

NO. 41662-0

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

STATE OF WASHINGTON, RESPONDENT

v.

TYLER RAY CANTRELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 10-1-01130-9

BRIEF OF RESPONDENT

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

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2. Has defendant failed to prove he received ineffective assistance of counsel based on counsel's failure to object during the prosecutor's closing argument when counsel's performance was effective and the identified argument was proper?

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B. STATEMENT OF THE CASE.

1. Procedure

On March 15, 2010, the Pierce County Prosecutor's Office filed an information charging appellant, Tyler Ray Cantrell ("defendant"), with one count of firearm enhanced first degree assault. CP 1-2. The Honorable Thomas J. Felnagle presided over the trial. RP 1. The jury found defendant guilty as charged. CP 86-87. The court imposed a high end sentence of 183 months, which was separated into a 123 month sentence for the underlying offense and a mandatory 60 month

consecutive sentence for the firearm enhancement. CP 120, 122-123. The court also imposed 36 months of community custody as required by statute. CP 123. The court's conditions of community custody included a requirement that defendant participate in crime-related treatment or counseling per RCW 9.94A.703(3)(c). CP 128. Defendant filed a timely notice of appeal. CP 130.

2. Facts

At approximately 9:30 in the evening of Friday March 12, 2010, Miguel Ortiz ("Ortiz") and his girlfriend Andrea Leija ("Leija") attended a party at their friend's house in Tacoma. RP 71-72, 75, 181. Several hours later Ortiz was "drunk" and had difficulty maintaining his balance. RP 80. Ortiz began checking people's pockets for his car keys after becoming convinced someone had taken them. RP 92-93, 121, 185, 260, 568. Ortiz threatened to beat people up if his keys were not returned. RP 118, 122, 140. Several people confronted Ortiz about his belligerent behavior. RP 208, 468-469.

Ortiz testified he asked defendant if he could check his pockets for the missing keys. RP 95-96. Ortiz said defendant was agitated by the request. RP 96. Ortiz and Leija testified Ortiz exchanged hostile words with defendant. RP 101, 127, 194. Leija testified defendant started yelling in Ortiz's face. RP 195. Leija intervened by taking Ortiz aside. RP 102, 197. Defendant walked outside. RP 102, 669, 694.

Meanwhile, Joey O'Brian ("O'Brian") was talking with Elanor Hill ("Hill") in a car parked across the street from the party. RP 214, 216, 231, 259. O'Brian saw Ortiz walk out of the house. RP 216, 231. Hill saw Ortiz stand in the street. RP 270. Hill watched defendant approach from Ortiz's left. RP 270-272, 470-472, 478-480. Ortiz was much smaller than defendant. RP 710. Defendant estimated his height as 6'5" and weight as 220 pounds. RP 710. Defendant estimated Ortiz stood between 5'6" to 5' 8" and weighed between 150 and 160 pounds. RP 710. Defendant raised his gun at a downward angle from several feet away. RP 273-274, 276, 284, 481. Hill heard two pops; O'Brian heard shots and saw flashes. RP 274. Ortiz fell to the ground and began to convulse. RP 275, 481.

Ortiz could not recall who shot him, but was able to provide the following details about the shooting:

"I remember falling. I remember my ears ringing so bad that I couldn't hear anybody talking to me. I remember hitting the ground. I remember trying to get back up, but when I tried to get up, my legs just shook, and I just dropped back to the floor. And I started inhaling my blood and started suffocating ... I could hear [my blood] gurgling. It was gurgling in my chest."

RP 108. Police and medical personnel responded shortly thereafter. RP 51-54.

Ortiz received emergency surgery at St. Joseph's Hospital. RP 646. Ortiz had a gun shot wound to the chest, which entered below his

collar bone and exited through a vertebrae. RP 119, 648. The second bullet passed through Ortiz's right hand and lacerated his neck. RP 121, 649. Ortiz would have died from his injuries if he had not received immediate medical attention. RP 652. It took four months for Ortiz to regain the ability to stand. RP 120.

Monjett Bradley ("Bradley") was defendant's close friend. RP 345, 703. Haley Thompson ("Thompson") was Bradley's girlfriend. RP 555-556. Defendant called Thompson's phone to speak with Bradley after the shooting. RP 380, 589. Defendant eventually had Bradley drive him to the waterfront near the Tacoma Yacht Club. Defendant and Bradley got out of the car and walked behind a waterfront restaurant. RP 388, 600. Defendant pulled a gun out of his backpack, dismantled it, and threw the pieces into the bay. RP 388.¹

Thompson questioned defendant about the shooting when he returned to the car. RP 601. Defendant admitted to shooting Ortiz. RP 603, 734-736. Defendant told Bradley he shot Ortiz because "[Ortiz] was talking shit;" defendant added that "[Ortiz] shouldn't have been trying to act so hard and stop [sic] running his mouth." RP 391. Defendant told

¹ During recross-examination it was left unclear as to whether Bradley testified that he was incorrect about the existence of a backpack or whether he had simply forgot to tell anyone about it before testifying. Defendant testified that he did have the backpack. Defendant admitted to dismantling the gun he shot Ortiz with and throwing the pieces in the water but claimed he only had one gun at the time. RP 418, 723.

