 474; Ex.16-17. The knife sliced upward through Ransom’s shirt and cut his face. RP 448-449, 475, 483; CP 291; Ex. 2, Ex. 3. Marshal later testified that defendant came within inches of cutting into Ransom’s chest or vital organs. RP 451. The struggle prompted several other men, including Steve Hebert (“Hebert”), to intervene in an attempt to help Ransom gain control of defendant’s knife. RP 279, 281, 300, 450, 477-478. Parrez later testified defendant

stepped back and screamed: “I’m going to kill you. I’m going to kill everybody.” RP 279. Herbert closed within two feet of defendant while defendant made stabbing motions toward the men. RP 281, 450. Defendant finally dropped the knife when Herbert touched the left side of his body with an activated taser. RP 280-281, 478. Police arrived on scene and apprehended defendant as he walked away from the bar. RP 532, 538. During the investigation that followed Officer Devaney observed Ransom had a bloody nose, swollen left eye, and lacerated wrist. RP 555; Ex. 1-7. Ransom later testified that his face remained swollen for three days. RP 484.

Defendant was the only witness called by the defense at trial. RP 570-622. During his testimony defendant admitted to punching both Parrez and Ransom in the face and using a knife during the struggle, but claimed he acted in self defense. RP 589-590, 608-609, 611-612.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INTRUCTED ON BOTH ALTERNATIVE MEANS OF COMMITTING THRID DEGREE ASSAULT BECAUSE EACH WAS SUPPORTED BY EVIDENCE ADDUCED AT TRIAL.

“If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to

affirm a conviction because [appellate courts] infer that the jury rested its decision on a unanimous finding as to the means.” *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994) (citations omitted). “On the other hand, if the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.” *Id.* at 708; *see also State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); *see also State v. Fry*, 153 Wn. App. 235, 220 P.3d 1245 (2009); *State v. Saunders*, 132 Wn. App. 592, 132 P.3d 743 (2006). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said: “great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

There is sufficient evidence to support the alternative means underlying defendant’s third degree assault conviction. At trial the jury received the following instruction:

“To convict the defendant of the crime of assault in the third degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 11, 2008, the defendant caused bodily harm to Robert Ransom,
- (2)(a) That the bodily harm was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering; or
- (b) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm
- (3) That the defendant acted with criminal negligence; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (3), (4), and either alternative element (2)(a) or (2)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a) or (2)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (2)(a) or (2)(b) has been proved beyond a reasonable doubt”CP 167 Instruction No. 27; *See also* RCW 9a.36.031(1)(d), (f).

Appropriately viewed in a light most favorable to the State, the testimony that defendant hit Ransom in the face hard enough to knock him over, bloody his nose, and cause his face to swell for three days is sufficient to support a jury’s reasonable inference that Ransom’s resulting bodily injury was accompanied by “considerable suffering.” RP 272, 442, 473, 484, 591, 608. Such an inference is further supported by the testimony defendant cut Ransom’s face with a serrated knife; this evidence was also sufficient to convince any rational trier of fact that defendant

physically injured Ransom with a weapon likely to produce bodily harm. RP 448-449, 475, 483. Moreover, defendant's own testimony did not dispute the balance of this evidence but merely explained it in terms of self defense. RP 589-590, 608-609, 611-612. Aside from the testimonial evidence, defendant's jury was also capable of drawing its own inculpatory inferences about the nature and impact of defendant's assault from the seven admitted photographs that documented the resulting injuries to Ransom's face. Ex. 1-7.

Defendant nonetheless challenges his jury's verdict claiming there was insufficient evidence the assault caused Ransom "considerable suffering." This argument should be rejected. The evidence of Ransom's suffering is more compelling than the evidence upheld as sufficient in *Fry*. Like defendant, Fry claimed the State's evidence was insufficient to prove his victim endured "considerable suffering." 153 Wn. App. at 240. The evidence showed Fry punched his victim on the right side of her face; the victim's eye became swollen and the pain in her face lasted throughout the morning. 153 Wn. App. at 237. Finding these injuries provided "ample support" for the jury to conclude Fry's victim experienced considerable suffering, the Court of Appeals affirmed Fry's third degree assault conviction. *Id.* at 241; *see also Saunders*, 132 Wn. App. at 600 (sufficient evidence of "considerable suffering" where the victim had swelling on her

cheek, an abrasion on her forehead, and complained of neck pain lasting more than three hours.).

