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NO. 50796-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DEAN O'NEAL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Garold Johnson, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
C. <u>ARGUMENT</u>	7
MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT DENIED O’NEAL A FAIR TRIAL	7
1. <u>In a bare appeal to the passions and prejudices of the jury,</u> <u>the State argued that jurors could find O’Neal acted in</u> <u>self-defense only if they were “comfortable with that</u> <u>conclusion regardless of the consequences”</u>	7
2. <u>It was improper for the State to make an emotional,</u> <u>extraevidentiary, send-a-message appeal to jurors regarding</u> <u>the “shameful[ness]” and “black eye” caused by O’Neal</u> <u>and other Hilltop neighborhood witnesses refusing to speak</u> <u>to law enforcement</u>	14
3. <u>The cumulative impact of prosecutorial misconduct requires</u> <u>reversal</u>	23
D. <u>CONCLUSION</u>	24

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	7, 11, 15, 23, 24
<u>State v. Belgarde</u> 110 Wn.2d 504, 755 P.2d 174 (1988).....	15
<u>State v. Casteneda Perez</u> 61 Wn. App. 354, 810 P.2d 74 (1991).....	7
<u>State v. Claflin</u> 38 Wn. App. 847, 690 P.2d 1186 (1984).....	7
<u>State v. Emery</u> 175 Wn.2d 742, 278 P.3d 653 (2012).....	10, 13
<u>State v. Ermert</u> 94 Wn.2d 839, 621 P.2d 121 (1980).....	13
<u>State v. Estes</u> 188 Wn.2d 450, 395 P.3d 1045 (2017).....	13
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	19
<u>State v. Fuller</u> 169 Wn. App. 797, 282 P.3d 126 (2012).....	10
<u>State v. Gregory</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	7
<u>State v. Lile</u> 188 Wn.2d 766, 398 P.3d 1053 (2017).....	10
<u>State v. Lindsay</u> 180 Wn.2d 423, 326 P.3d 125 (2014).....	11

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	7, 10, 22, 23
<u>State v. Ramos</u> 164 Wn. App. 327, 263 P.3d 1268 (2011).....	15, 23
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984).....	7
<u>State v. Smith</u> 189 Wash. 422, 65 P.2d 1075 (1937)	19
<u>State v. Thierry</u> 190 Wn. App. 680, 360 P.3d 940 (2015).....	12, 15, 17, 23
<u>State v. Walden</u> 131 Wn.2d 469, 932 P.2d 1237 (1997).....	10
<u>State v. Yarbrough</u> 151 Wn. App. 66, 210 P.3d 1029 (2009).....	12
 <u>FEDERAL CASES</u>	
<u>Berger v. United States</u> 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).....	7
<u>Strickland v. Washington</u> 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	12
<u>United States v. Solivan</u> 937 F.2d 1146 (6th Cir. 1991)	12

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505 (3d ed. 2004).....	13
CrR 3.5.....	4
RAP 10.4.....	6
U.S CONST. amend. VI.....	12
CONST. art. I, § 22.....	12

A. ASSIGNMENTS OF ERROR

1. Numerous instances of prosecutorial misconduct, whether considered alone or cumulatively, denied Dean Michael O’Neal of a fair trial.

2. O’Neal was also denied effective assistance of counsel given that counsel failed to object to prosecutorial misconduct that attempted to relieve the State of its burden of proving the absence of self-defense beyond a reasonable doubt.

Issues Pertaining to Assignments of Error

1a. The State argued that the jury should consider the collateral consequences of finding O’Neal acted justifiably in self-defense, given the person or property that could have been harmed by the public discharge of firearms. The prosecutor repeatedly argued not to allow the potential harm that could have occurred to become “irrelevant” to the question of whether O’Neal’s use of force was justified. Were these improper appeals to the passions and prejudices of the jury intended to relieve the prosecution of its burden of proving the absence of self-defense beyond a reasonable doubt, requiring reversal and retrial?

