

No. 44211-6-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Kasey Fenton,**

Appellant.

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Cowlitz County Superior Court Cause No. 11-1-00516-7

The Honorable Judge Marilyn K. Haan

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The trial judge commented on the evidence, in violation of Wash. Const. art. IV, § 16.
2. Mr. Fenton's convictions infringed his Fourteenth Amendment right to due process because the court's instructions relieved the prosecution of its obligation to disprove self-defense.
3. The court's instructions failed to make the self-defense standards manifestly clear to the average juror.
4. The trial court erred by giving Instruction No. 23.
5. Instruction No. 23 unduly emphasized the prosecution's theory of the case.
6. Instruction No. 23 undermined the subjective component of the self-defense standard.
7. Instruction No. 23 conflicted with the court's other instructions on self-defense.
8. The trial court abused its discretion by allowing two police witnesses to narrate their explanations of video and photographic evidence.
9. The trial court abused its discretion by allowing Officers Hochhalter and Clark to express their opinions outlining what the video and photographs depicted.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A trial judge is absolutely prohibited from commenting on matters of fact, and any judicial comment is presumed to be prejudicial. In this case, the judge's self-defense instructions included a comment on the evidence. Did the trial judge's comment violate Mr. Fenton's rights under Const. art. IV, § 16?

2. Instructions on self-defense must more than adequately convey the law. Here, the court's self-defense instructions failed to make the relevant standard manifestly clear to the average juror. Did the trial court's erroneous instructions relieve the prosecution of its burden to disprove self-defense, an essential element of first-degree assault, in violation of Mr. Fenton's Fourteenth Amendment right to due process?
  
3. A witness may not provide an opinion on what is depicted in a photograph or video unless the witness is more likely than the jury to accurately understand what is shown in the image or video. Here, the trial court allowed Officers Hochhalter and Clark to express their opinions outlining what video and photographic evidence depicted, even though neither was in a better position than the jury to evaluate the evidence. Did the trial court violate Mr. Fenton's right to an independent determination of the facts by erroneously admitting Clark and Hochhalter's opinion testimony?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Kasey Fenton went fishing with his friend on May 13, 2011, and then met his wife and her family for a birthday party in Longview. RP 637-639, 701-702. The party was at a bar in a bowling alley. RP 639. The large group drank and celebrated and talked until closing time. By that time, Mr. Fenton had consumed many drinks, as had many others at the bar. RP 106, 134-135, 228, 302-303, 640. He and his wife Rachel were outside at 1:30am, talking with another bar patron about school, religion, and life in general. RP 641-642, 708.

Others outside heckled the trio, yelling and laughing at them. The verbal banter focused increasingly on Mr. Fenton, and he became angry and shouted back. RP 55, 71, 138, 231, 308-310, 643-648, 664, 710. Rachel Fenton tried to get her husband to leave, seeing that the crowd was becoming hostile and there was no reason to stay. RP 55, 59, 233, 247-8, 644-649. Mr. Fenton wanted to have his say, and was pulled back repeatedly by shouts from the group outside the bar. RP 71, 174, 664, 669, 713.

Mrs. Fenton fell to the ground when she lost her balance in trying to pull her husband away. RP 649, 714-715. Some witnesses, who were closer to the couple, believed she had just lost her balance, but two men

who were further away believed that Mr. Fenton pushed her down. RP 107, 110, 119, 123-124, 139-140, 177, 234-236, 249-250, 312-313.

Justin Arthur and Larry McDonald felt that Mr. Fenton had just assaulted his wife. Though they were 50 yards away, they ran over and confronted Mr. Fenton. Another closer observer told them that Mr. Fenton had not hit her, and was hit in his face for his trouble. RP 237, 253-254, 312-314, 337-338. McDonald grabbed Mr. Fenton's shoulders and spun him around, and Mr. Fenton fell. RP 144, 181, 314-315. Once he got up, Arthur punched Mr. Fenton, who fell to the ground dazed. RP 145, 184, 344, 716.