Here, Ransom's swollen eye, bloody nose, and lacerated face is at least comparable to the swollen eye described in *Fry* while Ransom's trauma persisted for two and a half days longer.

Defendant attempts to distinguish his case from *Fry* by arguing that unlike Fry's victim, Ransom did not use the word "pain" when describing his injuries, and therefore left the jury insufficient evidence to conclude he endured "considerable suffering." This argument is flawed because it wrongly suggests that challenges to sufficiency of the evidence turn on a witness's particular word choice instead of the totality of favorable inferences a reasonable jury could draw from the evidence. Appellate courts give great deference to a jury's factual determinations and defendant's jury was optimally positioned to determine whether Ransom experienced "considerable suffering." In addition to hearing the testimony and seeing the exhibits, defendant's jury was able to observe Ransom's in court demeanor, which enabled it to appreciate any unspoken expressions of pain that may have been clear in court, but nonetheless absent in the transcribed record. Defendant's jury was also free to disregard Ransom's account as a brave understatement of his pain and make its own factual determinations about the nature and impact of the assault from the circumstances of the attack and the photographs of Ransom's injuries. Since any trier of fact could reasonably infer

“considerable suffering” from an unanticipated blow to the face sufficient in force to knock an adult male over, rupture the blood vessels in his nose, and cause his face to swell for three days, particularly when such an injury was accompanied by a knife wound, there was sufficient evidence to support the challenged means of third degree assault submitted to defendant’s jury. Accordingly, the jury’s verdict should be affirmed.

2. THE TRIAL COURT REASONABLY REFUSED TO DECLARE A MISTRIAL AFTER THE PROSECUTOR MADE ARGUMENT IN OPENING STATEMENT BECAUSE THE ARGUMENT WAS SUPPORTED BY THE EVIDENCE AND THE POTENTIAL FOR PREJUDICE WAS CURED BY THE COURT’S INSTRUCTIONS.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29 (1995); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991)). A trial court’s decision is an abuse of its discretion when it is manifestly unreasonable or based on untenable grounds for untenable reasons. *Stenson*, 132 Wn.2d at 839. “In making such a challenge the defendant bears the burden of establishing that the prosecutor’s conduct was both improper and prejudicial.” *Id.* at 839

(citing *Stenson*, 132 Wn.2d at 718; *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995)). “If the prosecutor’s conduct is improper it does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict.” *Id.* at 839 (citations omitted). “Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.” *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); see also *State v. Warrern*, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008) (prejudicial effect of improper argument undermining the presumption of innocence cured by the court’s curative instruction.).

“A prosecutor’s opening statement should be confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom. *State v. Campbell*, 103 Wn.2d 1, 16, 691 P.2d 929 (1984) (citing *State v. Kroll*, 87 Wn.2d 829, 834-35, 558 P.2d 173 (1976)). “Testimony may be anticipated so long as counsel has a good faith belief such testimony will be produced at trial. *Id.* at 16 (citing *State v. Grishy*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)). “The burden of showing bad faith is upon the defendant.” *Id.* at 16 (citing *State v. Parker*, 74 Wn.2d 269, 274-75, 444 P.2d 796 (1968), *overruled on other grounds in State v. Gosby*, 85 Wn.2d 758, 767, 539 P.2d 680 (1975)).

In the instant case, the prosecutor's opening statement addressed the legal concepts associated with defendant's charges and summarized the anticipated evidence. RP (May 10, 2010) at 2-13. The prosecutor concluded her opening statement with the following remarks:

Fortunately nobody was killed. Nobody was gravely injured." RP (May 13, 2010) at 13.