1b. Was defense counsel ineffective for failing to object to the State’s argument identified in the immediately preceding issue statement?

2. Numerous witnesses, the alleged victims, and O’Neal refused to speak with police and cooperate with the prosecution. Thus,

several of the State's themes and arguments at trial contrasted the straight-laced citizens from the suburbs who were willing to cooperate with police and prosecutors and those urbanite Hilltop neighborhood residents who were not willing to cooperate with police and prosecutors, calling the latter group "shameful" and a "black eye" on society. The State argued O'Neal was in this latter category. And the State failed to present evidence as to why witnesses did not show for trial. Was this emotional, extra evidentiary send-a-message, us-versus-them theme improper and did it deny O'Neal a fair trial?

3. If each instance of prosecutorial misconduct alone does not require reversal, did the cumulative effect of prosecutorial misconduct deny O'Neal a fair trial?

B. STATEMENT OF THE CASE

The State charged O'Neal with three counts of first degree assault and first degree unlawful possession of a firearm.¹ CP 1-3.

The charges arose from a shooting at an ARCO gas station in the Hilltop neighborhood of Tacoma on April 4, 2016 at about 11:54 p.m. Ex. 8. The State's case relied almost exclusively on the gas station's video surveillance system to support its charges. Ex. 8. The video shows the exchange of gunfire between O'Neal and three occupants in a car driving away from the gas station. Ex. 8. Rather than describe the details depicted in the video, O'Neal has designated the video for the appellate record so that the court can review the video itself.²

¹ O'Neal does not discuss the unlawful possession of a firearm charge further or make any argument pertinent to this charge on appeal. At trial, O'Neal conceded to the jury he was guilty of this charge. CP 9-10 (stipulation of parties that O'Neal had previously been convicted of a serious offense); RP 177-78 (stipulation read to jury); RP 436 (O'Neal acknowledging possession of firearm was unlawful); RP 540-41 (defense counsel conceding guilt for possessing firearm in summation).

² Exhibit 8, containing video of the incident, also contains footage from before and after the shooting and footage from cameras positioned inside of the minimart that do not show the gas pump or parking areas at all. Upon running the CD that is Exhibit 8, three application files appear. The second one, titled 20160404235200 provides the footage of the shooting on channels 6 and 8. The purple car containing the alleged victims pulls into the ARCO at 23:52:14 on channel 6; the car containing O'Neal pulls into the ARCO around 23:52:34. The purple car starts driving off at 23:53:13 and O'Neal can be seen shooting towards it at 23:53:30. As the video progresses, it shows additional shooting and both cars driving away from the ARCO station.

The State relied most heavily on the video because none of the alleged victims of the assault—the three occupants of the vehicle O’Neal shot at—was willing to cooperate with law enforcement. See CP 52-54 (to-convict instructions for first degree assault referring to human beings “A,” “B”, and “C”). Christopher Legg, whom the State attempted to identify as the driver of the vehicle O’Neal shot at, stated he had never been there, was not involved in any shooting, and did not speak to police.³ RP 152-55. Despite material witness warrants being issued for the other alleged occupants of the car who exchanged gunfire with O’Neal, the State did not present these witnesses. RP 319-23. Although the State’s detective attempted to explain why the witnesses did not show for trial, the trial court disallowed it on hearsay, foundational, and speculation grounds. RP 323-27.

O’Neal’s statements to police were admitted following a CrR 3.5 hearing. The arresting officer testified that he told O’Neal he had a felony warrant and named the offense and “[O’Neal] told me that he was going to be in prison for life over this” and “[h]e was crying. He was upset. He was visually obviously upset.” RP 195. In a later police interview, O’Neal also “denied knowledge of the incident. And then he said that even if he did know

³ The State attempted to undermine Legg’s denials through inconsistent statements he made to the detective “acknowledg[ing] he was shot at, but said he didn’t know who was shooting at him or why.” RP 317

something that he wouldn't tell me because he wasn't a rat or a snitch." RP 299.