Thompson “he hoped [Ortiz] would choke on his blood and die.” RP 605, 630. Defendant referred to Ortiz as “nigga.” RP 630-631. Defendant, Bradley, and Thompson decided to tell police Bradley dropped defendant off in Puyallup before the shooting. RP 394, 396, 400, 582, 605, 609.

Defendant was the only witness called by the defense at trial. RP 662-770. Defendant denied having any altercation with Ortiz before the shooting and claimed he shot Ortiz in self defense. RP 667, 695, 710-712. Defendant also admitted to throwing the pieces of his gun in the bay. RP 675-677, 717, 721, 725. Defendant denied creating a false alibi with Bradley and Thompson. *Id.*

C. ARGUMENT.

1. DEFENDANT FAILED TO PROVE THE PROSECUTOR MADE IMPROPER ARGUMENT BECAUSE THE PROSECUTOR APPROPRIATELY ARGUED THE EVIDENCE ADDUCED AT TRIAL.

In closing argument, a prosecutor is afforded wide latitude in drawing and expressing reasonable inferences from the evidence, including inferences about credibility. *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)). “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 136, 175, 892 P.2d 29 (1995)). “The

same rule has been applied as to the 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)). A defendant bears the burden of establishing both the impropriety of the prosecutor’s argument 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). Challenged “arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990); *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986)); *see also State v. Warren*, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008). If the prosecutor’s argument was improper and the defendant made a proper objection, appellate courts consider whether there was a substantial likelihood the comment affected the jury’s verdict. *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 defendant failed to make a proper objection, defendant must prove the prosecutor’s argument was so flagrant and ill-intentioned the resulting prejudice could not have been cured by a proper instruction. *Id.*

- a. The prosecutor did not improperly claim defendant had a duty to retreat when he argued defendant used excessive force and lacked credibility.

Defendant claims the prosecutor misstated the law of self defense during the following argument by implying defendant had a duty to retreat:

“Here, even if you believe [defendant], he shoots twice after spending time in Ortiz’s presence, seeing no indication, even from his mouth, that Ortiz is armed without giving a warning, even a warning as he shoots, even as he shoots the first time ... [defendant] said, I pulled out a gun and I shot him. Under the circumstances as testified to by [defendant], even if you believe it, no reasonable person would fire two shots when Ortiz makes a gesture behind his back. Even if you believe him—and you shouldn’t—the level of force was unreasonable. That’s beyond a reasonable doubt. And that’s the last of the elements in the to convict instruction, and that means that he’s guilty of Assault in the First Degree.”

RP 824; App.Br. at 1-2, 26, 29.²

“[T]his is more of an evolving story ... And I sort of press [defendant] on it a little bit, and he says oh, yeah, I guess I did have a beef with Mr. Ortiz about three years ago ... And then I said, well, did that have anything to do with what happened that night? And he said, oh, no... It illustrates ... when you look at everything that you know that he said, either here ... on the stand or someplace else, he tells people what he thinks they want to hear, to think better of him, and that’s what he did to you. I didn’t leave. I want to be very careful about this. I want you to be sure to understand exactly what I’m arguing and exactly what I am not arguing. [Defendant] does not have a duty to retreat.

² Appellant’s Brief (“App.Br.”)

Nobody has a duty to retreat, okay? He can stand there and if ... an altercation develops ... it doesn't make it defect self-defense if he stands his ground. That's in the instruction, and I am not trying to pretend that's not there or ignore it. My point about he doesn't leave, though, is, is that action credible? Is that what a reasonable person does?"

RP 828-829. Because defendant did not object to this argument at trial, he must prove it was so flagrant and ill-intentioned that any resulting prejudice could not have been cured by a proper instruction. RP 824, 828-829; *McChristian*, 158 Wn. App. at 400.

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. McChristian*, 158 Wn. App. 392, 241 P.3d 468 (2010); *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995); *State v. Gotcher*, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). Appellate courts review alleged misstatements of the law in the context of the total argument and the instructions given to the jury. *McChristian*, 158 Wn. App. at 400.

A defendant's exculpatory theory is not immunized from attack; "[o]n the contrary, ... evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). A prosecutor is entitled to comment on defendant's failure to support his

own factual theories. See generally, *State v. Barrow*, 60 Wn. App. 869, 872, 809 P.2d 209 P.3d 553 (2009) (citing *State v. Sinclair*, 20 Conn. App. 586, 569 A.2d 551, 555 (1990)); see also *State v. Jackson*, 150 Wn. App. 887, 885-886, 209 P.3d (2009).

