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Court of Appeals  
Division III  
State of Washington

32129-1-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

LOUIS L. HANSON aka LOUIS MONTOYA, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court's jury instructions violated Mr. Hanson's due process rights by relieving the State of its burden to disprove self-defense.
2. By failing to issue a revived self-defense jury instruction, the trial court allowed defense counsel to irreparably prejudice Mr. Hanson's trial defense.
3. The trial court erred when it failed to find that the State had committed repeated acts of prosecutorial misconduct.

## **II. ISSUES PRESENTED**

1. Did the trial court err by instructing the jury on a legally correct statement of the law regarding "first aggressor" despite the defendant's general objection to the instruction at the time of trial?
2. If this court finds the court's instruction on "first aggressor" was an error of constitutional magnitude, has the appellant established "actual prejudice" to trigger appellate review of his claim for the first time on appeal?
3. Did the defendant establish a factual and legal basis at the time of trial for his claim regarding a "revived claim of self-defense?"
4. Has the defendant met his burden to establish his trial counsel was ineffective when he did not request the trial court instruct on "revived self-defense" at the time of trial?

5. Has the defendant met his burden to establish the deputy prosecutor engaged in prosecutorial misconduct when he cross-examined the defendant at the time of trial and during the deputy prosecutor's closing argument?

### **III. STATEMENT OF THE CASE**

The appellant/defendant, Louis Hanson, was charged by information in the Spokane County Superior Court with premeditated murder in the first degree. CP 1. The crime included a firearm enhancement allegation. CP 1.

Evidence at trial established on December 30, 2012, Spokane police officers responded to 1607 North Wall. RP 437. When officers arrived at the address, a female answered the door. RP 438. At the door, officers observed a male (later identified as the victim Aaron Cummings) face down in the kitchen area in a pool of blood. RP 438. Medics arrived on scene and Mr. Cummings was declared dead. RP 439.

Earlier, between 5:00 pm and 6:00 pm on December 30, 2012, Penny Pupo was at a residence at 1607 North Wall in Spokane. RP 444-45. She was in a bedroom fixing her hair when she observed Mr. Cummings enter the bedroom. RP 446. The defendant arrived at the residence and went into the bedroom. RP 446-47. Ms. Pupo did not know either the victim or the defendant. RP 446-47. When the defendant entered the bedroom, he began fighting with Mr. Cummings. RP 447. She observed the defendant knock the victim onto the bed. RP 448. The

defendant reached into his pants and drew a pistol.<sup>1</sup> RP 448. He subsequently shot Mr. Cummings. RP 448. Ms. Pupo was confident Mr. Cummings did not reach for anything before he was shot. RP 448; RP 458. Mr. Cummings fell backward and began to vomit blood. RP 448. After the defendant shot the victim, the victim began zigzagging down a hallway and he collapsed in the kitchen area. RP 448. Ms. Pupo immediately exited the home and called 911. RP 448.

Lela Haisley was also present in the home at the time of the incident. She was in the bedroom visiting with others, including the victim, when the defendant arrived on December 30, 2012. RP 527. He arrived with a female. RP 528. After arriving, the defendant walked back into the bedroom and asked Mr. Cummings if he was a “Norteno.” RP 528; RP 530.<sup>2</sup> Thereafter, Ms. Haisley observed the defendant punch the victim. RP 531. She observed Mr. Cummings back up against the wall by the bed. RP 531. She then heard a gunshot and everyone scattered. RP 531. She did not observe either the defendant or Mr. Cummings with a weapon. RP 531.

Mindee Deligt was living at the residence at the time of the incident. RP 550. She had several friends over and was preparing to go out that evening. RP

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<sup>1</sup> Ms. Pupo described the gun as a shiny nickel-plated revolver; either a .38 or .45 caliber. RP 459. It was determined the bullet taken from the victim’s body at the time of autopsy was a .38 caliber. RP 606.