O'Neal acknowledged being present and firing his gun, asserting he was acting lawfully in self-defense. O'Neal stated he heard screaming coming from the a female in the car: "I seen what appeared to be a female hanging out the back of a car screaming and yelling, and what I thought was a gun." RP 435. Another witness, Drake Ackley, also described a female yelling in a "very hostile" tone, calling it a "hood rat tone" and "[v]ery street, ethnic tone." RP 357-58. O'Neal stated he heard a shot come from the car and then "let off a shot myself because of I felt threatened and in fear of being shot again"⁴ and also stated he fired to "protect myself and just to get them to stop, to get the shooting to stop." RP 435-36. However, as more shots were fired, O'Neal ran back the car he had been in, took cover, and proceeded to return fire. RP 437.

During cross examination of O'Neal, the State asked O'Neal whether he had shot himself in 2015 and then proceeded to ask O'Neal why he never spoke to police about that shooting. RP 438-41. As discussed in more detail below, the prosecutor began his closing argument by calling witnesses,

⁴ O'Neal had been shot in the stomach in 2015, necessitating a colostomy bag. RP 432-33.

victims, and O'Neal "shameful" and a "black eye" on society because they would not cooperate with law enforcement. RP 511-12. In rebuttal, the State also asked the jury to "make sure that you're comfortable with th[e] conclusion [O'Neal acted in self-defense] regardless of the consequences," those consequences being all the hypothetical damage to persons or property that could be caused by publicly discharged gunfire.⁵ RP 576-77.

The jury returned guilty verdicts for each of the three first degree assault charges and for the first degree unlawful possession of a firearm charges. CP 70, 73, 76, 79. With respect to the first degree assault charges, the jury also returned special verdicts finding that O'Neal was armed with a firearm. CP 72, 75, 78.

The trial court imposed an exceptional sentence below the standard range of 162 months, opting to run the sentences for the first degree assaults concurrent to each other and to the first degree unlawful possession of a firearm sentence. CP 92-93, 96, 99; RP 630-31. However, the trial court imposed a 60-month firearm enhancement for each of the first degree assaults and ran each 60-month enhancement consecutive to the underlying sentence and to each other. CP 99; RP 631-33. Thus, the total sentence imposed was

⁵ Rather than provide detail here of the prosecutor's improper arguments, O'Neal discusses the pertinent facts in his argument section with ample citations to the record pursuant to RAP 10.4(f).

342 months. CP 99. The court also imposed 36 months of community custody. CP 100.

O'Neal timely appeals. CP 111-12.

C. ARGUMENT

MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT
DENIED O'NEAL A FAIR TRIAL

Prosecutors are officers of the court and have a duty to ensure that the defendant receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). Where it affects the jury's verdict, prosecutorial misconduct violates the accused's rights to a fair trial and to an impartial jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

1. In a bare appeal to the passions and prejudices of the jury, the State argued that jurors could find O'Neal acted in self-defense only if they were "comfortable with that conclusion regardless of the consequences"

"Mere appeals to the jury's passion or prejudice are improper." State v. Gregory, 158 Wn.2d 759, 808, 147 P.3d 1201 (2006). The prosecutor has a duty to "ensure a verdict free of prejudice and based on reason." State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). A prosecutor's latitude in closing arguments is limited those arguments "based only on probative evidence and sound reason." In re Pers. Restraint of Glasmann, 175 Wn.2d

696, 704, 286 P.3d 673 (2012) (quoting State v. Casteneda Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)).

At the end of its rebuttal argument, the State made a lengthy appeal to the passions and prejudices of the jury that was intended to relieve itself of the burden of proving the absence of self-defense, asking the jury to consider the larger, collateral or unrelated consequences of finding O'Neal acted in self-defense:

When you talk about self-defense, it's very tempting to say well, no one got hit that night, or the victims are probably dirtbags, or the victims don't care so why should we. It's very tempting to have that state of mind.

But be mindful of how dangerous this was in the bigger picture. Be mindful how innocent people could have been hit and killed that day.

