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Division II
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KEITH ROBERSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00058-3

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the prosecutor's comment that the defendant created the risks not improper because it was part of a larger argument that the evidence did not support self-defense?
2. Whether the prosecutor's cross-examination of Roberson was designed to sort through conflicting accounts and was not flagrant or ill-intentioned or prejudicial considering the strength of the State's case?
3. Whether count two, Assault in the Second Degree was supported by sufficient evidence because there was testimony that Roberson pointed a gun directly at Walters and a jury could reasonably infer intent?
4. Whether the court did not abuse its discretion at sentencing because it did not categorically refuse to consider Dr. Muscatel's report and role that Roberson's mental illness may have contributed to the offense?

II. STATEMENT OF THE CASE

Michael Elkhart (ct 1 victim) testified that he lives with his wife at a house on Barr St. RP 274. Elkhart heard the alarm sensor at his house go off when he and his wife were about to go to sleep. RP 274. Elkhart got up to see what was going on outside and saw two persons that he identified as Israel Lundstrum and Jennifer Cox near the dead-end part of the street and saw a

vehicle which turned out to be a van. RP 275–77. Lundstrum and Cox walked away north on Barr Street and Elkhart called 911. RP 277. Two officers showed up and the vehicle was towed away. RP 277–78.

Then Elkhart and his wife went to bed again and were watching T.V. when they heard a gunshot. RP 278.

Elkhart got up again and went out his front door with 911 on the line and then heard cries for help. RP 279. Elkhart, concerned for his neighbor Louie Ricklick ran towards Ricklick's house, jumped over his fence and realized that the cry for help was coming from Mike Walters' house which was next to Ricklick's separated by a fence. RP 280. Elkhart went over to Walters' property and saw a person dressed in black (identified as Roberson) standing in Walters' carport and Walters standing by his back door. RP 281. Walters was yelling at Elkhart to get out of the area. RP 281, 298. Elkhart was standing by the wooden fence about 40 to 50 feet away from Walters' carport where Roberson was standing. RP 525.

Elkhart testified as follows:

A. When I was standing there, the gentleman -- he turned around and reached out, and I seen his arm go up in the air and then a big flame came out when his gun -- when the gun went off.

Q. Uh-huh.

A. And so he ended up shooting at me.

Q. Okay. And what was he -- he pointing in your direction, was he shooting at the ground --

A.He was pointing -- it was -- it was headed right straight towards me, yes.

Q.Okay. Did you –

A.I told the officers when we went down and they came up to see me at 8:00 in the morning, I told them that you come down -- we went down and I showed them where I was standing and I said if you look real close at this fence someplace, I said there's going to be a hole unless it's pointed a little bit too high.

Q.Uh-huh.

A.And I said then you ought to be checking the building, the shops behind here.

Q.Uh-huh.

A.And they turned around and it ended up being eight to ten feet or something like that, from right where I was standing.

Q.Okay. When you were over at the carport area near Mr. Walters' house, did you see anybody around the carport other than Mr. Walters and the Defendant, Mr. Roberson?

A.No.

Q.There was no one else around?

A.Huh-uh.

RP 283–84.

Elkhart was in shock after Roberson fired the gun toward him because Elkhart was only there to respond to the repeated calls for help. RP 286. After Roberson fired the gun, Elkhart retreated behind a concrete structure and then got himself out of the area. RP 287. Elkhart did not see anybody else in the area as he went back to his own house to wait for police. RP 288.

Michael Walters testified by deposition. RP 72 (State's Ex. 32, Video testimony of Michael Walters, hereinafter "Dep. Walters"). Walters testified

that Roberson came to his back door and was frantic and trying to get Walters to call 911. RP 81–83 (Dep. Walters). Walters called 911 and Roberson pulled a gun and was pointing towards the neighbor’s home and then directly at Walters while he was on the 911 call. RP 85. Walters told Roberson to not point the gun at him and to don’t shoot on multiple occasions. RP 85.

Roberson did not deny that Mr. Walters called 911. Roberson testified that Walters told Roberson on multiple occasions, while on the phone with 911, to not point a gun at Walters. RP 500; RP 40 (State’s Ex. 4, 911 call). Roberson also testified that he was not pointing the gun at Walter’s. RP 500–01.

