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NO. ~~45008-9~~ II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

MICHAEL M. MORIARTY  
v.  
STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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Appeal from the Superior Court of Pacific County  
The Honorable Michael J. Sullivan  
Pacific County Superior Court Cause No. 15-1-00079-7

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**BRIEF OF APPELLANT**

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**ORIGINAL**

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A. ASSIGNMENTS OF ERROR:

1. The trial court erred when it entered findings of fact nos. 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13, 1.14, 1.15, 1.16, 1.17, 1.18, 1.19, 1.20, 1.21, 1.22.
2. The trial court erred when it entered conclusions of law nos. 3, 5.
3. The defendant did not execute a valid waive of trial by jury and therefore is entitled to a new trial.
4. The trial court misapplied the law of self-defense where Washington applies to an individual who is defending himself against a vicious animal in the presence of its owner.
5. The deputy prosecutor committed misconduct in closing argument.
6. Defense counsel failed to provide constitutionally effective assistance of counsel.
7. The State failed to prove beyond a reasonable doubt that Mr. Moriarty was guilty of the crime of second degree assault.

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B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. The State has the burden to prove a criminal charge beyond a reasonable doubt.
2. The State fails to do so when it does not adduce evidence on each element of the crime charged
3. Where the State acknowledges that the defendant's claim of self-defense applies in the case, then the State has the duty to prove beyond a reasonable doubt that the force used by the defendant was not lawful.
4. The trial court erred when it denied Mr. Moriarty the defense of self-defense.
5. The law of self-defense in Washington applies to an attacking animal.
6. The use of force in an animal attack is lawful when used by a person reasonably believes that he or she is about to be injured.
7. The right to self-defense is a "retained right" under article I, section 30.
9. Self-defense is a fundamental right guaranteed by due process.
10. Self-defense is a component of the right to bear arms under article I, section 24.

11. The State failed to prove the charge beyond a reasonable doubt and therefore Mr. Moriarty is entitled to dismissal of this action.

12. The deputy prosecutor committed numerous acts of misconduct during closing argument and rebuttal.

13. The deputy prosecutor repeatedly inserted his personal opinions into closing argument on such subjects as which the credibility of witnesses and whether he personally believed the court should convict.

14. Defense counsel was ineffective for failing to object to the prosecutor's repeated acts of misconduct during closing argument.

15. Mr. Moriarty is entitled to relief under the cumulative error doctrine.

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### C. STATEMENT OF THE CASE:

A defendant has a fundamental right to a fair trial. U.S. Const. amends. VI and XIV, &1. There is no way Mr. Moriarty received a fair trial. Indeed, the sheer amount and scope of prosecutorial misconduct was so egregious and prejudicial that reversal would be required on that basis alone.

In general, prosecutors are unlike other attorneys and enjoy special status as “quasi-judicial” officers. *See, State v. Juarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994). Concurrent with this status comes the responsibility to ensure that a defendant receives a constitutionally fair trial and a verdict free of prejudice, based on reason and law. *See, State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011); *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 Ld.2d 1314 (1935), *overruled in part and on other grounds by Sirone v. United States*, 361 U.S. 12, 80 S.Ct. 270, 4 L.Ed. 2d 1252 (1960).

A prosecutor must act in seeking justice instead of making himself a “partisan” who is trying to “win” a conviction at all costs. *See, State v. Rivers*, 96 Wn.App.672, 674, 981 P.2d 16 (1999). It is without question that it is misconduct for a public prosecutor, with the weight of his office behind him to misstate the relevant law, especially in such a way that deprives a defendant of his rights, such as the due process right to have the prosecution disprove

self-defense beyond a reasonable doubt. *See, e.g., State v. Davenport*, 100 Wn.2d 757, 763, 675, P.3F 1213 (1984).

In this case, the prosecutor fell far, far short of honoring these duties. The prosecutor repeatedly misstated the law of self-defense. RP 9/8/15 207 The prosecutor also repeatedly stated his personal opinion of the merits on the evidence and make personal pleas to the court to convict Mr. Moriarty. RP 9/8/15 207, 208, 209, 210

This repeated, substantial unconstitutional prosecutorial misconduct denied Mr. Moriarty the his right to a constitutionally fair trial.

#### 1. PROCEDURE:

On June 17, 2015, the State of Washington charged Michael Moriarty in Pacific County Superior Court No. 15-1-00079-7 with second degree assault with a deadly weapon, to-wit, a knife, against Annie Booth on June 12, 2015, contrary to RCW 9A.36.021(1)(c). CP 1-2. The State subsequently amended that information to Assault in the First Degree with a deadly weapon enhancement. RCW 9A.36.011(1)(a); 9.94A.533(4)(a).CP 10-11.