The Fentons left the bar, but Mr. Fenton's keys and one of his shoes had been lost in the melee. RP 653, 718-719. While Mrs. Fenton returned to the bar to look for both, Mr. Fenton searched for and found his keys. RP 653, 719. He took his truck to the nearby McDonald's, which only served drive-through at that time of the night. He drove there, and saw both of the men who had confronted and hit him at the bar. Arthur and McDonald walked up to Mr. Fenton's truck, and called him a wife-beater and worse. RP 147, 719-722.

Mr. Fenton remembered that both men assaulted him as he sat in his truck, raining blows on his head. RP 722, 724. Arthur did not remember if he assaulted Mr. Fenton again at the truck. RP 161.

McDonald denied that Mr. Fenton was assaulted in the McDonald's parking lot. RP 323.

Mr. Fenton stabbed each of the men one time with the fishing knife he had in his truck and drove off. RP 155-157, 723-724. McDonald's wound was superficial, but the damage to Arthur was substantial and required surgery and hospitalization. RP 162, 286, 507, 510, 517. McDonald hit and kicked the McDonald's glass door until it shattered. RP 222, 327.

Mrs. Fenton walked by and saw that the men needed help, and she tended to Mr. Arthur until an ambulance and police arrived. RP 91-92, 269, 656-657.

All of the participants in the incident were under the influence of alcohol. RP 98, 102, 167, 207-208, 333-334, 661.

The bar had a video surveillance system that recorded part of the incident that night. The portion that took place in the bar smoking area outside was recorded, but the assault on Mr. Fenton was not recorded. RP 66, 72, 401-402. The McDonald's restaurant also had a surveillance system, which also did not capture the incident. RP 217, 225. The same was true for a Department of Licensing office in the same strip-mall area. RP 403-410.

The state charged Mr. Fenton with two counts of Assault in the First Degree, both including deadly weapon allegations. CP 1-3.

The state played the surveillance recordings for the jury. First was the video from the DOL office parking lot. Officer Hochhalter told the jury which person on the video was, in his opinion, Mr. Fenton, where his wife was, and even that there was “some shoving back and forth”. RP 408-409. The defense attorney objected to the officer offering his narration. RP 409. The court did not rule on the objection, and the state continued to admit testimony from the officer regarding what he opined the recording contained as it was played for the jury. RP 409-410.

The second recording offered was from the bar’s surveillance system, and again, Hochhalter narrated the action. RP 436-449. He identified who was where and what they were doing during moments in the replay, including what action he believed was taking place off camera and when. RP 438-452. The officer acknowledged that he was not present for any of the action at issue in the trial. RP 490.

Officer Clark played and narrated the video from McDonald’s. RP 571-577.

Mr. Fenton testified, acknowledging that he had stabbed both men and urging acquittal based on self-defense. RP 701-797.

The court gave the jury an instruction regarding self-defense that included the following:

Self-defense is an act that must be necessary. Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended. The right of self-defense does not permit action done in retaliation or revenge. Instr. No. 23, Supp. CP.

The court overruled the defense objection to the last sentence. The defense pointed out that the sentence is not part of the standard pattern instructions, and argued that it constitutes a comment on the evidence. RP 804-807.

The defense proposed lesser included charges of assault in the third and fourth degrees, which the court denied. The trial judge ruled that the lesser had “no legal or factual basis that would support” giving them. RP 813.

During his closing argument, the prosecutor urged conviction because Mr. Fenton wanted revenge for being humiliated in front of his wife, that he stabbed the men because he was angry and not in self-defense. RP 840-857, 894-904.

The jury convicted Mr. Fenton of both counts of Assault in the First Degree, both with deadly weapon findings. RP 923-924. After sentencing, Mr. Fenton timely appealed. CP 4-16, 17-30.