In *State v. Asaeli*, Asaeli claimed the prosecutor implied he had a duty to retreat by projecting a slide which stated:

“Killing Is Not Lawful When[:]

- *No provocative behavior by the victim
- *No verbal warning: “Stop or I’ll shoot!”
- *No warning shot
- *No attempt to hold at gun point
- *No taking cover
- *Victim is shot seven times and had no means to shoot back putting other people at risk.

Killing is not lawful as the first, last and only action taken against a person sitting in his own car minding his own business!”

State v. Asaeli, 150 Wn. App. 543, 591, 208 P.3d 1136 (2009). While presenting this slide the prosecutor suggested Asaeli’s response to the shooting did not support his assertion that he had “barely escaped death,” and noted Asaeli did not try to hide but went toward the victim while shooting. *Id.* at 592. The Court of Appeals held Asaeli’s claim that this argument improperly asserted defendant had a duty to retreat was “without merit.” *Id.* at 597. The Court of Appeals found that the potential for the jury to misconstrue the prosecutor’s proper meaning was cured when the prosecutor explicitly stated that there was no duty to retreat. *Id.*

Similar to the prosecutor in *Asaeli*, the prosecutor at bar did not impermissibly suggest defendant had a duty to retreat when he argued it was unreasonable for defendant to shoot Ortiz twice without warning. The State alleged defendant committed first degree assault. CP 1-2, 73, Instruction No. 6. The evidence showed defendant approached Ortiz outside a party without provocation, pointed a 9 millimeter pistol at him, and fired two bullets into his body. RP 214, 231, 270-277, 470-474, 479-481, 667-668, 671,692, 695, 711-712. And defendant's own testimony showed he did not have the reasonable fear required for a claim of self defense. Defendant admitted his version of the incident changed from denying involvement to self defense. RP 682-683, 702, 764-766. Defendant denied having any altercation with Ortiz prior to the shooting. RP 667, 695. Defendant described Ortiz as "running around like a chicken with its head cut off, [while] throwing a little temper tantrum...." RP 667. Defendant admitted to "joking" about Ortiz's behavior and betrayed his personal belief that Ortiz was incapable of beating him in a fist fight. RP 706, 710. Defendant admitted to bringing an illegally purchased 9 millimeter pistol to the party. RP 668, 692, 711-712. Defendant did not see any other guns at the party. RP 668. Defendant claimed he moved the gun from his backpack to his pocket when he felt the "atmosphere [of the party] change." RP 669, 694. Defendant claimed he probably prepared the gun to fire, or "chamber[ed] the round," at that time. RP 694. Defendant subsequently "got [Ortiz's] attention" when he saw Ortiz

running back towards the house. RP 671. Defendant estimated that he was nearly a foot taller than Ortiz and outweighed him by sixty pounds. RP 710. Defendant claimed Ortiz walked toward him and reached behind his back. RP 672. Although defendant testified to seeing Ortiz reach for a gun when he fired, defendant also said Ortiz was drunk and he “didn’t know what [Ortiz] was going to do.” RP 683-684.

The prosecutor fairly responded to defendant’s testimony by arguing defendant’s use of deadly force was excessive when it was only reasonable for defendant to believe Ortiz was challenging him to a fist fight. RP 812-830, 835-837. This argument was consistent with the court’s instructions on self defense and appropriately advanced the State’s theory that defendant intentionally shot Ortiz in anger. RP 837; CP 78

Instruction No. 11,³ CP 79 Instruction No. 12,⁴ CP 80 Instruction No. 13.⁵

The prosecutor unmistakably argued defendant's unhesitating escalation to deadly force was excessive, while making it clear defendant had a right to stand his ground once the altercation began. RP 824, 828-830. Like the prosecutor in *Asaeli*, 150 Wn. App. at 597, the prosecutor at issue eliminated any potential confusion about his meaning by stating defendant did not have a duty to retreat. RP 828-829. The jury was entitled to find that the shooting was unreasonable under the circumstances because brandishing the gun would have sufficed. It was proper for the prosecutor to urge the jury to adopt that interpretation of the evidence.

The challenged argument was also proper argument regarding defendant's lack of credibility. Defendant testified he had two amicable

³ "It is self defense to a charge of assault that the force used was lawful as defined in this instruction. The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary. The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident. The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of guilty as to this charge."

⁴ "A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful."

⁵ "It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat. Notwithstanding the requirement that lawful force be "not more than is necessary," the law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonably effective alternative."

interactions with Ortiz prior to the shooting, but nonetheless claimed he became so concerned for his safety he had to arm himself with a loaded firearm. RP 664, 667, 669-670, 694-696. Defendant testified that despite his safety concerns, he initiated a conversation with Ortiz to comment on the foolishness of Ortiz's friend at a time when Ortiz was focused on something other than defendant. RP 671, 698.