III. ARGUMENT

A. THE PROSECUTOR’S CLOSING ARGUMENT PROPERLY ARGUED THAT THE EVIDENCE DID NOT SUPPORT ROBERSON’S SELF-DEFENSE CLAIM AND THE PROSECUTOR ARGUED WITHIN THE LAW OF THE CASE.

Roberson argues that the prosecutor’s arguments regarding Roberson’s self-defense argument constituted prosecutorial misconduct.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish ‘that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.’” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

“[A] conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (citing *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991); *State v. Wood*, 44 Wn. App. 139, 145, 721 P.2d 541 (1986)).

- 1. The prosecutor properly argued that the facts did not support a claim of self-defense and did not argue that Roberson had no right to assert self-defense.**

Roberson assigned error to the prosecutor’s statement that, “[M]y argument is how can someone argue self-defense when they create the situation? When he essentially through his own behavior, brings someone into the area of danger, and when they come, he shoots at them.” RP 577.

Roberson argues that the prosecutor argued that Roberson had “no right to assert self-defense because he created the need for it.” Br. of Appellant at 15. This argument lacks merit because the prosecutor did not assert that Roberson has *no right* to assert self-defense. The context of the entire record and the circumstances at trial make clear that the prosecutor’s argument was that the evidence did not support a claim of self-defense because there was no evidence that anyone present was attacking Roberson. Rather, the evidence was that everyone present was trying to *help* Roberson (RP 568), and therefore, Roberson was not acting reasonably.

“Allegedly improper 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.” *Russell*, 125 Wn.2d at 85–86 (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)).

“In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses.” *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011) (citing *State v. Hoffman*, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991)).

“It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory.” *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990); *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990)). “Moreover, the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *Id.* (citing *United States v. Hiatt*, 581 F.2d 1199, 1204 (5th Cir.1978)).

Here, the defense was arguing self-defense under jury instruction no. 16 which required the State to disprove self-defense beyond a reasonable doubt. CP 82. The defense was also successful in having the trial court instruct the jury that the defendant could act in self-defense even if there was no actual danger. Instruction no. 17 instructs a jury that a defendant may act

in self-defense even if mistaken about the extent of danger he was in as long as the defendant acted on good faith and had reasonable grounds to believe he was in actual danger of great bodily harm. CP 83.

Looking at the context of the prosecutor's argument, the issues presented, and the jury instructions, it is clear that the prosecutor argued that the evidence did not support a claim for self-defense because Roberson was not acting reasonably. RP 565–66, 68, 77.

The prosecutor pointed out that except for the two individuals that were taking methamphetamine with Roberson earlier in the evening and were long gone from the scene, all the persons involved were trying to help Roberson. RP 568. In particular, the victim of the Assault in count 1, the neighbor Michael Elkhart, came to the scene because Roberson was shouting out for help. Elkhart, responding to Roberson's cry for help, did nothing to present any danger to Roberson and he testified he came no closer than 40 to 50 feet from Roberson. CP 525. Yet Roberson shot a firearm towards Elkhart as evidenced by Elkhart's testimony and the bullet hole in the fence that Elkhart was standing by. Elkhart immediately sought cover and then left the scene.

Roberson also testified that he remembered the home owner Michael Walters speaking with the 911 operator to inform that a neighbor came over with a flashlight and that Walter's told the neighbor to get lost. RP 503.

Thus, the prosecutor argued that although Roberson may have believed that he was defending himself, but he was not acting reasonably when he shot a firearm at Elkhart. RP 566.

This is far from arguing, contrary to the jury instructions, that Roberson had *no right* to assert self-defense. There was no argument to disregard the jury instruction for self-defense. CP 82. Therefore, Roberson's claim that the prosecutor's statement was improper lacks merit.

2. The prosecutor properly argued within the law of the case and did not invoke a first aggressor instruction and *Davenport* does not apply to the facts of this case.

Roberson also claims that the prosecutor improperly invoked the first aggressor instruction in closing argument and cites to *Davenport* to suggest that the prosecutor misstated the law of the case because the aggressor instruction, WPIC 16.04, was not given to the jury. *State v. Davenport*, 100 Wn.2d 757, 657 P.2d 1213 (1984); Br. of Appellant at 15–16.

Here, the prosecutor did use the words “Mr. Roberson created this situation with both the named victims Michael Walters and Michael Elkhart.” RP 577. However, contrary to Roberson's argument, the prosecutor's statement does not articulate what the first aggressor instruction encapsulates.