## **ARGUMENT**

### **I. THE COURT’S NONSTANDARD SELF-DEFENSE INSTRUCTIONS INFRINGED MR. FENTON’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS STATE CONSTITUTIONAL RIGHT TO A JURY TRIAL FREE OF JUDICIAL COMMENTS ON THE EVIDENCE.**

#### A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, No. 85367–3, 291 P.3d 876 (2012). Jury instructions are also reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

Jury instructions on self-defense must more than adequately convey the law. *State v. Kyлло*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Self-defense instructions must make the relevant legal standard manifestly apparent to the average juror. *Id.*; *see also State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). Instructions that misstate the law of self-defense create manifest error affecting the accused person’s Sixth and Fourteenth

Amendment rights to due process and to a jury trial. *Kyllo*, 166 Wn.2d at 862; U.S. Const. Amend. VI; U.S. Const. Amend. XIV. Such errors may be raised for the first time on review. *Id.*; RAP 2.3(a)(5).

B. Mr. Fenton’s convictions must be reversed because Instruction No. 23 contained an improper judicial comment, unduly emphasized the prosecution’s theory of the case, and undermined the subjective component of the self-defense standard.

1. Instructions on the lawful use of force must clearly convey the subjective self-defense standard without judicial comment and without unfairly emphasizing one party’s theory of the case.

Judges may not “charge juries with respect to matters of fact.” art. IV, § 16. A judge can neither convey a personal attitude nor instruct jurors that factual matters have been established as a matter of law. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The comment need not be expressly made; it is sufficient if it is implied. *Id.* A statement is a judicial comment if the court’s attitude can be inferred. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); *accord State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

A comment on the evidence “invades a fundamental right.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Judicial comments are presumed prejudicial and are only harmless if the record affirmatively shows no prejudice could have resulted. *Levy*, 156 Wn.2d at 725. This is a higher standard than that normally applied to constitutional errors. *Id.*

It is also improper for the court's instructions to unduly emphasize one party's theory of the case:

If the instructions on one point are so repetitious and overlapping that they emphatically favor one party, they deprive the other party of a fair trial.

*Ford v. Chaplin*, 61 Wn. App. 896, 900, 812 P.2d 532 (1991); *see also Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 38, 864 P.2d 921 (1993). This is so even if the repetitive instructions are a correct statement of the law. *Cornejo v. State*, 57 Wn. App. 314, 321, 788 P.2d 554 (1990). Such instructions can “unfairly turn the jury’s attention away from” one party’s position, overstating the other side’s evidence “to such a degree as to make it ‘palpably unfair.’” *Id.* (quoting *Samuelson v. Freeman*, 75 Wn.2d 894, 897, 454 P.2d 406 (1969)). Reversal is required where “the instructions on a particular point [are] so repetitious as to generate an ‘extreme emphasis’ that ‘grossly’ favors one party over the other.” *Adcox*, 123 Wn.2d at 38 (citations omitted).

An accused person is entitled to proper instructions on self-defense whenever there is “some” evidence of the lawful use of force. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). When self-defense is properly raised, the prosecution is obligated to prove the absence of self-defense beyond a reasonable doubt. *Kyllo*, 166 Wn.2d at 862; *McCreven*, 170 Wn. App. at 462.

Evidence of the lawful use of force “is evaluated ‘from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.’” *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) (quoting *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). This standard necessarily incorporates both subjective and objective elements:

The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

*Id.*; see also *Werner*, 170 Wn.2d at 336-37.

The accused person may stand her or his ground and use that degree of force that “a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” *McCreven*, 170 Wn. App. at 462-63. The right to use force does not depend on an actual threat, “so long as a reasonable person in the defendant's situation *could have believed* that such threat was present.” *State v. George*, 161 Wn. App. 86, 96, 249 P.3d 202, *review denied*, 172 Wn.2d 1007, 259 P.3d 1108 (2011) (George I) (emphasis added).

Failure to adequately convey the subjective standard requires reversal. Instructions that confuse or undermine the subjective standard rather than making it “manifestly apparent to the average juror” violate an

accused person's Fourteenth Amendment right to due process. *Walden*, 131 Wn.2d at 477; *see also State v. LeFaber*, 128 Wn.2d 896, 913 P.2d 369 (1996).