The challenged argument appropriately advanced the State's theory that defendant's stated reasons for remaining at the party prior to the altercation with Ortiz and confronting Ortiz before leaving the party were not credible because they were inconsistent with defendant's other testimony. RP 828-830. This point was amplified in the argument that followed:

“[Defendant] doesn't think, you know what” I have been drinking, [Ortiz is] an idiot, a drunken fool, I don't want to become a target of this. I live two blocks away ... Again, he doesn't have to retreat, but is the decision that he made, oh, I was just going to hang out and see if things calm down, that's what he told you, does that make sense in light of everything else he told you? Not to be subtle, the answer is no... Chambered a round. Doesn't leave. Then when we were outside, separately, right, and [defendant] tells you that Ortiz comes by and headed back towards the house, which ... by the way is utterly inconsistent with what everybody else said. All right. Why does he say that? Because he doesn't want to admit that he turns the corner and sees [Ortiz] and says, that's the guy that called me a bitch. I'm not having that. So according to [defendant], Ortiz walks by him, and then [defendant] has to have a reason why the encounter starts, right? So, [defendant] ask[s] [Ortiz] ... is that your homey and so on ... Is that credible in light of everything else that you know that he's

going to initiate contact with the guy that concerned him so much?”

RP 829- 830.

“I suspect you will pick up on that any analytical assessment leads you to the inescapable conclusion that [defendant’s] testimony is not credible. He comes up with excuses ... He doesn’t want you to think badly of him, so he’s going to tell you what he thinks you need to hear to do what he wants you to do ... The version that’s consistent with everything else is what he told Bradley [and] Thompson immediately after the shooting ... [Ortiz] shouldn’t have been running his mouth.”

RP 835-836.

Furthermore, the argument pertaining to defendant’s decision to remain at the party did not refer to a situation covered by the court’s instruction on retreat. The court’s instruction stated:

“It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force ...”

CP 80, Instruction No. 13. This instruction describes a person’s decision to stand his or her ground when attack is believed to be imminent. The prosecutor’s argument referred to a decision defendant claimed he made when he first arrived at the party and noticed Ortiz’s belligerent behavior toward others; it did not comment on defendant’s decision to stand his

ground outside the party once his personal altercation with Ortiz began.

RP 830. This claim of prosecutorial misconduct should be rejected.

- b. The prosecutor did not appeal to racial bias by quoting the racial epithet defendant used to describe Ortiz after the shooting.

Defendant also claims the prosecutor committed misconduct by quoting a statement attributed to defendant in the following argument:

“[Defendant] shot ... Ortiz twice, not because he reached behind his back after a lot of banging on him in a reasonable belief that he ... was somehow armed and was going to injure him. [Defendant] ... shot [Ortiz] for calling him a little bitch. Shocking when I put it up on the screen, isn't it? It's hard to say. ““I hope that nigga chokes on his blood and dies.”” It's a really loaded word, and I am not suggesting to you that there was any racial component to this. I'm suggesting to you that that's [defendant's] way of saying who's the bitch now. It wasn't self defense, it was Assault in the First Degree.”

RP 837. Because defendant did not object to this argument at trial, he must again prove the challenged argument was so flagrant and ill-intentioned that any resulting prejudice could not have been cured by a proper instruction. RP 837; *McChristian*, 158 Wn. App. at 400.

There is no question it is misconduct for a prosecutor to “resor[t] to racist argument and appea[l] to ... racial bias to achieve convictions.” *State v. Monday*, 171 Wn.2d 677, 676, 257 P.3d 551 (2011). But a prosecutor does not commit misconduct by referring to evidence of a racist statement made by the defendant when it is relevant to proving an

element of the crime. Due process requires the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *State v. Dolan*, 118 Wn. App. 323, 331, 73 P.3d 1011 (2003). To this end, “[r]elevant evidence” is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401;⁶ *State v. Beeb*, 44 Wn. App. 893, 723 P.2d 512 (1986), *aff’d* 108 Wn.2d 515, 740 P.2d 829 (1987); *see also* 5D Karl B. Tegland, Wash.Prac: Evid, author’s cmts. at 209 (2010-11 ed.). This rule applies to evidence of a defendant’s motive and criminal intent. *See generally, State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009) *citing State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007). Since credibility determinations are for the trier of fact, “it [i]s important for the jury to see the whole sequence of events...” *State v. McBride*, 74 Wn. App. 460, 464, 873 P.2d 589 (1994); *State v. O’Hara*, 141 Wn. App. 900, 910, 174 P.3d 114 (2007) (*citing State v. Lliard*, 122 Wn. App. 422, 437, 93 P.3d 482 (2005), *review denied*, 154 Wn.2d 1002,

⁶ “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

113 P.3d 482 (2005) *reversed on other grounds*, 167 Wn.2d 91, 217 P.3d 756 (2009); *see also State v. Brown*, 132 Wn.2d 529, 571-572, 940 P.2d 546 (1997); *State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003).