<sup>2</sup> During the defense case-in-chief, the defendant was identified by law enforcement as an active “Sureno” gang member at the time of the shooting. RP 624. Mr. Cummings was identified as a “Norteno” gang member. RP. 624.

550-51. She was smoking methamphetamine at the time. RP 552. On the day of the event, Mr. Cummings arrived at her house and he visited with her in the bedroom. RP 553-54. The defendant was in another room of the house at the time. RP 553-54. The defendant entered the room and asked Mr. Cummings if he was a “Norteno.” RP 554. Mr. Cummings responded “Yeah. Why? What’s up?” RP 554. The defendant began striking Mr. Cummings as he stood over him. RP 554; RP 556. Mr. Cummings pushed the defendant off of him. RP 556. The defendant then shot the victim as he sat on the bed. RP 554; RP 574. She did not observe any weapons around Mr. Cummings. RP 555. She did not observe Mr. Cummings reach for a weapon before being shot. RP 555. She believed he would not have had sufficient time to do so. RP 555. Thereafter, the defendant ran out of the bedroom. RP 555.

Detective Martin Hill responded to the scene. During the initial search of the residence, the detective did not find any weapon associated with the crime near the body of the victim in the kitchen or in the bedroom area. RP 505; RP 511.<sup>3</sup> The detective observed a trail of blood originating in the bedroom (on the carpet near a corner of the bed) and ending in the kitchen area where the victim

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<sup>3</sup> Detectives responded back to the residence several days after the incident on January 2, 2013, at the request of the homeowner. The homeowner directed the detectives to the back bedroom where a pistol was located inside a purse which was hanging just to the left of the doorway. RP 512; RP 523-24. The pistol belonged to Mindee Deligt. RP 555. She stated Mr. Cummings had no knowledge of the firearm. RP 555.

collapsed. RP 511; RP 520-21. A knife was located in a sheath inside Mr. Cummings right front coat pocket at the time of autopsy. RP 513; RP 525; RP 599. However, the defendant never claimed he saw a knife.

The defendant testified when he entered the bedroom, he observed Mr. Cummings. RP 664.<sup>4</sup> Based upon the color of the victim's clothing, the defendant asked him if he was a "Norteno." RP 664. The defendant claimed Mr. Cummings jumped off the bed and balled up his fist. RP 664-65. Thinking he was going to be struck, the defendant punched Mr. Cummings three or four times in the mouth and head area. RP 665. The defendant then asserted that Mr. Cummings kicked him in his face, cutting his lip. RP 665. When detectives made contact with the defendant at some point after the shooting, the defendant did not have any observable injuries. RP 608.

The defendant alleged Mr. Cummings ended up on the bed and that he had a "crazy evil look." RP 665. The defendant then claimed Mr. Cummings appeared as if he was reaching for a weapon with his right hand, moving from right to left. RP 665-66.<sup>5</sup> He made this assertion notwithstanding that Mr. Cummings was left-handed. RP 682. The defendant contended that he pulled a revolver from his pants. He testified he "was ready to run to the right to try to get out of the room,

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<sup>4</sup> At the time of the incident, the defendant weighed approximately 200 pounds. RP 677. Mr. Cummings was 5'8" and weighed 126 pounds at the time of autopsy. RP 601.

<sup>5</sup> The defendant did not explain what prompted him to believe Mr. Cummings even had knowledge of or access to a firearm in the bedroom.

and [he] pointed the gun in [the victim's] direction and fired one shot." RP 666. He maintained he was in fear for his life and he was going to be shot. RP 665-67.

The defendant then claimed as he ran down the hallway after the shooting to leave the residence, Mr. Cummings was chasing him (albeit with blood spewing from Mr. Cummings' mouth and his collapsing shortly thereafter in the kitchen). RP 667.

On cross-examination, the defendant admitted that killing a rival gang member can increase one's own status in a gang. RP 669. However, he claimed he did not shoot Mr. Cummings to increase his status. RP 681.