On the first day of trial, defense counsel informed the court that Mr. Moriarty wanted to waive the jury. RP 9/4/15 2. Defense counsel presented a

written waiver to the court. CP 17. He averred that he reviewed it earlier in the week with Mr. Moriarty. RP 9/4/15 2.

The trial court inquired whether he had signed the waiver of jury trial. RP 9/4/15 3. Moriarty stated that he had signed the form of his own free will after he had reviewed it with his attorney so he knew what he was signing. RP 9/4/15 4.

After this colloquy, the court found that Moriarty had read the jury waiver statement either by himself or by his attorney and had signed it in his attorney's presence. RP 9/4/15 5. Based on this information, the court found that Moriarty had knowingly, intelligently, and voluntarily waived his right to a jury trial. RP 9/2/15 5.

The State's closing argument was fraught with the prosecutor's statements of personal opinion: RP 207, 208, 209, 210

The prosecutor also argued that Mr. Moriarty's right to assert self-defense was somehow subordinate to the woman's need to protect her property, that is, the dog. RP 207.

The prosecutor argued that Mr. Moriarty had not "established a need to defend himself." RP 207. He further argued, "And even if there is, I believe the State has overcome the burden that he established some sort of self-defense or that he had some necessity to defend himself. He describes the dog

never coming to him. He describes the dog as never getting within more than arm's reach. None of that would necessitate self-defense." RP 207

The prosecutor continued his argument by asserting that the woman was "entitled to protect her property, in particular the dog." RP 207.

On September 18, 2015, the parties appeared before the court for verdict. RP 231. The court found Mr. Moriarty guilty of assault in the second degree "in large part based upon the defendant's testimony." RP 231.

Without any discussion of the evidence or the applicability of self-defense, the court continued, "There's just areas of the defendant's testimony that don't make sense." RP 231. So therefore, anyway, the court is finding the defendant guilty of assault second degree with no aggravating factor". RP 231. The trial court took no consideration of the self-defense issue and made no ruling about it. *Passim*. Essentially, the trial court simply ignored Moriarty's affirmative defense in this case. *Passim*.

The State recommended 6 months in custody with 12 months of community custody. RP 240. The State also asked the court to order a mental health evaluation and require Mr. Moriarty to complete any recommended treatment "given the facts of this case, given sort of story that he told that obviously the court disbelieved . . ." RP 240.

Mr. Moriarty asked for low end of the range, three months. RP 242-243.

The Court imposed a sentence of 4 months, converting 30 days to community service. RP 252, CP 56-67.

The court entered findings of fact and conclusions of law for the trial and verdict. RP 248; CP 76-78.

This appeal was timely filed. RP 255; CP 70-71.

Mr. Moriarty has been found indigent for this appeal. CP 68-69.

## 2. TESTIMONIAL FACTS:

Michael Moriarty, a seventy-seven year old man recovering from quadruple by-pass surgery, walked on the beach nearly every day on doctor's orders to walk. RP 143, 146,153. His doctors had recommended that he take long walks every day. RP 146-147.

During his walk on Pacific Beach on June 12, 2015, he was charged at by an unleashed dog. RP 149-150. The dog came at him "as fast as a bullet." RP 151. When Mr. Moriarty had stepped off the rocks on the bottom of the trial onto soft sand, the dog came at him with its mouth wide open, its teeth glistening, snarling, and heading right for Mr. Moriarty's feet. RP 154. Mr. Moriarty was in the low crouch position to protect himself. RP 155. Mr. Moriarty, who lived on a sail boat and carried a sailor's knife, pulled out his

knife and flipped it open. RP 154. He carried the knife out of habit. RP 171.

The dog was about two feet high and appeared to be a pit bull. RP 154-155.

The dog was running full bore at Mr. Moriarty who feared that the dog “was going to take off the bottom of my leg or something.” RP 155. This was a “damn vicious dog.” RP 177. Moriarty further described the dog as “snarling and aggressive.” RP 9/4/15 16. The dog ran toward Mr. Moriarty “like a bullet.” RP 185.

The dog was within 15”-18” of Mr. Moriarty. RP 156.

Mr. Moriarty testified that he pulled his knife because of “the immediacy of the affront.” RP 155. He wanted to scare the dog and to attempt to deter the dog from attacking him. RP 9/4/15/ 17. Mr. Moriarty explained that the dog “scared the hell out of me.” RP 185.

Mr. Moriarty tried to back out of the encounter but the dog pursued him. RP 157.

Sometime during this encounter, a person showed up. RP 158. That person started hitting him on his back. RP 158. The person never called the unleashed dog off. RP 159.

Mr. Moriarty found himself on the ground and experiencing some breathing problems. RP 161.

The person [a woman, Annie Booth, the dog's owner] then returned to Mr. Moriarty and pushed him face-first into the sand. RP 162. She then jumped and sat on his hand. RP 162.