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense [or] [defense of another] and thereupon [kill] [use, offer, or attempt to use force upon or toward] another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and *that*

defendant's acts and conduct provoked or commenced the fight, then self-defense [or] [defense of another] is not available as a defense.

WPIC 16.04 (Aggressor—Defense of Self) (emphasis added).

The prosecutor argued as follows:

So, my argument is how can someone argue self-defense when they create the situation. When he essentially through his own behavior, brings someone into the area of danger, and when they come, he shoots at them. And then says well, I was defending myself –

RP 577.

Roberson's argument fails because the *first* aggressor instruction covers the situation where there was a *fight* and conduct that provoked or commenced the fight. Here the prosecutor did not suggest that the defendant's conduct provoked a belligerent response or commenced a fight. Additionally, the behavior attributed to Roberson in bringing someone to the area of danger was shouting out for help and the prosecutor pointed this out. RP 568, 583. Shouting out for help is not conduct that is reasonably likely to invoke a belligerent response and the prosecution did not argue such. See RP 568, 71, 77, 83. Therefore, the prosecutor did not invoke the first aggressor instruction and did not instruct the jury by misstating the law of the case.

Rather, the prosecutor's statement simply recounted the testimony that Roberson was shouting out in a way that invited the neighbor's attention, and when the neighbor came over to help, Roberson assaulted the neighbor by

firing a shot towards him. There was no resulting fight and thus no *first* aggressor. The prosecutor's statement simply argues that there are no facts under that scenario which supports a claim that Roberson acted in self-defense as there was no need to.

Therefore, the prosecutor's argument was proper because it was within the facts and law of the case and did not instruct the jury on the first aggressor instruction.

3. Roberson fails to establish unfair prejudice from the prosecutor's arguments during closing.

"[A] case will not be reversed for improper argument of law by counsel, unless such error is prejudicial to the accused, and only those errors which may have affected the outcome of the trial are prejudicial." *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) (citing *State v. Estill*, 80 Wn.2d 196, 200, 492 P.2d 1037 (1972); *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)).

"Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark." *Davenport*, 100 Wn.2d at 762 (citing *State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983)).

“Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.” *Davenport*, at 762–63 (citing *State v. Wheeler*, 95 Wn.2d 799, 807, 631 P.2d 376 (1981); *State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); *State v. Music*, 79 Wn.2d 699, 489 P.2d 159 (1971); *State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968)).

A jury is presumed to follow the instruction of the court absent any contrary showing. *Davenport*, at 763–64 (citing *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982); *State v. Cerny*, 78 Wn.2d 845, 850, 480 P.2d 199 (1971)).

In *Davenport*, the prosecutor argued to the jury that they could convict the defendant as an accomplice to burglary when stating “it doesn't make any difference actually who went into the house ... they are accomplices.” *Davenport*, at 761. There was no accomplice instruction provided to the jury. *Id.* The defendant objected and the court overruled the objection which “lent an aura of legitimacy to what was otherwise improper argument.” *Id.* at 764. After deliberating for 2 hours, the jury requested a definition of accomplice. *Id.* at 764. It was clear that the jury considered the improper statement to be a correct statement of law and the court did not provide a curative instruction to correct this possibility. *Id.* The facts of *Davenport* are distinguishable from

the instant case.

Here, unlike in *Davenport*, there was no evidence that the prosecutor's argument instructed the jury on an instruction that was not part of the law of the case. Nevertheless, the trial court sustained Roberson's objection before the jury and instructed the jury to disregard the prosecutor's remark which was more likely damaging to the prosecutor's argument. RP 583. Finally, there was no evidence that the jury was affected by the remark as in *Davenport* because there was no request for a definition of "first aggressor."

Ultimately, there was no showing that the jury did not follow the instructions of the court. Therefore, Roberson fails to establish unfair prejudice from the prosecutor's arguments. This Court should affirm.

B. THE PROSECUTOR'S QUESTIONS ON CROSS EXAMINATION WERE NOT IMPROPER OR FLAGRANT AND ILL INTENTIONED AND ROBERSON FAILS TO ESTABLISH PREJUDICE.