In this case, the court instructed the jury on the law of self-defense using a nonstandard instruction. *See* Instruction No. 23, Supp. CP; WPIC 16.05. Because of this deviation from the standard self-defense charge, the court's instructions as a whole suggested that the trial judge believed the prosecution's theory of the case. The instructions also overemphasized the prosecutor's position, and undermined the subjective component of the self-defense standard.

2. The trial court's nonstandard self-defense instructions deprived Mr. Fenton of a fair trial.

According to the prosecution, Mr. Fenton went looking for his two assailants and assaulted them in retaliation for the earlier altercation. RP 840-857, 894-904. The standard instructions on self-defense correctly require a finding of guilt under circumstances involving retaliation: a person seeking revenge does not "reasonably believe that he is about to be injured," does not use force "in preventing or attempting to prevent an offense," uses more force "than is necessary," and goes beyond the actions of "a reasonably prudent person... under the same or similar conditions..." WPIC 17.02; Instruction No. 20, Supp. CP. Nor can a

person seeking revenge believe “in good faith and on reasonable grounds that he is in actual danger of injury...,” that he “has reasonable grounds for believing that he is being attacked,” that “no reasonably effective alternative to the use of force appear[s] to exist,” or that “the amount of force used was reasonable to effect [a] lawful purpose.” WPIC 17.04; WPIC 17.05; Instruction Nos. 21-23, Supp. CP. If the jury believed that Mr. Fenton sought to retaliate against his assailants, or that he was motivated by a desire for revenge, it would have had no choice but to convict, under the standard instruction set. Mr. Fenton did not claim that he had a legal right to use force in retaliation for the earlier assault. He did not submit any evidence or advance any legal theory that would have permitted acquittal if he sought revenge.

Despite this, the court did not rely on the standard instruction set. Instead, the court acceded to the prosecutor’s request to modify WPIC 16.05 and made the instruction significantly more favorable to the state. Instruction No. 23, Supp. CP. The modified instruction set commented on the evidence, unduly emphasized the prosecution’s theory of the case, and undermined the subjective component of the self-defense standard. *Levy*, 156 Wn.2d at 725; *Cornejo*, 57 Wn. App. at 321; *Walden*, 131 Wn.2d at 477.

The pattern instruction defining “necessary” reads as follows:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

11 Wash. Prac., WPIC 16.05 (3d Ed) (2011).<sup>1</sup>

The court added one sentence to the beginning and one sentence to the end of the pattern instruction. Both additions emphasized the prosecution's theory of the case. The court's modified instruction reads as follows:

*Self-defense is an act that must be necessary. Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended. The right of self-defense does not permit action done in retaliation or revenge.* Instruction No. 23, Supp. CP.

This language significantly tilted the careful balance struck by the pattern instructions, shifting the instructions so that they favored the prosecution's position. Jurors could have interpreted the instructions as an indication of the judge's belief—that the evidence proved Mr. Fenton acted unreasonably by attacking the others in retaliation and by using more force than necessary under the circumstances. The emphasis on the word 'necessary' (at the beginning of Instruction No. 23) and the addition

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<sup>1</sup> This language is drawn from RCW 9A.16.010, and incorporates the subjective standard derived from the common law. See *State v. Fischer*, 23 Wn. App. 756, 598 P.2d 742 (1979).

of a sentence specifically addressing revenge or retaliation suggested the judge favored the prosecution's version of events. Given this implication, the addition of nonstandard language to Instruction No. 23 violated art. IV, § 16. *Levy*, 156 Wn.2d at 721; *Lane*, 125 Wn.2d at 838; *Jackman*, 156 Wn.2d at 744.