Mr. Moriarty figured he could "handle any girl" and so attention was focused the on the dog." RP 163. At this time, Mr. Moriarty was totally out of air. RP 164.

At some point, the dog ceased to bother him. RP 165. The woman, however, continued to slug him. RP 165.

The sailor's knife had fallen into the sand. RP 165. Mr. Moriarty did not try to scare her with the knife because "she sort of wasn't worth scaring" and he was still worried about the dog. RP 166.

Mr. Moriarty was able to gain control of his knife and he pointed it at the dog. RP 167. He did not believe it was "even slightly possible" that he cut the woman's finger with the knife." RP 168.

After this incident resolved [the woman and dog left], Mr. Moriarty was exhausted, had difficulty standing up, and finally staggered to his feet. RP 169. It was very hot and so he took off his jacket and hat. RP 169.

He then walked up the hill toward his car. RP 170.

Annie Booth called the police, who met up with Mr. Moriarty. RP

Mr. Moriarty asked the police whether they asked the woman if she had a knife. RP 180. He did not recall stabbing her and believed it possible that she had cut herself. RP 180.

The woman had been walking on the beach in Pacific County. RP 77. She had her dog with her and she let her dog off leash. RP 77. 92.

In her initial call to 911, the woman gave a far different story. She averred that her dog saw the man and started barking. RP 88. She claimed that the man tried to pick up the dog by the collar and stab him in the throat but that she stopped him. RP 88. The woman asserted that she stopped him but then the man tried to stab her in the face, but got her hand instead. RP 88. She told 911 dispatch that the man then “just walked away.” RP 88.

During the entire encounter between Mr. Moriarty and her dog, Annie Booth never once called her dog to stop or otherwise desist. RP 183.

C. LAW AND ARGUMENT:

1. THE TRIAL COURT ERRED WHEN IT ACCEPTED MORIARTY’S WAIVER OF JURY TRIAL WHERE CONSTITUTIONAL REQUIREMENTS WERE NOT MET.

“[A] record sufficiently demonstrates a waiver of the right to trial by jury if the record includes either a written waiver signed by the defendant, a personal expression by the defendant of an intent to waive, or an informed acquiescence.” *State v. Cham*, 165 Wn. App. 438, 448, 267 P.3d 528

(2011) (citing *State v. Stegall*, 124 Wn.2d 719, 729, 881 P.2d 979 (1994); *State v. Wicke*, 91 Wn.2d 638, 641-42, 591 P.2d 452 (1979)).

The State bears the burden of establishing a valid waiver, and absent a record to the contrary, the appellate court adopts every reasonable presumption against waiver. *Cham*, 165 Wn. App. at 447. The appellate court reviews de novo the sufficiency of the record to establish a valid waiver. *Cham*, 165 Wn. App. at 447.

In *State v. Trebilcock*, 184 Wn. App. 619; 341 P.3d 1004 (2014), the appellate court found the defendant's waiver of jury trial to be constitutionally sufficient where the defendant also confirmed that they wished to waive their right to a jury trial the defendant's attorney stated that the defendant "signed the waiver of a jury trial. It was, after being discussed over a period of months now," and it has been decided that this is how the defendant wants to proceed."

At a minimum, a valid waiver of jury trial requires "only a personal expression of waiver from the defendant." *Pierce*, 134 Wn. App. at 771 (citing *Stegall*, 124 Wn.2d at 725). As a result, the right to a jury trial is easier to waive than other constitutional rights. *Pierce*, 134 Wn. App. at 772 (citing *State v. Brand*, 55 Wn. App. 780, 786, 780 P.2d 894 (1989)).

In the instant case, the record fails to establish even this minimal waiver of jury trial. Defense counsel provided the court with the standard waiver of jury form. CP 29; RP 9/4/15 2. Defense counsel stated that he had reviewed it with Moriarty earlier in the week with his client while they were preparing for trial and that Moriarty had “a chance” to read it completely. RP 9/4/15 2.

There obviously is a substantial difference between having “a chance” to read the waiver of jury trial and in fact actually reading and understanding the waiver or form.

Moriarty’s attorney never assured the court that he had provided to Moriarty more than “a chance” to read the document. *Passim*

When the court asked Moriarty questions about the waiver, the court should have grasped that Moriarty had some issues understanding communications and/or responding appropriately to the court’s queries. When the court began its query, the court asked Moriarty if he signed the waiver of jury trial. RP 9/4/15 3. Moriarty responded, “Sorry. Pardon.” RP 9/4/2015 3. When the court asked Moriarty whether he would like a hearing device, Moriarty answered, “I can hear most of the words, but not all the words.” RP 9/4/15 3.