- 1. The prosecutor's question as to whether Walters made up his statement for the 911 call was not an attempt to get Roberson to state his opinion of Walters' credibility but rather for Roberson to explain from his own point of view why Walters made the statement.**

Roberson argues that the prosecutor committed misconduct by asking him a whether Walters was making it up when Walters said to stop pointing the gun at him while on the 911 call. Roberson argues that this was cross-

examination seeking to compel Roberson's opinion as to whether Walters was telling the truth. The prosecutor cross examined Roberson as follows:

Q. Um, do you remember him saying don't shoot?

A. Yes.

Q. In fact, he said don't shoot more than once; right?

A. Yes.

Q. Okay. Do you remember him saying don't point it at me?

A. I heard him say that.

Q. Okay, and he said that more than once; right?

A. Yes, he did.

Q. And you were pointing the gun at him?

A. No, I wasn't.

Q. So, he was just -- you weren't pointing the gun at him, and he was just saying don't point it at me for -

A. Absolutely, because he was on the phone with dispatch. But the reason why he was saying don't point the gun at me, don't point the gun at me, I'm just looking at him hollering for help.

Q. So he was just making that up?

A. He was -- that's all, don't point the gun at me, don't point the gun -- I wasn't -- I had no reason -- I had no -- this man's saving my life. I had no reason to point the gun at him, I didn't want anything from him but help. I just wanted him to help me.

Q. So he was just making that up for 911?

A. Yes --

MR. ANDERSON: Objection as to the motives of the witness.

THE COURT: Overruled.

THE WITNESS: I never pointed the gun at him.

BY MS. KING

Q. So -

A. No reason -

MS. KING: Okay, so I don't know -- the objection was over -- I said -

MR. ANDERSON: Overruled.

BY MS. KING

Q. So Mr. Walters was just making that up for 911 when he said don't point it at me is what you're saying?

A. That's what I'm saying.

RP 500-01.

Q. Okay. Well, no one came into the carport and started physically assaulting you or attacking you; correct?

A. Correct.

Q. The whole hour you were there, no one came into the carport and attacked you?

A. No.

Q. And Mr. Walters, do you remember him saying repeatedly please don't, please don't shoot?

A. I remember him saying that.

Q. Okay. And could that be because he understood there was no danger -

MR. ANDERSON: Objection, as to what he knew or didn't know, calls or speculation.

THE COURT: Sustained.

RP 509.

The prosecutor's question to Roberson whether Walters was making it up for 911 was not for the purpose of having Roberson testify about his

opinion of Walter's credibility but rather to explain the discrepancy between his testimony and Walters statements on the 911 call. The questioning about Walters intent for making such statements was aimed at finding out whether this fit within Roberson's argument and theory of the case that his actions were simply aimed at getting assistance from law enforcement quicker. RP 506.

This is different from asking whether Walters was lying and therefore not credible. The jury was already aware that Roberson's version of events conflicted with Walters' and Elkhart's testimony. The prosecutor's statements were designed to help sort through conflicting testimony.

In *State v. Wright*, the Court of Appeals pointed out that questions as to whether other witnesses "got it wrong" are not improper when relevant and for the purpose of sorting through conflicting testimony. *State v. Wright*, 76 Wn. App. 811, 822, 888 P.2d 1214 (1995) ("So long as they are relevant, questions about whether another witness was mistaken or had "got it wrong" are not objectionable or improper.) Questions about whether another witness was mistaken may be relevant and probative and may help the jury sort through conflicting testimony. *Wright*, at 821-822.

Here, the prosecutor's leading question was whether Walters' statement while on the 911 call "don't point that at me" was made up for the purpose of the 911 call. After all, Roberson testified that he wanted Walters

to call 911 for help and Walters was trying to help. This could explain that Walters made the statement in an effort to get law enforcement's attention. The prosecutor did not ask Roberson to opine on Walters credibility.

Roberson cites to *State v. Jerrels* and *State v. Suarez-Bravo* for the proposition that “[a] prosecutor commits misconduct when his or her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth.” *State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209 (1996) (citing *State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994); *State v. Padilla*, 69 Wn. App. 295, 299, 846 P.2d 564 (1993)).