The challenged argument appropriately tied evidence adduced at trial to defendant's motive for committing the crime. The challenged statement also tended to disprove self defense. Defendant's remark communicated a level of contempt inconsistent with the claim he had shot Ortiz out of pure necessity. RP 664, 667. Appreciating the potential import of defendant's word choice, the prosecutor tempered his use of defendant's statement with a reminder that the evidence showed the epithet communicated defendant's sense of vengeance, not racial animus. RP 837. Defendant used the word to refer to the victim first, not the prosecutor; the jury was free to assess what defendant's word choice revealed about his mental state. The prosecutor does not act improperly by arguing the evidence supports a conclusion about an element of the crime. Defendant asked the jury to believe his claim of self defense was credible; the State was entitled to explain why defendant's words and deeds proved otherwise. This claim of prosecutorial misconduct is without merit.

c. Defendant cannot show that the prosecutor's arguments were ill-intentioned.

A prosecutor does not make ill-intentioned argument by arguing reasonable inferences from the evidence adduced at trial and directing the jury to the law contained in the court's instructions. *See generally State v. Hilton*, ___ Wn. App. ___, 261 P.3d 683 (2011); *State v. Bea*, 162 Wn. App. 570, 585, 254 P.3d 948 (2011).

The prosecutor began his argument by telling the jury to disregard his statements if they differed with the court's instructions. RP 808. The prosecutor reminded the jury its duty to determine the facts from the evidence and apply the law in the court's instructions. RP 809; CP 65. The prosecutor also reminded the jury of the State's burden to prove each element of the charged offense beyond a reasonable doubt. RP 809-811, 813-818. The prosecutor directed to the jury on the court's self defense instruction. RP 814. The prosecutor explicitly stated defendant did not have a duty to retreat. RP 828-829. The prosecutor discussed the court's instruction on credibility. RP 824-828. During rebuttal argument, the prosecutor again directed the jury to the court's instructions. RP 874-875, 878-879. The prosecutor concluded by asking the jury for a verdict based on the evidence. RP 892-894. The jury was appropriately instructed and

it is presumed the jury decided the case according to the instructions it was given. *See State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

The prosecutor's repeated references to the evidence and the court's instructions plainly establish that his argument was not ill-intentioned. The prosecutor did not attempt to manipulate the jurors into deciding the case on facts outside the record or reasons contrary to their instructions. The claim that the prosecutor's argument was nonetheless ill-intentioned is not supported by the record and should be rejected.

Defendant also appears to argue that the several instances of alleged prosecutorial misconduct resulted in cumulative error. App.Br. at 2. The cumulative error doctrine applies when several trial errors occur which standing alone, may not be sufficient to justify reversal, but when combined, deny a defendant a fair trial. *See State v. Warren*, 165 Wn.2d at 35. If defendant proved that the prosecutor made flagrant and ill-intentioned argument resulting in incurable prejudice, defendant would have established prosecutorial misconduct, not cumulative error. *See generally McChristian*, 158 Wn. App. at 400. Defendant's claim of cumulative error should fail because he has failed to identify an aggregation of trial errors that made his trial unfair.

2. DEFENDANT FAILED TO PROVE DEFICIENT PERFORMANCE BASED ON COUNSEL'S FAILURE TO OBJECT DURING THE PROSECUTOR'S CLOSING ARGUMENT BECAUSE THE ARGUMENT WAS PROPER AND COUNSEL'S OVERALL REPRESENTATION WAS EFFECTIVE.

To prevail on an ineffective assistance of counsel claim a defendant must prove his counsel's performance was deficient and that deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In the instant case defendant claims his counsel was deficient for failing to object to the same arguments he assigns error to in his claims of prosecutorial misconduct. RP 824, 828-829; App.Br. at 2.

a. Defendant has failed to prove his counsel's performance was deficient.

Counsel is deficient when his or her representation falls below an objective standard of reasonableness. *State v. McFarland*, 137 Wn.2d 322, 335, 880 P.2d 1251 (1995). "Strickland begins with a strong presumption that counsel's performance was reasonable." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (citing *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). "To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *Id.* at 42 (citing *State*

v. Richenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *see also State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968). The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (*citing Strickland*, 466 U.S. at 763). Claims of ineffective assistance of counsel based on counsel's failure to object must show: (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct; (2) that the objection would have likely been sustained; and (3) that the result of the trial would have been different if the objection was successful. *See generally State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

As explained above in the State's response to defendant's claim of prosecutorial misconduct, the argument counsel did not object to was proper so the identified objections were almost certain to fail. Counsel cannot be labeled ineffective for withholding frivolous objections to proper argument. Furthermore, the record strongly suggests counsel tactically structured his argument to confront the State's evidence and explain why it should be disbelieved. RP 838-872. Counsel recalled the jury to the State's burden of proof while emphasizing the court's instructions on self defense. RP 841-846. Counsel addressed the testimony underlying the challenged argument and dismissed it as

unreliable. RP 848-863. Counsel then urged the jury to accept defendant's version of events. RP 863-865, 871. Defendant's claim of ineffective counsel should be rejected.

b. Defendant has failed to prove his counsel's overall performance was ineffective.

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, 89 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgments 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).