After putting on the hearing device, Moriarty stated that he could hear the court “great.” RP 9/4/15 3. The court then asked Moriarty whether he had heard what his attorney said because of his hearing loss. RP 9/4 /15 4. Moriarty responded, “I didn’t know I had a hearing loss.” RP 9/4/15 4.

After the court affirmed that Moriarty could hear, the court ceased to ask any further questions and explained that Moriarty’s counsel “will” explain “all that.” RP 9/4/15 5. The court’s choice of the word “will” affirms that the court was not satisfied that Moriarty understood what he was doing when he signed the jury waiver form. *Passim*

The court nevertheless found that Moriarty had made a valid waiver of his right to trial by jury. RP 9/4/15 5.

In response to the court’s questions, Moriarty stated that he signed the waiver of his own free will and he reviewed it with his attorney so he “knew what in the world [he] was signing.” RP 9/4/15 4.

However, the court did not ask Moriarty whether he wanted to proceed without a jury at that time. *Passim*

The record in this case belies defense counsel’s statements that he had reviewed the statement with Moriarty earlier in the week. Further, the written statement was dated 9/4/15, the first day of trial. CP 17

The record in this case fails to meet the lower constitutional standard necessary to establish a waiver of jury trial. The record further establishes that Moriarty likely failed to understand questions from the court and that the court wanted to move things along. Because there is no valid jury waiver, this case must be remanded for new trial.

2. THE TRIAL COURT ERRED WHEN IT REFUSED TO APPLY THE LAW OF SELF-DEFENSE TO THE FACTS OF THIS CASE.

A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). Generally, a defendant is entitled an instruction on self-defense if there is some evidence demonstrating self-defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The sufficiency of the evidence of self-defense is evaluated by determining what a reasonable person would do standing in the shoes of the defendant. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The refusal to give instructions on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266-67, 96 P.3d 386 (2004). <sup>1</sup>

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<sup>1</sup> Of course, this was not a jury trial. However, the principles of law are the same.

“To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; [and] (3) the defendant exercised no greater force than was reasonably necessary.” *State v. Callahan*, 87 Wn. App. 925, 931-33, 943 P.2d 676 (1997).

Washington cases support the principle that an individual has the right to use force against an animal that is endangering either the person or his property.

These cases thus support the self defense argument made below. The State failed even to acknowledge this self-defense argument and erroneously convinced the trial court that self-defense was not available to Mr. Moriarty.

Having successfully persuaded the trial court that self-defense did not exist in this case, the State relieved itself of the burden to disprove the defense beyond a reasonable doubt.

In *State v. Hoeldt* 139 Wn.App. 225, 160 P.3d 55 (2007), under facts similar to the instant case, the court considered whether a dog could be a deadly weapon for purposes of the deadly weapon element of second degree assault, RCW 9A.36.021 (c) . In that case, the court held that a large powerful dog that was barking, snarling and apparently charging at individual met the instrumentality of for the “as used” definition of a “deadly weapon.”

In *State v. Burke*, 195 Wn.P.16 (1921), the court considered under what circumstances an individual might defend against an animal threatening his property. The court reasoned, "If, in this case, the appellant had undertaken to defend on the ground that he killed the elk for the protection of his life, or that of some member of his family, then, unquestionably, such defense would have been available. But the constitutional right is to defend not only one's life but one's property. The difference in the justification in killing a protected elk in defense of one's life and killing one in defense of one's property is only in degree. Undoubtedly, a stronger showing would have to be made by one undertaking to justify his violation of the law in defense of his property than he would be required to make in defense of his life."  
*(emphasis added)*

In this case, Booth released her unleashed dog and it ran toward a 77 year old man who was recovering from quadruple heart surgery. RP 149-151, 77, 92. The parties agreed the dog snarled at Mr. Moriarty and that the dog focused its attention on his. Although the court found that the dog "honored" Mr. Moriarty's knife [in some unknown way] the dog persisted in appearing to attack him. Mr. Moriarty was in apprehension. CP 77, FOF 1.3, 1.5, 1.6  
He had every right to resort to self-defense.

Having met the requirements for adducing the defense, the State then had the burden to disprove it beyond a reasonable doubt. The State's method of disproving it was to deny that the defense existed and to so persuade the trial court.

Washington cases support the argument that the right to use force against an animal endangering the person or even property is a constitutional right. These cases arguably support the constitutional right to defend oneself from animal attack that occurs when another citizen knowingly releases an animal in a public setting.

In the instant case, Moriarty testified that he was afraid when Booth's dog came aggressively running "full bore" at him, snarling, baring its teeth, and appearing to focus on him. RP 151, 154, 155, 177, 185

It is significant that no one else saw the snarling, vicious animal as it focused on Moriarty. Annie Booth was at her car, putting together snacks for the hike up the shore. RP 77, 93.