The cases cited above are distinguishable from the instant case. In *State v. Jerrels*, the prosecutor erred by asking a mother for her opinion of her children's veracity and credibility. *Jerrels*, 83 Wn. App. at 508. In *State v. Suarez-Bravo*, the prosecutor erred by repeatedly attempting to get the defendant to call police witnesses liars and misrepresented the testimony of those witnesses in order to create a conflict which did not exist. *State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994). In *State v. Padilla*, the prosecutor asked the defendant if the officer that testified was lying on multiple occasions. *State v. Padilla*, 69 Wn. App. 295, 298–99, 846 P.2d 564 (1993). Additionally, the *Padilla* Court found that the defense properly preserved the issue for appeal because he asked for a sidebar and the trial court indicate that it had ready the case on lying questions. *State v.*

Padilla, 69 Wn. App. at 300–01.

Absent a proper objection, a request for a curative instruction, or a motion for a mistrial, the issue of a prosecutor's misconduct cannot be raised on appeal unless the misconduct was so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.

Padilla, 69 Wn. App. at 300 (citations omitted).

An objection to a prosecutor's question is inadequate unless it calls the trial court's attention to the specific reason for the impropriety of the question.

Id. (citing *State v. Casteneda–Perez*, 61 Wn. App. 354, 363–64, 810 P.2d 74 (1991)).

Here, the grounds for defense counsel's objection was more specific than in *Padilla*. Defense counsel in this case objected on the grounds of "motives of the witness" which might be better stated as "calls for speculation." In fact, defense counsel does object on speculation grounds to later similar questioning by the prosecutor. RP 509. There was no indication that the objection was for improper questioning on the basis of trying to get Roberson to testify about his opinion of Walters' credibility.

Furthermore, Roberson fails to establish that the prosecutor's questioning was flagrant and ill-intentioned. The prosecutor was questioning Roberson to see if he could explain the discrepancy between his testimony that he never pointed the gun at Walters, and Walters' statements in the 911 call telling Roberson to not point the gun at him:

The prosecutor never asked if Walters was lying and did not provoke Roberson into saying that Walters was lying. Rather, Roberson first suggested there was a *reason* why Walters was saying don't point the gun at me but didn't finish until that opening was explored by the prosecutor. Then Roberson agreed with the suggestion that Walters said "don't point the gun at me" over the 911 call to get a quicker response from law enforcement which is what Roberson claimed he wanted all along. RP 482, 484. This statement was consistent with Roberson's story. Thus, the prosecutor did not insist as in *Suarez-Bravo* and *Padilla* on getting Roberson to claim that Walters was lying.

[C]ross-examination "designed to compel a witness to express an opinion as to whether other witnesses were lying" constitutes improper conduct. *State v. Padilla*, 69 Wash.App. 295, 299, 846 P.2d 564 (1993). Liar questions on cross-examination are harmless if they "were not so egregious as to be incapable of cure by an objection and an appropriate instruction to the jury." *State v. Stover*, 67 Wash.App. 228, 232, 834 P.2d 671 (1992). In determining whether these questions are harmless, courts consider several factors including "whether the prosecutor was able to provoke the defense witness to say that the State's witnesses must be lying, whether the State's witness's testimony was believable and/or corroborated, and whether the defense witness's testimony was believable and/or corroborated." *Padilla*, 69 Wash.App. at 301, 846 P.2d 564.

State v. Vassar, 188 Wn. App. 251, 257, 352 P.3d 856 (2015).

Roberson fails to establish prejudice or that the questions were not harmless. Walter's testimony in his deposition was corroborated by the 911 call and Elkhart's testimony and the case was very strong. The question may

have been objectionable as it called for speculation but then again, it is not likely that the question affected the outcome of the trial considering all the other evidence presented.

Therefore, Roberson's claim of prosecutorial misconduct fails.

C. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING OF GUILT AS TO COUNT 2, ASSAULT IN THE SECOND DEGREE.

"Sufficiency of the evidence is a question of law that we review de novo." *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Kintz*, at 551 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* "Circumstantial evidence and direct evidence are equally reliable' in determining the

sufficiency of the evidence.” *Id.* (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). “In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case.” *State v. Dejarlais*, 88 Wn. App. 297, 305, 944 P.2d 1110 (1997), *aff’d*, 136 Wn.2d 939, 969 P.2d 90 (1998).

Additionally, this Court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. J.P.*, 130 Wn. App. 887, 891–92, 125 P.3d 215 (2005).