And when you're thinking about the idea that this was self-defense, remember what you're justifying. When you say that something is self-defense, you say that pulling that trigger was justified, consequences be damned.

Wherever that bullet goes after it leaves the barrel of that gun, it's irrelevant to the equation.

You are saying that in the moment that the defendant pulled that trigger that was a lawful act of self-defense, and whatever happens as a result is irrelevant to the equation. The fact that no one was hit, irrelevant. If someone driving down Sprague had been hit, caught in the crossfire, tragic, irrelevant to the equation.

If that bullet pierces that gas vein at 1018 South Sprague Street and the home erupts, tragic. But the act of pulling that trigger was justified.

So whatever your conclusion is about self-defense, make sure that you're comfortable with that conclusion regardless of the consequences, because the consequences tell you the reasonableness of the actions.

RP 576-77.

This argument was improper. It indicated that jurors could not find O'Neal acted in self-defense unless they could also justify the potential damage flying bullets might cause to persons or property. This use of sympathy for persons who could have been injured was designed to impose an additional requirement on the self-defense standard: even in the event jurors believed O'Neal acted in self-defense under the law provided in the instructions, that wasn't enough—jurors also had to “remember what [they're] justifying . . . consequences be damned” should they have the audacity to apply the law as written. RP 577.

Fundamentally, this amounts to a nullification argument. Even if the jury found O'Neal's actions justified by the need to act in self-defense, the prosecution contended it should convict anyway because of what could have happened and who could have been injured. Indeed, the State repeatedly argued that if the jury were to apply the law as written it would make “irrelevant to the equation” “[w]herever that bullet goes after it leaves the barrel,” “whatever happens as a result,” “[i]f someone driving down Sprague had been hit, caught in the crossfire,” or a “bullet pierces that gas vein at 1018

South Sprague Street and the home erupts.” RP 577. Of course, under the law, these types of considerations *are* irrelevant to the determination of whether a defendant justifiably acts in self-defense. See CP 55-58 (self-defense instructions). The prosecutor’s bare emotional appeal intended to supplant the rule of law has no place in a fair trial.

When prosecutorial misconduct directly violates constitutional rights, the misconduct is presumed prejudicial and the State bears the heavy burden of establishing harmlessness beyond a reasonable doubt. State v. Emery, 175 Wn.2d 742, 458, 278 P.3d 653 (2012); Monday, 171 Wn.2d at 680; State v. Fuller, 169 Wn. App. 797, 813, 282 P.3d 126 (2012). The due process clause of the Fourteenth Amendment requires that the State prove the absence of self-defense beyond a reasonable doubt. State v. Lile, 188 Wn.2d 766, 802, 398 P.3d 1053 (2017) (citing State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). The State’s attempt through an improper emotional appeal to relieve itself of this burden violated O’Neal’s due process rights. The constitutional harmlessness standard must apply in such circumstances.

The State cannot demonstrate harmlessness beyond a reasonable doubt. The jury really had only one question to answer in this trial: did O’Neal’s actions constitute lawful self-defense? The prosecutor’s argument that jurors should substitute their application of the law of self-defense with an emotional reaction to the various “consequences” of applying the law of

self-defense went to the central issue at O’Neal’s trial. And this argument was designed to relieve the State of its burden to show O’Neal did not act in self-defense beyond a reasonable doubt—according to the prosecutor, even if the State failed in making this showing, conviction was nonetheless required because of the potentially harmful collateral consequences of guns being discharged in public. Moreover, the State’s argument came at the end of its rebuttal argument; improper arguments made during rebuttal closing “increas[e] their prejudicial effect.” State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014). Because the State’s improper arguments pertained to the critical issue at trial and came at the end of summation, the State cannot demonstrate that its impropriety was harmless beyond a reasonable doubt.

Even under a nonconstitutional standard, O’Neal must prevail. When there is no objection, as here, on appeal the defense generally must show that the prosecutor’s misconduct is so flagrant and ill intentioned that no instruction could have cured the prejudice. Glasmann, 175 Wn.2d at 703-04.