The instant trial began with a preliminary hearing in which defense counsel advocated for the exclusion of evidence of defendant's gang affiliation as well as his prior experience with firearms. RP 4-10, 27-28. Counsel then cross-examined thirteen of the State's eighteen witnesses; the remaining five witnesses were incidental to defendant's theory of the

case. RP 62-66, 121-134, 173-178, 204-210, 227-232, 254-255, 287-292, 314-316, 318, 407-415, 418-419, 428, 454, 485-487, 549-552, 553, 616-628, 632, 653. Counsel made proper objections, one of which resulted in the exclusion of gang-expert testimony. RP 573-574, 611, 761, 772-778. Counsel presented evidence in support of defendant's self defense theory and proposed jury instructions to the court. RP 662-687, 769-770; CP 31-60.

Defendant misapplies the *Strickland* standard to the extent he suggests he necessarily prevails on a claim of ineffective assistance if proves counsel missed the opportunity to make two helpful objections. "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 Cronin*, 466 U.S. at 656. In instant case defendant's counsel successfully opposed the admission of state's evidence, subjected state's witnesses to meaningful cross examination, made proper objections, and carefully presented defendant's theory of the case. RP 6-10, 27-28, 62-66, 121-134, 173-178, 204-210, 227-232, 254-255, 287-292, 314-316, 407-415, 418, 485-487, 549-552, 553, 573-574, 611, 616-628, 653, 662-687,761, 769-770; CP 31-60. Defendant does not allege that any of these fundamental activities were deficiently executed. Defendant has failed to identify how counsel's overall performance was so inadequate as to call the fairness of his entire trial into question. His claim of ineffective assistance of counsel should be rejected.

3. DEFENDANT’S CLAIM THAT RCW 9.94A.703(3)(c)’s CRIME-RELATED TREATMENT CONDITION OF SENTENCE IS UNCONSTITUTIONALLY VAGUE IS NOT RIPE FOR REVIEW AND FAILS ON ITS MERITS.

Defendant was convicted of firearm enhanced first degree assault. CP 1-2, 86-87. Assault in the first degree is a “serious violent offense.” RCW 9.94A.030(44). The sentencing court imposed the required 36 months of community custody. CP 123; RCW 9.94A.701(1)(b). Defendant’s community custody conditions included a requirement that he “participate in crime-related treatment or counseling” per RCW 9.94A.703(3)(c). *See* Appendix A. On appeal, Defendant claims RCW 9.94A.703(3)(c) is unconstitutionally vague. App.Br. at 35.

- a. Defendant’s challenge is premature because RCW 9.94A.703(3)(c) imposes an affirmative requirement that requires further factual development to review.

A preenforcement challenge to the constitutionality of a community custody condition is ripe for review on direct appeal if the issue raised is primarily legal, does not require further factual development, and the challenged action is final. *State v. Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (citations omitted); *See also State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). The court must also consider the hardship to the parties of withholding consideration. *Id.*

To decide if a challenge to a community custody condition raises a primarily legal issue Washington's Supreme Court has looked to whether the passage of time would sufficiently clarify the condition or whether challenging offender would have to discover the meaning of his condition only under continual threat of reimprisonment, in sequential hearings before the court. *Id.*

The vagueness issue raised by defendant is not primarily legal. Defendant's period of community custody has not begun. CP 117-129. The passage of time could cure any problems resulting from the alleged vagueness because the condition may be administered in a manner that eliminates the possibility of reasonable misunderstanding or may be rendered moot through nonenforcement.

The second prong of the ripeness test asks whether the issues require further factual development by looking to whether the challenged condition "places an immediate restriction on the petitioners' conduct, without the necessity that the State take any action." *Id.* The Supreme Court contrasts these types of conditions from those that direct an offender to complete a specified assignment or authorize the department to engage in compliance-enforcement activities. *Id. citing State v. Ziegenfuss*, 118 Wn. App. 110, 113-115, 74 P.3d 1205 (2003) (challenge to sentencing condition imposing financial obligation not ripe until State takes action to collect fines); *State v. Massey*, 81 Wn. App. 198, 200-201, 913 P.2d 424 (1996) (challenge to sentencing condition subjecting defendant to search

premature until search actually conducted). “Such conditions are not ripe for review until the State attempts to enforce them because their validity depends on the particular circumstances of the attempted enforcement.” *Valencia*, 169 Wn.2d at 789.

Like the imposition of legal financial obligations the requirement that defendant participate in crime-related treatment directs defendant to complete a defined assignment; it does not impose an immediate restriction that requires defendant to interpret the scope of prohibited conduct. The challenged condition is also similar to a judicially authorized compliance search since its validity turns on the manner in which it is enforced. In both cases RCW 9.94A.704 defines the parameters of the department’s supervision during community custody, so its discretion is not unfettered. *See also* RCW 9.94A.704 (7)(a); WAC 137-104. A challenge to the constitutionality of the department’s enforcement of the challenged condition consequently requires a factual record that is not currently before this Court.