Defendant immediately objected but failed to request a curative instruction. RP (May 10, 2010) at 13. On the following day defendant elaborated on his objection and moved for a mistrial. RP 227. Defendant argued that it was inappropriate for the prosecutor to describe the incident in terms of potential loss of life since the case did not involve allegations of attempted murder. RP 226-227. The trial court properly characterized the State's comments as argument, but found a mistrial was unnecessary. RP 228-229. The court then admonished the State not to "[t]alk"... about killing in th[e] case as the charge is assault...." RP 228-229. Defendant did not request a lesser remedy such as a curative instruction. RP 226-229.

The trial court did not abuse its discretion when it declined to declare a mistrial. The challenged comment was objectionable because it phrased an otherwise permissible recitation of facts in the form of argument. Considered apart from its form, the content of the prosecutor's statement was logically related to the anticipated instructions and

consistent with the evidence produced at trial. Defendant's charges included two deadly weapon enhanced second degree assaults, which required the prosecutor to prove that defendant used his knife in a way "readily capable of causing *death* or substantial bodily harm." CP 149 Instruction No. 9 (emphasis added). At trial, multiple witnesses testified defendant unexpectedly punched two men in the face before attacking one of them with a knife. RP 255-257, 386, 439, 448-449, 474-475, 483, 585; Ex. 2-3, 16-17. One witness added that defendant came within inches of cutting into that man's chest or vital organs. RP 451. Another witness claimed defendant stepped back from the altercation and screamed: "I'm going to kill you. I'm going to kill everybody." RP 279. Several men ultimately had to intervene to gain control of defendant's knife. RP 300, 450. Accordingly, if the prosecutor would have avoided making argument, it would not have been inappropriate for her to explain how defendant used his knife in a way that could have but did not result in death or substantial bodily harm.

Defendant has also failed to prove that the challenged comments, which came at the end of an otherwise unchallenged opening statement, prejudiced his case. To begin, the jury's subsequent verdicts are well supported by the evidence. At trial, defendant conceded that he punched two of his victims in the face and used a knife during the fight. RP 570-622. The only contested issue at trial was self defense, and defendant was the only of five eye witnesses to identify defendant as the victim. The

other four witnesses gave similar accounts of the assaults, each making it unmistakable that defendant was the aggressor. RP 230-316, 324-362, 374-416, 418-463, 464-491, 570-622. Moreover, contrary to defendant's claim, the prosecutor's decision to describe the event in terms of people who were not killed instead of deaths that did not occur was not in itself prejudicial. See *State v. McKenzie*, 157 Wn.2d 44, 57, 134 P.3d 221 (2006) ("If the evidence indicates that the defendant is a murderer or killer, it is not prejudicial to so designate him."). Further proof that defendant's jury was not stirred to a passionate outcome may be observed in the fact that the jury returned verdicts in favor of the lesser included offenses.

Lastly, defendant failed to seek a lesser remedy such as a curative instruction after the court denied his request for a mistrial. Since juries are presumed to follow their instructions,⁴ any potential prejudice attending the prosecutor's comment could have been neutralized by a curative instruction. Even in the absence of a curative instruction, any lingering prejudice was adequately addressed when the court properly instructed the jury that: "[t]he lawyers' ... arguments ... are not evidence ... You must disregard any ... argument that is not supported by the evidence or the law in my instructions." CP 140 Instruction No. 1.

⁴ *In re Davis*, 152 Wn.2d 647, 712, 101 P.3d 1 (2004) (citations omitted) (juries are presumed to follow the court's instructions.).

Having failed to prove the prosecutor's comments prejudiced his case, defendant has also failed to prove the trial court erred when it refused to declare a mistrial. The jury's verdicts should be affirmed.

3. DEFENDANT HAS FAILED TO PROVE THE PROSECUTOR'S CLOSING ARGUMENT IMPROPERLY EXPRESSED PERSONAL OPINIONS ABOUT WITNESS CREDIBILITY AND MISSTATED THE LAW BECAUSE THE PROSECUTOR APPROPRIATELY ARGUED WITNESS CREDIBILITY FROM THE EVIDENCE IN ACCORDANCE WITH THE COURT'S INSTRUCTIONS.