There was no cure for the State’s nullification argument. To be sure, it was emotionally appealing: it exhorted the jury to problem-solve by considering the larger societal consequences of saying a person who discharges a gun in public is justified. The State’s argument was an attack on the self-defense standard itself, suggesting that it is always problematic because it fails to account for the larger consequences. No instruction could

have cured the State's decision to erroneously lead the jury down this emotion-laden path. "Because the jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, [a prosecutor's] improper insinuations or suggestions are apt to carry more weight against a defendant." State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015) (alteration in original) (quoting United States v. Solivan, 937 F.2d 1146, 1150 (6th Cir. 1991)). The prosecutor's flagrant and ill intentioned misconduct warrants reversal.

Finally, this court may also review this issue under the rubric of ineffective assistance of counsel, because it was ineffective not to object to the prosecutor's emotional appeal that encouraged the jury to grossly misapply the law. The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel's performance must have been deficient and the deficient performance must have resulted in prejudice. Strickland v. Washington, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness." State v. Yarbrough, 151 Wn. App. 66, 89, 210 P.3d 1029 (2009). "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." Id. at 90. A reasonable probability is lower than the preponderance standard; it constitutes "a

probability that is sufficient to undermine confidence in the outcomes.” State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

When a prosecutor resorts to improper argument, the defense has a duty to interpose a contemporaneous objection “to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.” Emery, 174 Wn.2d at 761-62 (quoting 13 WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505, at 295 (3d ed. 2004)). In addition, counsel’s failure to preserve error constitutes ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980).

Here, no reasonable strategy could explain not objecting to the State’s argument that jurors needed to consider the larger consequences before they could justify applying the law of self-defense to the facts. The prosecutor’s emotional appeal encouraged the jury to nullify the law and convict O’Neal regardless of whether it believed his use of force was lawful. No strategy can explain not objecting when there is a substantial risk the jury would heed the prosecutor’s direction not to apply the correct legal standards. In failing to object to this argument, counsel’s performance was deficient.

As discussed, the prosecutor’s argument was extremely prejudicial and thus counsel’s failure to object to it was also prejudicial. Had counsel objected, the court could have at least attempted to reiterate the correct self-

defense standards. That the failure to object deprived O'Neal of even an opportunity to cure the prejudice caused by the State's improper arguments undermines confidence in the outcome of trial. It is all too likely that the jury did as the State asked, declining to find O'Neal's actions justified because the public discharge of firearms can never be justified. Counsel's failure to object constituted ineffective assistance of counsel.

Because this misconduct denied O'Neal a fair trial, reversal and retrial is required.

2. It was improper for the State to make an emotional, extraevidentiary, send-a-message appeal to jurors regarding the "shameful[ness]" and "black eye" caused by O'Neal and other Hilltop neighborhood witnesses refusing to speak to law enforcement

Another major theme of the State's case and closing argument was us versus them. According to the State, "us" consisted of the jurors and "straightlaced" suburban witnesses who were willing to assist law enforcement in investigating crimes and testifying in court. "Them" consisted of O'Neal and others in the Hilltop neighborhood who "shamefully" would not come forward to assist police and prosecutors. This emotional appeal relied on evidence the State never presented and inappropriately asked the jury to send a message of disapproval to O'Neal and others like him who refuse to speak to law enforcement. This misconduct also requires reversal.

As noted, arguments calculated to inflame the passions or prejudices of the jury are improper. Glasmann, 175 Wn.2d at 704. Arguments that exhort the jury to “send a message to society” constitute improper emotional appeals. Thierry, 190 Wn. App. at 690; State v. Ramos, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011). And a “prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.” State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). The State’s us-versus-them theme violated these principles and requires a new trial.

The clearest example of this improper theme occurred at the very beginning of the State’s initial closing argument:

Victims of a shooting who nearly got killed that night, who don’t stick around and don’t want to cooperate or report to the police.