The third prong of the ripeness test, whether the challenged action is final, is met here; defendant has been sentenced to the condition at issue. As for the potential hardship to defendant, the risk is minimal. Defendant has been directed to participate in a narrowly defined activity to be administered by the department of corrections, i.e., participate crime-related treatment or counseling. Defendant could only find himself in violation of this condition if he fails to comply with treatment as

specifically directed. Defendant's challenge to constitutionality of RCW 9.94A.703(3)(c) is not ripe for review.

- b. Defendant's challenge also fails on the merits because RCW 9.94A.703(3)(c) imposes an affirmative requirement which is enforced through clearly defined standards.

“A statute violates due process of law if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. The same principles apply to a condition of supervised release.” *U.S. v. Hugs*, 384 F.3d 762, 768 (C.A.9, 2004) (citing *United States v. Loy*, 237 F.3d 251, 262 (3d Cir.2001) (internal citations and quotation marks omitted); see also *Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010); *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). Appellate court's review a vagueness challenge to a statute's constitutionality de novo. *State v. Caton*, ___ Wn. App. ___, 260 P.3d 946 (2011) (citing *State v. Watson*, 160 Wn2d 1, 5-6, 154 P.3d 909 (2007). When the statute does not involve First Amendment rights under the United States Constitution, appellate courts review a vagueness challenge by examining the statute as applied to the particular facts of the case. *Id.* (citing *Watson*, 160 Wn.2d at 6); see also *Bahl*, 164 Wn.2d at 753. “A challenger bears the burden of proving beyond a reasonable doubt that a statute is unconstitutionally vague and, because [appellate court's] presume a statute is constitutional and the

standard for finding a statute unconstitutionally vague is high, only in exceptional cases may a challenger overcome this presumption. *Id.* (citing *Watson*, 160 Wn.2d at 11).

In *Valencia*, the Supreme Court stated that “in challenging a condition of custody as opposed to a statute ..., the challenger does not have to overcome a presumption of constitutionality. 169 Wn.2d at 792 (citing *Bahl*, 164 Wn.2d at 753). The stated reason for treating conditions of community custody differently from statutes is that “[a] sentencing condition is not a law enacted by the legislature ... [so] does not [share] the same presumption of validity.” *Bahl*, 164 Wn.2d at 753. The judicially created prohibitions in *Bahl* and *Valencia* are distinguishable from the statutorily enacted condition at bar. In *Bahl*, the Supreme Court evaluated the constitutionality of a judicially created condition prohibiting Bahl from possessing or assessing pornographic materials as directed by the supervising community corrections officer. 164 Wn.2d at 754. Whereas, *Valencia* addressed a judicially created condition which prohibited Valencia from using or possessing any paraphernalia that can be used for the ingestion or possession of controlled substances. 169 Wn.2d at 785. In both cases the Supreme Court found that the sentencing court’s condition employed words too vague in scope to provide the petitioners with fair notice of what they could not do. *Valencia*, 169 Wn.2d at 794. Unlike the conditions in *Bahl* and *Valencia*, RCW 9.94A.703(3)(c)’s crime-related treatment condition is a legislatively

enacted condition. As such it should enjoy a presumption of statutory validity applies. *See generally, Caton*, ___ Wn. App. ___, 260 P.3d 946 (2011) (*citing State v. Watson*, 160 Wn2d 1, 5-6, 154 P.3d 909 (2007)).

Defendant's legislatively enacted requirement to "participate in crime-related treatment or counseling" is not vague. "Statutory interpretation begins with the statute's plain meaning. Plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (internal citations and quotations omitted). "If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end." *Id.* "[B]ecause ... some measure of vagueness is inherent in the use of language, [appellate courts] do not require impossible standard of specificity or absolute agreement." *Caton*, ___ Wn. App. ___, 260 P.3d 946 (*citing Watson*, 160 Wn.2d at 7) (internal quotation marks and citations omitted). "In addition ... citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute and [appellate courts] consider such materials presumptively available to all citizens." *Id.* (*citing Watson*, 160 Wn.2d at 8).

Unconstitutional vagueness is not mere uncertainty, and a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which their compliance with a legislatively enacted condition of sentence is inadequate to avoid sanction.

See generally *Hugs*, 384 F.3d at 768; *Caton*, ___ Wn. App. ___, 260 P.3d 946 (citing *Watson*, 160 Wn.2d at 7). Given this, a legislatively enacted condition of community custody meets constitutional requirements if persons of ordinary intelligence can understand what the condition requires, notwithstanding some possible areas of disagreement. *Id.* (internal quotation marks and citation omitted).