"The defendant bears the burden of establishing both the impropriety of the prosecutor's conduct and its prejudicial effect." *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)) see also *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). "Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict." *In re the Matter of the Detention of Michael R. Sease*, 140 Wn. App. 66, 81, 201 P.3d 1078 (2009). "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." *Hoffman*, 116 Wn.2d at 93 (citation omitted); see also *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) ("Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and

statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” “Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *Brett*, 126 Wn.2d at 175 (citing *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986)).

In determining whether prosecutorial misconduct resulted from a prosecutor’s comment to the jury, appellate courts first evaluate whether the prosecutor’s comment was improper. *State v. McChristian*, 158 Wn. App. 392, 400, 241 P.3d 468 (2010) (citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). If the prosecutor’s comment was improper and the defendant made a proper objection, then appellate courts consider whether there was a substantial likelihood that the comment affected the jury’s verdict. *Id.* If the defendant failed to make a proper objection, defendant must show that the prosecutor’s comment was so flagrant and ill-intentioned that it could not have been cured by a proper instruction. *Id.*

Defendant claims the following three statements made during the prosecutor’s rebuttal argument amounted to improper comments on witness credibility and misstatements of law:

- I. “So there’s no doubt that there are inconsistencies when you put X number of witnesses on an incident almost two years old [sic]. State submits that is actually an [sic] indicia of reliability.” RP 773-774.

II. “The State submits that the [witness accounts] ... are not identical, that they did their best to recount their observations and their recollections, and when you put them all together, they are in fact consistent and logical ... measure that against defendant’s rendition, which is unsupported and is biased” RP 774.

III. “[T]he other point is that the defendant is entitled to give his version of events ... [b]ut no witness including the defendant is entitled to be absolutely believed, when it flies in the face of common sense and other facts. You are guided specifically in Instruction No. 2.” RP 774 (Instruction No. 2 was the court’s instruction on reasonable doubt. CP 142).

Defendant only objected to the first of these three statements. RP 774. Although the trial court sustained defendant’s objection, defendant did not move to strike or request a curative instruction. RP 774.

a. The prosecutor did not express a personal opinion about witness credibility when she argued that positive inferences could be drawn from inconsistencies in the witnesses’ description of events.

“There is a distinction between the individual opinion of the prosecuting attorney, as an independent fact, and an opinion based upon or deduced from the testimony in the case.” *State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). “In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including commenting on the credibility of the

witnesses and arguing inferences about credibility based on evidence in the record.” *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995) (citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)). While misconduct occurs when the prosecutor expresses a personal opinion about witness credibility during closing argument, “prejudicial error does not occur until it is clear that the prosecutor is not arguing an inference from the evidence, but is expressing a personal opinion.” *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1340 (1996) (citing *State v. Swan*, 114 Wn.2d 613, 664, 790 P.2d 610 (1990); *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). “[P]rejudicial error will not be found unless it is clear and unmistakable that [the prosecutor] is expressing a personal opinion.” *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996).

For this reason “prosecutors may argue ... inferences as to why the jury would want to believe one witness over another. *Id.* at 290 (citing *State v. Brett*, 126 Wn.2d at 175). “The same rule has been applied as to credibility of a defendant.” *Id.* at 291 (citing *State v. Adams*, 76 Wn.2d 650, 458 P.2d 558, *rev'd on other grounds by*, 403 U.S. 947, 91 S.Ct. 2273, 29 L.Ed.2d 855 (1971)(it was not improper for the prosecutor to call the defendant a liar when the prosecutor referred to specific evidence, including the defendant’s own testimony, which demonstrated the defendant had lied.); *see also State v. Luoma*, 88 Wn.2d 28, 40, 558 P.2d

756 (1977); *State v. Jefferson*, 11 Wn. App. 566, 524 P.2d 248 (1974); *Warren*, 165 Wn.2d at 30 (the prosecutor did not improperly express her personal opinion when she argued the details in the victim’s testimony “gave it a badge of truth and ... rang out clearly with truth....”); *contrast with State v. Sargent*, 40 Wn. App. 340, 343, 698 P.2d 598 (1985) (improper expression of opinion when the prosecutor said: “I believe him ...There was no other reason he would be testifying....”); *see also State v. Hudson*, 73 Wn.2d 660, 662, 440 P.2d 192 (1968).