The defendant, who nearly kills others and nearly gets a whole bunch of other people, innocent bystanders, killed that night, who doesn’t want to stick around and tell the police about what he did.

Whole bunch of people in that parking lot that night, who once the scene is safe and once these players are all out of there don’t want to stick around because they know the police are coming and have no interest in reporting to the police what happened that night.

Witnesses and victims of crimes who don’t want to come in and testify. Warrants have to be issued for them to try and find them, and when they are found are told by the Court you stay in touch with the state, you stay in touch with the prosecutor, and then they just disappear again. And even when they are found, they get on the stand and they tell you something entirely different from what they told a detective.

Someone like the defendant who takes the stand, swears to tell the truth, and then just lies through his teeth.

All of it, all of it is a black eye and shameful, shameful, all of it, all around.

And what it tells you is that you cannot always rely on human beings to do the right thing. That more often than not all someone cares about is me. I don't care about how dangerous this was. I don't care about doing the right thing and coming in to testify. I don't care about honoring the oath I swear to tell the truth. I just don't care. What's most in my personal interest.

And so what it should tell you is that when you can't rely on human beings to do the right things, you have to look for other types of proof, other types of evidence.

RP 511-12.

By making this argument, the State improperly interjected an emotional appeal, disparaging those who did not assist law enforcement and calling them a "black eye" on society and "shameful." Based on this appeal to passions and prejudices, the prosecution asked the jury to align itself to its view that cooperation with law enforcement was the "right thing" to do and that O'Neal's and other witnesses' noncooperation was the wrong thing. This improperly "invited the jury to decide the case on an emotional basis, relying on a threatened impact on other cases, or society in general, rather than on the merits of the State's case." Thierry, 190 Wn.2d at 691. This misconduct requires reversal.

This argument was improper also because it relied on facts that were not in evidence. The prosecutor's first words in summation were critical of the victims because they "don't want to cooperate or report to the police." RP 511. The prosecutor also criticized the "[w]hole bunch of people" who were "[w]itnesses and victims of crimes who don't want to come in and testify." RP 511. However, the State never introduced evidence as to why the alleged victims and witnesses were not present at trial or as to why they did not report the shooting to police. The State's argument that these witnesses' noncooperation was some shameful scourge on our society was therefore not supported by evidence, just the State's sanctimonious speculation.

To be sure, the State attempted to introduce such evidence, but the trial court would not allow it. Detective Vicki Chittick's testified she identified the persons she interviewed or wished to interview in conjunction with the shooting, Danielle Carter, Christopher Legg,⁶ Jessica Handlen, and Alyxandria McGriff. RP 287-88. The State began asking about the material witness warrants that issued for Legg and Carter, the latter of whom was in Idaho, and then asked what Chittick's understanding was for Carter's apparent unwillingness to return to Washington to testify. RP 323. Defense counsel

⁶ Legg testified at trial but denied being present at the ARCO when the shooting occurred and denied having any knowledge about the shooting. RP 152-53, 159. This testimony was impeached by a prior inconsistent statement provided by Detective Chittick that, during a police interview, Legg "acknowledged that he was shot at, but said he didn't know who was shooting at him or why." RP 317.

lodged a hearsay objection, which the trial court sustained, and the State asked to be heard.

At a hearing that occurred outside the presence of the jury, the trial court indicated “foundation has not been set as to how this witness knows what Ms. Carter’s, what her reasons are for not responding -- not wanting to be here.” RP 324. The State indicated that it did not intend to suggest O’Neal had tampered with the witnesses but thought “it’s fair game to explain why the jury might not be hearing from these people when they might otherwise expect to hear from these people.” RP 325-26. The court disagreed, stating that no foundation had been laid for Carter’s refusal to testify and indicating, “And how far to go down why other people in society don’t respond to subpoenas, I don’t know how insightful that is in this particular case.” RP 326. The trial court expounded,

And just to take it a little bit further. There could be multiple causes, for this jury to speculate as to why these particular witnesses didn’t come, with absolutely no basis whatsoever.