Booth was allowed to testify regarding her dog's thoughts and motives at the time the dog assaulted Moriarty. RP 91 Notwithstanding the objection that it called for speculation into the mind of a dog, Booth testified that her dog had a peaceful disposition. RP 90, 91.

Moriarty was entitled to act on appearances in defending himself in this situation. In Washington, this is true if the person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, 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. WPIC 17.04; *State v. Miller*, 141 Wash. 104, 250 P. 645 (1926); *State v. Penn*, 89 Wn.2d 63, 567 P.2d 797 (1977).

In this case, Moriarty did more than act on appearances. He acted on a very real threat. This seventy-six year man, recovering from a recent quadruple by-pass, was the victim of a rushing, snarling, angry dog, running toward him like a bullet. RP 149., 150, 151, 77, 92. This dog had no leash. There was no person with the dog initially. *Id* The dog focused on Moriarty and continued to exhibit vicious behavior. RP 154, 155, 177, 178, 77, 93. Based on this evidence, Moriarty had every reason to be frightened and to be in fear for himself. Due to his physical limitations, he did not have the ability to flee from this mad dog. RP *supra*. He defended himself as best he could. Even when the dog's owner, Booth, appeared, she could not get control of this animal. RP 81. She noted that her dog was very focused on Mr. Moriarty, who was also focused on the dog. RP 82

Moreover, Moriarty had no duty to retreat. *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984). Indeed, until the dog was under control, Moriarty had no physical ability to retreat from this dangerous dog. His lung capacity and heart condition prohibited him from moving very fast.

Regrettably the trial court's oral ruling provided no insight into the basis on the trial court's ruling. See CP 67

The trial court's findings of fact are similarly uninformative. Finding of Fact [FOF] No. 3 is not supported by the evidence. "Ms. Booth did not first see Moriarty climbing off the rocks toward her dog." That being the case, the dog could not have run towards him.

Moriarty's fear thus was arguably reasonable given that he faced an out of control dog with no owner initially apparent where the dog appeared ready to attack him. Moriarty had the right to defend himself against the dog.

A person asserting self-defense has no duty to retreat. The law is well settled that there is no duty to retreat when a person is assaulted in a place where he or she has a right to be. *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999). Further in *State v. Williams*, the Court held "where a jury may conclude that flight is a reasonably effective alternative to the use of force in self-defense, the no duty to retreat instruction should be given." *State v. Williams*, 81 Wn. App. 738, 744, 916 P.2d 445 (1996).

In this case, then, even had the face-finder found the Moriarty had some reasonably effective alternative to the use of force against the dog or the individual who belatedly arrived and attempted to control the canine, the court could not find that Moriarty had any duty to retreat from his lawful position on the beach.

Finally, the State bears the burden of disproving self-defense in an assault case. *State v. Acosta*, 101 Wd. 2d 612, 615-16, 683 P.2d 1069 (1984); *State v. McCullum*, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983).

In this case, the State argued that Moriarty had no right to defend himself because he never described the dog coming to him. RP 9/8/15 207. The State further argued that it had overcome any burden that Moriarty had established self-defense or necessity to defend himself because the dog was never within arm's reach. RP 9/8/15 207. The State contended that self-defense was not warranted because the dog was not close enough to present a danger to Moriarty. RP 9/8/15 207.

The State also asserted that Booth was entitled to protect her property from the angry defendant. RP 9/8/15 207. The State presented no authority in support of this proposition.

The defense responded that none of this would have happened had Booth simply followed the leash laws and kept her hound on the leash. RP

9/8/15 211. The actions of a 75 year old man who was trying to protect himself from a dog bite were reasonable and constituted self-defense. RP 9/8/15 211. Moriarty was defending himself from that dog. RP 9/8/15 212. Moriarty met his burden to present self-defense. The trial court did not when it not only dismissed this defense without consideration, but failed to make the State respond to the defense. *Passim*

### 3 THE DEPUTY PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.

The prosecuting attorney represents the people and is presumed to act with impartiality “in the interest only of justice.” *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984) (quoting *State v. Case*, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1986) (quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497) (1899).

Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant. *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

To establish that the prosecuting attorney committed misconduct during closing argument, a defendant must prove that the prosecuting attorney's remarks were both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). A prosecuting attorney commits

misconduct by misstating the law. *State v. Warren*, 165 Wn.2d 17, 28, 195 [\*374] P.3d 940 (2008). Here, the State concedes that the prosecuting attorney misstated the self defense standard upon which Moriarty could be found guilty.