When taken as a whole, the instructions overemphasized the prosecution's theory of the case and undermined the subjective component of the self-defense standard.<sup>2</sup> The instructions are overflowing with language emphasizing the objective part of the inquiry. The instruction defining the lawful use of force uses the word 'reasonably' (twice), 'prudent,' and 'necessary.' Instruction No. 20, Supp. CP. The "act on appearances" instruction uses the phrases 'good faith' and 'reasonable grounds.' Instruction No. 21, Supp. CP. The "no duty to retreat" instruction uses the phrase "reasonable grounds." Instruction No. 22, Supp. CP. Without the modifications at issue here, the instruction defining "necessary" uses the words 'reasonably' (twice) and 'reasonable.'

The trial court added to this language by burdening the definition of "necessary" with the first and last sentences of Instruction No. 23.

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<sup>2</sup> The "retaliation or revenge" language appears to be drawn from *State v. Studd*, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999). The *Studd* court rejected the defendant's argument that the language overemphasized the state's case. Presumably, the court reviewed the challenged language in the context of the trial court's other instructions, only two of which were reproduced in the opinion. *Id.*, at 539-541.

These two sentences were superfluous, in light of the other instructions provided, but they helped the prosecution by emphasizing the state's positions—that Mr. Fenton had no need to defend himself and that he went too far by drawing a knife.

Furthermore, by telling jurors that “[s]elf-defense is an act *that must be necessary*,” the court changed the emphasis of WPIC 16.05 and suggested that force is available only to those in real danger—that is, that self-defense can only be used in cases of actual necessity. Instruction No. 23, Supp. CP. The problem is not solved by other portions of the court's instructions, because instructions on self-defense must more than adequately convey the law. *Kyllo*, 166 Wn.2d at 864-65. A correct instruction cannot repair the problem caused by an incorrect instruction. *Id.* The first sentence of Instruction No. 23 has never been approved by any published decision in Washington. It undermines the subjective component of the self-defense standard, in violation of Mr. Fenton's right to due process. *Id.*

The court's instructions included a judicial comment, unfairly emphasized the prosecution's theory, and failed to adequately convey the subjective standard for self-defense. Accordingly, Mr. Fenton's convictions must be reversed. *Werner*, 170 Wn.2d at 337-338. His case must be remanded for a new trial. *Id.*

C. Mr. Fenton's convictions must be reversed because Instruction No. 23 contradicted the court's other self-defense instructions.

A trial court's instructions to the jury should not contradict each other. *State v. Walden*, 131 Wn.2d at 478. If the inconsistency relates to a material point, the error is presumed to be prejudicial because "it is impossible to know what effect [such an error] may have on the verdict." *Hall v. Corp. of Catholic Archbishop of Seattle*, 80 Wn.2d 797, 803-04, 498 P.2d 844 (1972); see also *Renner v. Nestor*, 33 Wn. App. 546, 550, 656 P.2d 533 (1983) ("Instructions which provide inconsistent decisional standards are erroneous and require reversal.")<sup>3</sup> Furthermore, such errors "are rarely cured by giving the stock instruction that all instructions are to be considered as a whole." *Donner v. Donner*, 46 Wn.2d 130, 137, 278 P.2d 780 (1955).

In this case, the court's instructions contradicted each other. The contradiction stems from the court's declaration that "[s]elf defense is an act that must be necessary." Instruction No. 23, Supp. CP. This sentence removes any subjective component from the jury's evaluation of self-defense. The absolute and objective standard expressed in this sentence conflicts with language throughout the self-defense instructions that

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<sup>3</sup> Reversal is also required if the inconsistency is due to a "clear misstatement of the law." *Walden*, 131 Wn.2d at 478 (quoting *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977) (citations omitted)).

directs jurors to consider subjective factors when they evaluate a self-defense claim. *See* Instructions Nos. 20-22, Supp. CP.