Roberson was charged in count 2 with Assault in the Second Degree for assaulting Michael Walters. CP 160. The State was required to prove that the defendant intentionally assaulted Walters. CP 74. Assault was defined in the jury instructions as an act done with intent to create in another apprehension and fear of bodily injury and which in fact creates in another reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury. CP 75.

Here, the State presented evidence by Walters that Roberson pointed a firearm directly at him and Walters was afraid Roberson was going to shoot. This evidence appears through Walters’ statements to 911 to not point the gun at him and to “please don’t shoot” and also during Walters’ deposition. RP 40, 42, 43, 44, 53, 54, 57 (State’s Ex.4); RP 85 (State’s Ex. 5, Dep.

Walters). Walters testified that he was “scared spitless” when Roberson pointed the firearm at him. RP 85 (Dep. Walters). Roberson himself testified that he remembered everything he did that evening and his goal was to get law enforcement to respond.

Roberson argues that there was insufficient evidence that he had specific intent to place Walters in apprehension or fear of an assault. This argument fails because a jury could reasonably infer that the Roberson intended Walters to be placed in apprehension of an assault by repeatedly pointing a gun at him.

There was evidence supporting each element of the offense and therefore, in the light most favorable to the State, there was sufficient evidence to support the conviction in count II and this Court should affirm.

D. THE COURT PROPERLY EXERCISED ITS DISCRETION AT SENTENCING AFTER CONSIDERING THE MENTAL HEALTH CONSIDERATIONS BEFORE DECLINING TO IMPOSE AN EXCEPTIONAL SENTENCE DOWNWARD.

“The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535.

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard

range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

RCW 9.94A.535(1), (1)(e).

Roberson argues that the trial court erred by failing to impose an exceptional sentence downward after presenting some evidence that mental illness along with use of methamphetamine played a role in Roberson's actions.

"A trial court abuses discretion when "it refuses *categorically* to impose an exceptional sentence below the standard range under any circumstances." *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (emphasis added) (citing *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997)).

Here, the sentencing judge ruled over the State's objection that the court would consider Dr. Muscatel's report on Roberson's mental health for sentencing purposes. RP 641. Roberson's attorney recommended 3 years which would consist of an exceptional sentence in order to run the firearm enhancements concurrently to each other and not assess any time at all on count 2. RP 644. The State recommended 84 months, the high end of the

range. RP 646.

The trial court explained that it did not believe there was much in the way of mitigating factors supporting an exceptional sentence. RP 653. The court believed that “to the extent that [Roberson was] not capable of appreciating the wrongfulness of [his] behavior that night” was “*largely attributable*” to voluntary use of methamphetamine. RP 653-54. The court went on to focus on the impact Roberson’s conduct had on the victims. There was nothing to suggest that the court believed it did not have discretion to impose an exceptional sentence. This dialogue shows that the court did not categorically refuse to consider an exceptional sentence downward.

This Court should affirm.

IV. CONCLUSION

The prosecutor’s comments in closing simply argued that the evidence did not support Roberson’s claim of self-defense and did not suggest an improper instruction of first aggressor. Therefore, the prosecutor’s comments were not improper.

The prosecutor’s questioning Roberson about why Walters kept saying to Roberson to not point the gun at him was not flagrant or ill-intentioned and was for the purpose of sorting through conflicting testimony. Roberson also fails to establish the comment was prejudicial.

There was sufficient evidence supporting the conviction for count II

because there was testimony that Roberson repeatedly pointed a gun at Walters and a jury could infer that such an action was done with intent to create apprehension and fear of an assault.

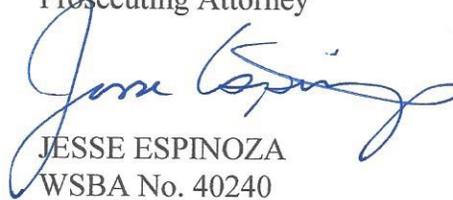
Finally, the court exercised its discretion and considered Dr. Muscatel's report on Roberson's mental illness and methamphetamine use. Therefore, the court did not abuse its discretion by categorically refusing to consider an exceptional sentence downward.

For the foregoing reasons, the Court should affirm the conviction.

Respectfully submitted this 2nd day of July, 2018.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Mark W. Muenster on July 2, 2018.

MARK B. NICHOLS, Prosecutor


Jesse Espinoza

CLALLAM COUNTY DEPUTY PROSECUTING ATTORN

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