In addition, the context of closing arguments, misconduct includes making arguments that are unsupported by the admitted evidence. *See State v. Belgarde*, 110 Wn.2d 504, 505, 508-09, 755 P.2d 174 (1988). Although “the prosecuting attorney has ‘wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence’” , prosecutors are not allowed to recast the testimony into a version that clearly never occurred but which wishfully supports their theory of the case.. *Fisher*, 165 Wn.2d at 747 (quoting *State v. Gregory*, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)). The prosecutor's conduct is reviewed in its full context. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011).

Moreover, it is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. However, prosecutors have wide latitude to argue reasonable inferences from the facts concerning witness credibility, and prejudicial error will not be found unless it is clear and unmistakable that counsel is expressing a personal opinion. *State v. Warren*, 165 Wn.2d 17, 30,

195 P.3d 940 (2008) (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)).

Closing argument provides the prosecutor an opportunity to draw the jury's attention to the evidence presented, but it does not give a prosecutor the right to present altered versions of admitted evidence to support the State's theory of the case, to present derogatory depictions of the defendant, or to express personal opinions on the defendant's guilt. *In re Personal Restraint of Glasmann*, 175 Wn.2d at 706-07, 712, 286 P.3d 673 (2012)(plurality opinion). Furthermore, RPC 3.4(e) expressly prohibits a lawyer from vouching for any witness's credibility or stating a personal opinion "on the guilt or innocence of an accused." In this case, the deputy prosecutor's closing and rebuttal are rife with personal opinions:

- Mr. Moriarty is asserting some type of self defense but *I don't think* that he's demonstrated a need to defend himself. (RP 9/8/15 207)
- *I don't think* that there's evidence that he had the need to defend himself. (RP 9/8/15 207)
- And even if there is, *I believe* that the State has overcome . . . (RP 9/8/15 207)
- *I think* Ms. Booth was entitled to protect her property (RP 9/8/15 207)
- *I think* there is ample evidence here . . . (RP 9/8/15 207)
- *I think* the evidence would show . . . (RP 8/9/15 207)
- *I think* he's minimized on the stand and *I think* the court can see that. 9RP 9/8/15 207)
- *I think he was basically angry that he was being disrupted by an animal* (RP 9/8/15 207)

- *I think* what the evidence has shown is that he down off that rock . . . (RP 9/8/15 207)
- *I think* when he did . . .(RP 9/8/15 207)
- *I think* this court can gauge the testimony . . .(RP 9/8/15 208)
- And *I think* the evidence shows . . .(RP 9/8/15 208)
- *I don't think* . . . (RP 9/8/15 208)
- *I don't think that's what occurred there* . . .(RP 9/8/15 208)
- *I think* you have somebody , . . (RP 9/8/15 209)
- *I think the evidence shows* . . . (RP 9/8/15 209)
- *And here I think when you're startled* . . . (RP 9/8/15 209)
- *And I think that's what this evidence shows.* (RP 9/8/15 210)
- *His testimony, frankly, Judge, does not appear to be credible to me.*
- *I think that's pretty telling* . . . (RP 9/8/15 210)
- *I think this evidence has proved beyond a reasonable doubt that he committed this crime.* (RP 9/8/15 210)
- *I hope the Court will convict him of it,* RP 9/8/15 210)

In rebuttal, the prosecutor continued to provide his personal opinion of the evidence and the interpretation thereof.

- [after discussing his view that Booth was entitled to intervene to save her dog], "Well, because that's the truth of it."
- And *I just don't think*, Judge, that anyone reaches down toward a dog when they're afraid of it. (RP 9/8/15 222)
- *I think they take a more defensive posture* . . . (RP 9/8/15 222)  
*I don't think the evidence bears it out and would like the Court to find him guilty.* (RP 9/8/15 222)

At the conclusion of the State's closing and rebuttal, the parties clearly knew the deputy prosecutor's personal opinions on virtually every aspect of the case.

To prevail on a claim of prosecutorial misconduct, a defendant must show first that the prosecutor's comments were improper and second that the comments were prejudicial. *See, e.g., State v. Yates*, 161 Wn.2d 714, 774, 168

P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008); *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). In this case, the prosecutor's argument was improper because it undermined the presumption of innocence.

The presumption of innocence is the bedrock upon which the criminal justice system stands. The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve. This court, as guardians of all constitutional protections, is vigilant to protect the presumption of innocence. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Due process requires that the State bear the burden of proving every element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A defendant is entitled to the benefit of a reasonable doubt. Whether a doubt exists and, if so, whether that doubt is reasonable may be subject to debate in a particular case. However, it is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. It is error for the State to suggest otherwise.

In this case, the deputy prosecutor repeatedly diluted the presumption of innocence by instead inserting his own personal opinion into closing and

rebuttal, thereby urging the court to convict on something other than a reasoned and dispassionate view of the evidence.