The inconsistency relates to a “material point,” provides the jury with varying “decisional standards,” and stems from a “clear misstatement” of the law. *Hall*, 80 Wn.2d at 803-04; *Renner* 33 Wn. App. at 550; *Walden*, 131 Wn.2d at 478. Because self-defense was the primary issue at trial, there is no possibility the error was harmless. Accordingly, Mr. Fenton’s convictions must be reversed and the charges remanded for a new trial. *Walden*, 131 Wn.2d at 478.

**II. THE TRIAL COURT SHOULD NOT HAVE ALLOWED POLICE OFFICERS TO PROVIDE NARRATION EXPLAINING WHAT WAS DEPICTED IN PHOTOGRAPHIC AND VIDEO EVIDENCE.**

A. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id.*, at 579.

B. The officers’s “narration” was inadmissible and should have been excluded.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “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.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

A witness may not testify about a particular matter absent personal knowledge of that matter. ER 602. Lay opinion testimony must be excluded unless it is rationally based on the witness’s perception and helpful to the fact-finder. *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009) (George II) (citing, *inter alia*, ER 701).

This includes opinion testimony as to the identity of a person in a surveillance photograph: such evidence is inadmissible absent proof that the witness “is more likely to correctly identify the defendant from the photograph than is the jury.” *State v. Hardy*, 76 Wn. App. 188, 190, 884 P.2d 8 (1994) *aff’d and remanded sub nom. State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996). Opinion testimony identifying individuals in a surveillance photo runs “the risk of invading the province of the jury and unfairly prejudicing [the defendant].” *George II*, 150 Wn. App. at 118 (alteration in original) (quoting *U.S. v. La Pierre*, 998 F.2d 1460, 1465 (9th Cir.1993)). Presumably, these same principles apply when a party seeks to introduce opinion testimony conveying additional information beyond the identity of a person depicted in a photograph or video.

The improper admission of opinion testimony from a law enforcement officer “may be especially prejudicial.” *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009). Such testimony ““often carries a special aura of reliability.”” *Id.* (quoting *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)).

Here, the prosecutor did not establish an adequate foundation for Officers Hochhalter’s and Clark’s testimony. Neither officer claimed to be familiar with the people depicted in the images taken from surveillance cameras (other than through the passing contact related to the investigation

itself). Nor did the officers have any superior knowledge enabling them to opine on what the people depicted in the images were doing. Nothing in the record proves that Hochhalter or Clark were “more likely” than the jury to correctly interpret the images. RP 388-496, 563-636; *Hardy*, 76 Wn. App. at 190.

Neither officer should have been allowed to narrate any of the videos presented by the state. Instead, jurors should have been allowed to arrive at their own independent opinions regarding the three videos and still images introduced into evidence. Furthermore, there is a reasonable probability that it materially affected the outcome of the trial. *Asaeli*, 150 Wn. App. at 579. By telling the jury who was where and when, both officers were able to buttress the state’s other evidence, paint Mr. Fenton as the aggressor during the earlier interaction outside the bar, and undermine Mr. Fenton’s self-defense claim regarding the confrontation at McDonald’s. RP 388-496, 563-636.

The improper admission of Hochhalter’s opinion testimony violated ER 602 and ER 701 and prejudiced Mr. Fenton. Accordingly, his convictions must be reversed and the case remanded for a new trial. *George II*, 150 Wn. App. at 117.

**CONCLUSION**

Mr. Fenton's convictions must be reversed and the case remanded for a new trial. The court's nonstandard self-defense instructions contained an improper judicial comment, unduly emphasized the prosecution's theory of the case, undermined the subjective component of the self-defense standard, and conflicted with each other.

Furthermore, the trial court erroneously allowed a police officer to narrate video evidence.

Respectfully submitted on May 23, 2013,

**BACKLUND AND MISTRY**



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Kasey Fenton, DOC #362024  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

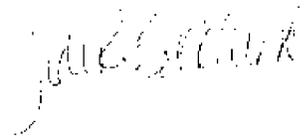
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 23, 2013.



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Jodi R. Backlund, WSBA No. 22917  
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# BACKLUND & MISTRY

May 23, 2013 - 7:17 AM

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