During closing argument, defendant asserted that his testimonial account of self defense should be believed and identified the inconsistencies among the State’s witnesses as a reason to doubt the State’s case. RP 759-765. In rebuttal, the prosecutor responded by arguing:

“So there’s no doubt that there are inconsistencies when you put X number of witnesses on an incident almost two years old [sic]. State submits that is actually an [sic] indicia of reliability.” RP 773-774 (Defendant objected to the prosecutor’s argument but did not move to strike or request a curative.).

This is not an improper expression of personal opinion but an impersonal argument that presented an alternative evidentiary inference from the one defendant asserted moments before. Considered in context, the challenged statement countered defendant’s expressed assessment of the evidence with the permissible argument that unbiased witnesses who observe an incident from differing vantage points two years before trial

should be expected to differ but are nonetheless credible. In arguing this inference, the prosecutor referred directly to the witness testimony; she did not reach beyond the record and insert her own opinion as an independent fact to be considered as evidence. Moreover, by introducing her argument with the words “State submits,” instead of “I believe,” the prosecutor avoided the use of personalized language more commonly associated with statements of personal opinion. The prosecutor’s argument was also consistent with the court’s instruction that the jury may judge the credibility of a witness’s testimony by considering the quality of the witness’s memory, any bias the witness might have, and the reasonableness of the witness’s testimony in the context of other evidence. CP 140 Instruction No. 1. Consequently, defendant has failed to prove that the challenged statements are unmistakable assertions of the prosecutor’s personal belief.

Unlike the statement discussed above, defendant challenges the subsequent two statements on appeal but did not object to them at trial. RP 774. Taking each in turn, the prosecutor’s second statement fairly argued the positive inferences to be drawn from the testimony provided by the State’s witnesses and went on to appropriately compare them against defendant’s self serving testimonial claim of self defense. Like the first statement addressed above, the second statement was similarly introduced with the impersonal signal “The State submits” instead of “I believe,” directly referenced the testimony adduced at trial, and in no way attempted

to bolster witness credibility by adding the prosecutor's own qualitative evaluation of the evidence.

As for the prosecutor's third statement, it properly acknowledged defendant's right to testify in his own defense and accurately distinguished the jury's obligation to presume the defendant innocent from its authority to judge his credibility as it would any other witness. This statement concluded by reminding the jury that its fact finding was to be guided by the court's reasonable doubt instruction.

Taken together and considered in context the prosecutor's arguments urged the jury to evaluate the evidence and decide the case according to the court's instructions. Defendant has failed to prove that the challenged statements were improper because he has failed to prove they were unmistakable assertions of the prosecutor's personal belief.

Defendant has similarly failed to prove his trial was prejudiced by any of the prosecutor's three remarks, let alone that the latter two were so flagrant and ill-intentioned that they could not have been remedied by a curative instruction. Prior to receiving the case for deliberation, the jury was properly instructed that it was the sole judge of the credibility of each witness and that the lawyers' arguments are not evidence. CP 140 Instruction No. 1. In addition to being well supported by the evidence, the verdicts that followed these instructions favored the lesser included offenses, demonstrating that the jurors were not overwhelmed by the prosecutor's closing argument, for the prosecutor also urged them to find

defendant guilty as charged. Since defendant has failed to prove the prosecutor prejudiced the outcome of his case, the jury's verdicts should be affirmed.

- b. The prosecutor did not misstate the law when she argued the jury was empowered to judge credibility and should be guided by the reasonable doubt instruction.