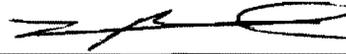
RCW 9.94A.703(3)(c) is part of Chapter 9.94A RCW—Sentencing Reform Act of 1981, which is in relevant part purposed to “[p]romote respect for the law by providing [just] punishment ... [and] [o]ffer the offender an opportunity to improve him or herself...” RCW 9.94A.010. One “participates” when one “take[s] part in something ... as an in an enterprise or activity ... usu[ally] in common with others ...” Merriam-Webster Third International Dictionary 1646 (2002). “Treatment” in the context of the criminal justice system is commonly understood as “preventive guidance and corrective training.” *Id.* at 2435. Whereas “counseling” is understood to mean “a practice of professional service designed to guide an individual to a better understanding of his [or her] problems” *Id.* at 518. RCW 9.94A.703(3)(c) is therefore an unambiguous directive enforced according to the parameters of RCW 9.94A.704. See also WAC 137-104. Defendant has failed to overcome RCW 9.94A.703(3)(c)’s presumed constitutionality; his sentence should be affirmed.

D. CONCLUSION

Defendant has failed to prove prosecutorial misconduct or ineffective assistance of counsel. He has also failed to prove that RCW 9.94A.703(3)(c) is unconstitutionally vague. The jury's verdict and defendant's sentence should be affirmed.

DATED: November 9, 2011

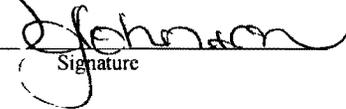
MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{1-c-ble} 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.

11/9/11 
Date Signature

APPENDIX “A”

RCW 9.94A.703


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RCW 9.94A.703

Community custody — Conditions.

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

(1) **Mandatory conditions.** As part of any term of community custody, the court shall:

(a) Require the offender to inform the department of court-ordered treatment upon request by the department;

(b) Require the offender to comply with any conditions imposed by the department under RCW [9.94A.704](#);

(c) If the offender was sentenced under RCW [9.94A.507](#) for an offense listed in RCW [9.94A.507\(1\)\(a\)](#), and the victim of the offense was under eighteen years of age at the time of the offense, prohibit the offender from residing in a community protection zone;

(d) If the offender was sentenced under RCW [9A.36.120](#), prohibit the offender from serving in any paid or volunteer capacity where he or she has control or supervision of minors under the age of thirteen.

(2) **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

(a) Report to and be available for contact with the assigned community corrections officer as directed;

(b) Work at department-approved education, employment, or community restitution, or any combination thereof;

(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

(d) Pay supervision fees as determined by the department; and

(e) Obtain prior approval of the department for the offender's residence location and living arrangements.

(3) **Discretionary conditions.** As part of any term of community custody, the court may order an offender to:

(a) Remain within, or outside of, a specified geographical boundary;

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals;

(c) Participate in crime-related treatment or counseling services;

(d) Participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community;

(e) Refrain from consuming alcohol; or

(f) Comply with any crime-related prohibitions.

(4) Special conditions.

(a) In sentencing an offender convicted of a crime of domestic violence, as defined in RCW 10.99.020, if the offender has a minor child, or if the victim of the offense for which the offender was convicted has a minor child, the court may order the offender to participate in a domestic violence perpetrator program approved under RCW 26.50.150.

(b)(i) In sentencing an offender convicted of an alcohol or drug-related traffic offense, the court shall require the offender to complete a diagnostic evaluation by an alcohol or drug dependency agency approved by the department of social and health services or a qualified probation department, defined under RCW 46.61.516, that has been approved by the department of social and health services. If the offense was pursuant to chapter 46.61 RCW, the report shall be forwarded to the department of licensing. If the offender is found to have an alcohol or drug problem that requires treatment, the offender shall complete treatment in a program approved by the department of social and health services under chapter 70.96A RCW. If the offender is found not to have an alcohol or drug problem that requires treatment, the offender shall complete a course in an information school approved by the department of social and health services under chapter 70.96A RCW. The offender shall pay all costs for any evaluation, education, or treatment required by this section, unless the offender is eligible for an existing program offered or approved by the department of social and health services.

(ii) For purposes of this section, "alcohol or drug-related traffic offense" means the following: Driving while under the influence as defined by RCW 46.61.502, actual physical control while under the influence as defined by RCW 46.61.504, vehicular homicide as defined by RCW 46.61.520(1)(a), vehicular assault as defined by RCW 46.61.522(1)(b), homicide by watercraft as defined by RCW 79A.60.050, or assault by watercraft as defined by RCW 79A.60.060.

(iii) This subsection (4)(b) does not require the department of social and health services to add new treatment or assessment facilities nor affect its use of existing programs and facilities authorized by law.

[2009 c 214 § 3; 2009 c 28 § 11; 2008 c 231 § 9.]

Notes:

Reviser's note: This section was amended by 2009 c 28 § 11 and by 2009 c 214 § 3, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Short title -- 2009 c 214: "This act shall be known as the Eryk Woodruff public safety act of 2009." [2009 c 214 § 1.]

Effective date -- 2009 c 214: "This act takes effect August 1, 2009." [2009 c 214 § 4.]

Effective date -- 2009 c 28: See note following RCW 2.24.040.

Intent -- Application -- Application of repealers -- Effective date -- 2008 c 231: See notes following RCW 9.94A.701.

Severability -- 2008 c 231: See note following RCW 9.94A.500.

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