It could have been reassigned to Afghanistan because in the military, it could be -- seems to be unlikely, but we don’t have any idea why they’re not here, and neither does this witness other than by conjecture or by hearsay. Consequently, the objection is sustained.

RP 327.

This exchange makes clear that the State’s theme—that various witnesses and victims were not present at trial because of their “shameful”

refusal to cooperate with law enforcement, which was a “black eye” on society—was not supported by any evidence the State presented. It was highly improper for the prosecution to disregard the trial court’s ruling and argue the very speculation that the trial court had expressly excluded. See State v. Fisher, 165 Wn.2d 727, 748-49 202 P.3d 937 (2009) (improper for State to elicit and argue evidence excluded by trial court); State v. Smith, 189 Wash. 422, 428-29, 65 P.2d 1075 (1937) (same).

In addition, the prosecution laid part of the groundwork for its improper argument during O’Neal’s testimony. On direct, O’Neal said he had been shot in 2015 in the stomach, which is why he had a colostomy bag. RP 432-33. The State’s first question to O’Neal during cross examination was, “The colostomy bag that you have, it’s because you shot yourself, right?” to which O’Neal responded, “No.” RP 438. The prosecutor then asked whether O’Neal reported the 2015 shooting to the police and why; O’Neal indicated that he was unconscious for a lengthy period following the shooting and police never approached or questioned him about it. RP 439-41. Over defense counsel’s asked-and-answered objection, the prosecutor asked, “So if you have no reasons for not reporting [the 2015 shooting], why didn’t you,” and O’Neal responded, “I don’t know.” RP 441. The State thus elicited this testimony as part of the unpinning of its improper emotional appeal that

O'Neal was part of the "shameful" social problem of citizens refusing to cooperate with law enforcement.

The State's improper us-versus-them theme continued during its rebuttal argument pertaining to witness Drake Ackley. Ackley testified that right before the gunfire started, he heard a female voice screaming in a very hostile tone. RP 357. Ackley stated, "And it just sounded like something was about to happen, liked I figured someone was about to get beat up or something," referring to the screaming as a "hood rat tone" and a "[v]ery street, ethnic tone." RP 357-58. He continued, "there's a certain tone that you just don't hear in daily life that's, you know -- it's just a tone that's not used unless you're about to fight." RP 358.

From this, defense counsel argued in closing, "If Mr. Ackley can have that same uneasy queasy feeling that something is about to happen, why can't Dean O'Neal have the same uneasy queasy feeling that something bad is about to happen. Particularly when it's directed at him." RP 557.

The State responded to this argument by more us-versus-them, asserting Ackley was on the "us" side while O'Neal was on the "them" side:

Yeah, Mr. Ackley said, I think he said a hood rap [sic] or something along those lines. He heard hood rap [sic] talk from a female voice that made him queasy.

And then [defense counsel] takes that and tries to draw a parallel between how Mr. Ackley felt and how the defendant felt.

Do not compare those two people. Mr. Ackley, straightlaced from Gig Harbor is not the defendant. Mr. Ackley, coming over at midnight to the Hilltop to get some gas, doesn't have the same state of mind as the defendant.

Yeah. Mr. Ackley there at midnight hears a woman yelling, hears a woman taunting, hears a woman running her mouth. It probably did make him queasy. Anyone who's just a normal, everyday person who sees that unfold at a gas station would get uncomfortable.

Maybe you've been there and just someone is acting crazy; someone is being stupid; someone is creating drama and makes you uncomfortable.

And of course, it really makes Mr. Ackley uncomfortable when he thinks about that in the context of what happened afterwards.

But just because Mr. Ackley got uncomfortable with what he heard that night doesn't tell you that what the defendant did was justified. Because you don't get to shoot someone for running their mouth.

RP 575-76.