Further, the deputy prosecutor egregiously misstated the law of self-defense first by misstating the facts in a manner wildly inconsistent to the testimony and then using that twisted version to convolute the law of self-defense to relieve the State of any burden to disprove that defense.

Finally, at the conclusion of the deputy prosecutor's closing and rebuttal, the deputy prosecutor expressed his personal desire for the court to convict Moriarty. At the conclusion of his closing, the deputy prosecutor made his personal plea, "And this evidence has proved beyond a reasonable doubt that he committed this crime. I hope the court will convict him of it. RP 9/8/15 210. At the conclusion of rebuttal, the deputy prosecutor again made a plea to the court, "I would like the Court to find him guilty." RP 9/8/15 222. The prosecutor's errors in closing and rebuttal were not harmless.

A prosecutor has a duty to "seek a verdict free of prejudice and based on reason." *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). The appellate court evaluates any prejudicial effect in the context of all the evidence and circumstances of the trial. *State v. Barrow*, 60 Wn.App. 869, 877, 809 P.2d 209 (1991).

To determine whether there is any prejudicial effect the court consider arguments in the context of all the evidence and circumstances of the trial. The appellate evaluates any prejudicial effect in the context of all the evidence and circumstances of the trial. *In re Harbert*, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975). There is a presumption that a judge, in a bench trial, will consider only evidence properly before the court, and only for proper purposes. *Id.*

In the instant case, as the State acknowledged in its closing arguments, the defendant asserted self-defense. RP207. The State argued that (1) Moriarty had not demonstrated a need to defend himself; (2) the State had overcome the burden. Neither argument is true. Moriarty, time and again established reasonable belief that this vicious dog would hurt him. supra. The State's response that Both somehow "was entitled to protect her property" lack any basis in law under the facts of the case.

However, the State trivialized Moriarty's self defense claim and failed even to assert any serious response to it. It is likely that this extreme minimization affected the trial court's ruling. The trial court made no reference whatsoever to Moriarty's defense and simply made conclusions as to the credibility of witnesses.

Further, the trial court adopted in its findings of fact and conclusions of law the skewed and twisted version set forth by the prosecutor.

4. THE TRIAL COURT'S FINDINGS OF FACT ARE NOT SUPPORTED BY THE EVIDENCE AND THE FINDINGS OF FACT DO NOT SUPPORT THE CONCLUSIONS OF LAW.

The appellate court reviews a trial court's conclusions of law de novo and its findings of fact used to support those conclusions for substantial evidence. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). In the instant case the trial court's findings of fact and conclusions of law fail to pass appellate review.

*Finding of Fact [FOF] 1.3 – Ms. Booth had let her dog out of the jeep. As she was getting things out of the vehicle, she heard her dog barking. Ms. Booth looked up to see an older male, later identified as the defendant, Michael Moriarty, climbing off the rocks towards her dog. As Mr. Moriarty came off the rocks into in the soft sand, her 55 pound stocky dog came towards him barking and with teeth bared. The dog was not on a leash. Mr. Moriarty was wearing a rain coat, knit hat, and long pants. Mr. Moriarty retrieved a folding knife from his pocket. The knife was attached to a lanyard which was further attached to his pants with a metal clasp. Mr. Moriarty*

*opened the knife and went towards Ms. Booth's dog, saying, "Do you want to fucking die?" "*

Annie Booth did not go to Beard's Hollow to let her dog out for a walk. However, when she arrived there, she let her unleashed dog out of the car unsupervised. RP 77. She did this because the dog liked to run and run around and she liked the surf. RP 94. Booth did not have her eyes on the dog at all times. *Passim*. Moriarty had parked his car at upper Beard's Hollow and walked down to lower Beard's Hollow. RP 147. Moriarty was taking his daily walk when he was accosted by this dog that "was running as fast as a bullet." RP 151. Moriarty thought the dog was a pit bull. RP 154-155. Moriarty noted that the dog's mouth was wide open, its teeth glistening, snarling, barking, doing anything it can. And it's headed right for my feet. Moriarty pulled out a sailor's knife to protect himself. RP 154. The dog, at most, was two feet away from him. RP 154. Moriarty opened the knife "because the immediacy of the situation." RP 155. At that time, the dog was fifteen or eighteen inches from him. RP 156. The dog stayed by Moriarty and made circular motions around him. RP 156. Moriarty did not want to chase the dog. RP 157. He felt as though the dog was pursuing him. RP 157. Moriarty believed the dog was focused on him RP 157. He did not get within a foot of the dog. RP 158.