Although prosecutors are afforded wide latitude during closing argument they may not misstate the law. See *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972); *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995); *State v. McChristian*, 158 Wn. App. 392, 241 P.3d 468 (2010); *State v. Gotcher*, 52 Wn.App. 350, 355, 759 P.2d 1216 (1988). A defendant claiming that the prosecutor misstated the law during closing argument bears the burden of establishing the impropriety of the prosecutor's comments as well as their prejudicial effect. See *McChristian*, 158 Wn. App. at 400. Appellate courts review alleged misstatements of law in the context of the total argument and the instructions given to the jury. *Id.*

In addition to arguing that the three statements addressed above were improper expressions of the prosecutor's opinion, defendant also claims they were misstatements of the law. As stated before, defendant only objected to prosecutor's first statement; as a result, defendant must prove the latter two statements were so flagrant and ill-intentioned that they could not have been remedied by a curative instruction. Defendant has failed to reach this higher burden as he has failed to prove that any of the challenged remarks are a misstatement of law.

To begin, the first two statements do not purport to explain the law, but plainly argue factual inferences about witness credibility from direct references to the testimonial evidence adduced at trial. Since a prosecutor may argue reasonable inferences from the evidence to include why some witnesses are more believable than others, these statements are not otherwise prejudicial.

When the third challenged statement is considered in context with the evidence and the court's instructions, it clearly drew an appropriate distinction between the jury's obligation to presume the defendant innocent and its authority to decide the case according to the evidence, which included assessing the defendant's credibility as it would any other witness. At trial, defendant elected to testify and claimed self defense. During defendant's closing argument his counsel stated:

“The defense, *we obviously believe* that Mr. Barnes was completely justified and lawful in all of his actions that night. That’s why *we’ve* asserted self-defense.” RP 766. “As I stated before, *we believe* that Mr. Barnes acted reasonably ... He reacted lawfully, he reacted reasonably, and based on that, *we believe* that you should find Mr. Barnes not guilty.” RP 767-768.

In response to this improper argument, that the jury should find defendant not guilty because he and his counsel believed in defendant’s innocence, it was proper for the prosecutor to respond with argument aimed at ensuring the jury did not confuse defendant’s presumption of innocence with a non-existent, but nonetheless suggested, presumption of credibility. Had the prosecutor failed to make this distinction clear, the jury might have been frustrated in its deliberations as it attempted to reconcile its disbelief in defendant’s testimonial claim of self defense, and the associated belief in his guilt, with its obligation to presume defendant innocent unless the State disproved defendant’s legal claim of self defense beyond a reasonable doubt. Since the jury was instructed to decide the value to be given to the testimony of each witness,⁵ and to return a verdict of guilty if it found the evidence proved defendant’s guilt beyond a reasonable doubt,⁶ it was not a misstatement of law for the prosecutor to

⁵ CP 140 Instruction No. 1.

⁶ CP 155 Instruction No. 15; CP 156 Instruction No. 16; CP 157 Instruction No. 17; CP 166 Instruction No. 26; CP 167 Instruction No. 27; CP 169 Instruction No. 29; CP 170 Instruction No. 30; CP 171 Instruction No. 31; CP 173 Instruction No. 33.

argue that credibility was to be determined by the jury according to the evidence and did not inhere in any witness due to that witness's status.

The appropriateness of the third statement is easily discerned when its substance is considered along with its structure. The prosecutor first acknowledged defendant's constitutional right to testify. She then grouped defendant, as witness, with her own witnesses and stated that none of them were entitled to belief when their testimony is contradicted by the evidence and common sense. This is an accurate statement of the law to assign credibility which otherwise would require an irrational belief in a witness's veracity animated by the vary sympathy, prejudice, and personal preference the jury was specifically instructed to avoid. CP 141 Instruction No. 1. The prosecutor then concluded the argument by specifically directing the jury to the court's reasonable doubt instruction, thereby affirming the jury's authority to decide the case and reminding it of the standard it must apply to the task. This is proper argument.

Even if the prosecutor's comments were construed as misstatements of the court's instructions, defendant has failed to prove the remarks prejudiced his case. First, any prejudice attending the challenged argument could have been effectively ameliorated by a curative instruction had defendant requested one. Nevertheless, any potential prejudice was adequately dealt with when the jury was properly instructed to disregard any argument that was not supported by the law in the court's instructions. CP 140 Instruction No. 1. Lastly, the jury's verdict in favor of lesser