This argument improperly vouched for the credibility of Ackley and disparaged the credibility of O'Neal and others in the Hilltop neighborhood. The State called Ackley a "normal, everyday person," like those that would assist law enforcement and become uncomfortable when "crazy" people create drama—read, white suburbanites—and contrasted this "normal, everyday person" with O'Neal and others in the Hilltop neighborhood with that "state of mind"—read, ethnic urbanites. This is a racist, classist, highly

inflammatory argument that served as a capstone for the State's entire us-versus-them theme.

This misconduct requires reversal. As discussed, when the defense does not object to misconduct, reversal is required when the misconduct is so flagrant and intentioned that it is not capable of being cured by a jury instruction. Monday, 171 Wn.2d at 679. The prosecutor's conduct here, disparaging those who do not speak with or assist law enforcement as "shameful" and a "black eye," and vouching for a suburban witness of a different "state of mind" than residents in the Hilltop neighborhood like O'Neal could not have been cured by an instruction. Because it pervaded the entire case, a cure simply was not possible.

Monday is analogous and there the Washington Supreme Court reversed even though there was no objection. 171 Wn.2d at 680-81. In that case, the prosecutor specifically argued that black people do not testify against other black people, and employed the term "po-leese" to "subtly and likely deliberately, call to the jury's attention the witness was African American and to emphasize the prosecutor's contention that 'black folk don't testify against black folk.'" Id. at 679.

Here, the prosecutor did not directly invoke race, but the effect was similar. He opted to contrast residents of a neighborhood well known for its ethnic makeup and violence with "straightlaced" suburban residents. He

stated the Hilltop witnesses, victims, and O'Neal were "shameful" and a "black eye" for their refusal to assist police and prosecutors, in contrast to "normal, everyday people," like Mr. Ackley. Thus, the State was very clearly asserting that the jury should convict not based on the evidence, but based on geography, socioeconomics, and the prosecutor's personal disparagement of people who came from a certain neighborhood and background. This argument was flagrant, ill intentioned, highly improper, and permeated the whole case; therefore, it could not have been cured with an instruction or set of instructions. Numerous cases, including Monday, Thierry, and Ramos warn against making these send-a-message emotional appeals to the jury. Where "case law and professional standards" "clearly warned against the conduct here" and the misconduct "permeated the state's closing argument," the misconduct qualifies as flagrant and ill intentioned, requiring reversal. Glasmann, 175 Wn.2d at 707. Because this misconduct deprived O'Neal of a fair trial, his first degree assault convictions must be reversed.

3. The cumulative impact of prosecutorial misconduct requires reversal

The cumulative effect of prosecutorial misconduct may be so damaging that no instructions or series of instructions can erase their combined prejudicial effect. Glasmann, 175 Wn.2d at 707. That is certainly the case here.

The State opted to undermine the self-defense standard by making an emotional appeal to ask the jury to consider the larger consequences of finding O'Neal's actions were justified. This relieved the prosecution of proving the absence of self-defense beyond a reasonable doubt. The State also disparaged O'Neal and everyone in a particular geographical area well known for its ethnic makeup for "shamefully" refusing to assist law enforcement, even though it had no evidence for why certain witnesses and the alleged victims did not show up at trial. The State vouched for a witness's credibility based solely on the fact that he was a "normal, everyday person" from suburban Gig Harbor rather than from the shameful, black eye of a neighborhood like Tacoma's Hilltop who refuse to speak to police. This us-versus-them theme was pervasive through the State's presentation of evidence and closing arguments.

Each instance of misconduct identified above alone was extremely prejudicial. When considered cumulatively, the misconduct is even more so. Based on egregious prosecutorial misconduct that occurred in his case, O'Neal asks that this court reverse his first degree assault convictions and remand for a new and fair trial.

D. CONCLUSION

Because numerous instances of prosecutorial misconduct deprived him of a fair trial, O'Neal asks that his first degree assault convictions be reversed and that this matter be remanded for retrial.

DATED this 27th day of April, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read 'K. March', written over a horizontal line.

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