FOF 1.5 – Mr. Moriarty testified that he never reached the dog and only crouched lower in order in order to “prick” the dog on the nose. He testified that he did not reach for the dog. The dog honored the knife and stayed approximately one foot away from the knife and continued to bark and snarl. This FOF is not supported by the evidence. Moriarty testified that the dog was focused on him, stayed by him, and seemed to be pursuing him. RP 156, 157, 94. Moriarty had the knife out and did so simply to keep the dog away from him. RP 158. There is no evidence that the dog “honored” the knife nor is it even possible to divine what is meant by that sentence. Once again we are asked to speculate into the mind of this dog, whom the fact finder noted was “honoring” the knife while staying about a foot from the knife and continuing to bark and snarl. RP 158.

FOF 1.7 – Mr. Moriarty agreed that the dog was not approaching him, but he feared the dog may give him rabies given an experience he’s had with a dog that had bitten him in the leg more than 20 years ago in a foreign country. Mr. Moriarty did not ever consider whether he would get rabies. Rather because the dog came at him so viciously, he thought the dog was rabid. RP 168. The prior experience was in his mind but there was no testimony it was in mind for any other reason. *Passim*

FOF 1.8 – Ms. Booth ran towards Mr. Moriarty and once she reached him, she grabbed Mr. Moriarty’s shoulder and pulled him away from the dog. This FOF is not supported by the evidence. Booth testified that after she saw Moriarty with his hands on the dog, she ran over to them from behind Moriarty. She put her hands on his shoulder, he turned his back, she reached down to separate him from her dog. RP 82-83. She asserted that at he then tried to stab her in the face but she quickly put her hand up and so instead she sustained very minor injury to her hand. RP 83-84. She then threw Moriarty on the ground and left. RP 84. Moriarty testified consistent with Booth that she approached from the back. RP 160. However, he testified that she hit him numerous times on the left side, back, etc., while all the time he was trying to deal with this vicious animal. RP 160. Moriarty wound up on the ground. RP 161. After this altercation and due to his recent quadruple bypass, he was having difficulty breathing. RP 161. The woman came back and resumed hitting him. RP 161-162. Moriarty continued to defend himself against the dog. RP 163. Then Moriarty noticed that the dog was no longer there. RP 165. FOF 1.8: Officer Melling located Mr. Moriarty and found that he had hidden his coat in the small of his back under an outer shirt and also placed his cap in his pocket. Mr. Moriarty testified that he did not do this in order to hide his appearance, but instead because he was hot. Moriarty testified that his hat

was a wool, sailor's pull on hat and that his jacket was a thin nylon rain protector. RP 169-170. He testified that it was his custom to fold them up and slip them in his shirt when he was out walking. RP 170. Officer Melling gave no testimony that Mr. Moriarty had hidden the hat, jacket, or knife from anyone. The officer simply testified where he had found these items. His testimony was not the least bit inconsistent with Moriarty's testimony. *Supra*.

#### 5. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN MORIARTY'S CONVICTION FOR SECOND DEGREE ASSAULT.

This case was tried to the court without a jury, so the appellate court engages in a three-part inquiry. First, the court must determine whether the evidence supports the findings of fact. Second, the court must determine whether the findings of fact support the conclusions of law. And third, the court must decide whether the conclusions of law support the judgment. *State v. Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1996).

Regarding the trial court concluded that Mr. Moriarty was not armed with a deadly weapon for purposes of the special allegation for a *deadly weapon enhancement*. COL .4.

The trial court's COL .5 misstates the law regarding self-defense because, as noted above, Mr. Moriarty was entitled under the law to defend himself against the threatening, vicious property of Booth.

Where there is insufficient to prove the crime charged the defendant is entitled to dismissal with prejudice. This is so because the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime *with which he is charged.*” *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (emphasis added) (citing U.S. Const. amend. XIV). (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

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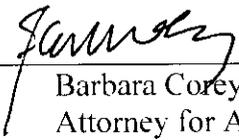
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D. CONCLUSION:

For the foregoing reasons, Mr. Moriarty respectfully asks this court to grant the relief request and remand this matter for a new trial.

DATED this 2nd day of May, 2016.

  
Barbara Corey, WSB # 11778  
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she delivered by U.S. Mail or ABC-LMI delivery to the Appellate Unit, Pacific County Prosecutor's Office a true and correct copy 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.

5/2/16  
Date

  
Signature

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WASHINGTON STATE COURT OF APPEALS, DIVISION II

MICHAEL M. MORIARTY,

Appellant.

vs.

STATE OF WASHINGTON,

Respondent.

CAUSE NO. 48337-8-II

DECLARATION OF SERVICE  
(AMENDED)

WILLIAM DUMMITT, declares under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on the 2<sup>nd</sup> day of May, 2016, I delivered a copy of the Brief of Appellant to Michael M. Moriarty at [tirnamicéal@gmail.com](mailto:tirnamicéal@gmail.com).

The Appellant has no mail address.

DATED: 5/3/16

  
WILLIAM DUMMITT

DECLARATION OF MAILING