Dr. Sally Aiken, Spokane Medical Examiner, testified Mr. Cummings died as a result of a gunshot wound to his chest. RP 589. The bullet had an upward trajectory as it entered the body four inches above the right hip, travelling from back to front. RP 592; RP 593; RP 596. Mr. Cummings had methamphetamine in his body at the time of death. RP 589.

The defendant was convicted as charged by the State. CP 73; CP 74; RP 784.

#### IV. ARGUMENT

A. THE TRIAL COURT DID NOT ERR BY GIVING A LEGALLY CORRECT STATEMENT OF THE LAW REGARDING FIRST AGGRESSOR INSTRUCTION TO THE JURY DESPITE THE DEFENDANT'S GENERAL OBJECTION TO THE INSTRUCTION AT THE TIME OF TRIAL.

The appellant first contends that the trial court should have *sua sponte* instructed the jury that an aggressor's right to self-defense is revived if he withdraws from the altercation.

At the time of trial, the defense requested the trial court instruct on self-defense and the trial court agreed to do so. RP 481; RP 578; RP 640-42; RP 693. Utilizing the standard WPICs submitted by the defense, the instructions read as follows:

##### INSTRUCTION NO. 15

It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction. Homicide is justifiable when committed in the lawful defense of Mr. Montoya when: (1) Mr. Montoya reasonably believed that the person slain intended to inflict death or great personal injury; (2) Mr. Montoya reasonably believed that there was imminent danger of such harm being accomplished; and (3) Mr. Montoya employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to Mr. Montoya, taking into consideration all the facts and circumstances as they appeared to him, at the time of, and prior to, the incident. The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 72; RP 737-38 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: Criminal 15.01 (3d ed. 2008) (WPIC).

INSTRUCTION 16

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

CP 72; RP 738 (WPIC 16.05).

INSTRUCTION 17

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

CP 72; RP 738 (WPIC 16.07).

INSTRUCTION 18

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 72; RP 739 (WPIC 16.08).

At the request of the State and over the defendant's general objection,<sup>6</sup> the trial court also agreed to instruct the jury on first aggressor. RP 694.

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<sup>6</sup> The defense made a general objection to the court's proposed instruction 19, but it did not state on the record its specific reason for opposition to the instruction. RP 728.

## INSTRUCTION 19

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, or attempt to use force upon another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 72; RP 739 (WPIC 16.04).

Where a defendant raises the issue of self-defense, “the State must disprove self-defense in order to prove that the defendant acted unlawfully.” *State v. Redwine*, 72 Wn. App. 625, 629, 865 P.2d 552 (1994); *State v. Miller*, 89 Wn. App. 364, 367, 949 P.2d 821 (1997). This court “must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

A defendant whose aggression provokes the contact eliminates his right of self-defense. *State v. Currie*, 74 Wn.2d 197, 198–99, 443 P.2d 808 (1968); *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005).<sup>7</sup>

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<sup>7</sup> Accordingly, a first aggressor instruction potentially removes self-defense from the jury's consideration, relieving the State of its burden of proving that a defendant did not act in self-defense. *State v. Douglas*, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005). For that reason, it is only to be given sparingly and carefully, in cases where the theories of the case cannot be sufficiently argued and understood by the jury without such an instruction. *State v. Riley*, 137 Wn.2d 904, 910 n. 2, 976 P.2d 624 (1999).

At trial, the defendant failed to specify any basis for his objection regarding the aggressor instruction. Consequently, the defense did not comply with CrR 6.15(c) and request the trial court further define, and, instruct, as he claims for the first time on appeal, on “an aggressor's right to self-defense is revived if he withdraws from the altercation.”

CrR 6.15(c) requires a party to assert the specific reason for objecting to the instructions given or refused. Where a party fails to follow the requirement of CrR 6.15(c), this court will not consider the alleged error. *State v. Robinson*, 92 Wn.2d 357, 361, 597 P.2d 892 (1979), *State v. Brown*, 36 Wn. App. 166, 170, 672 P.2d 1268 (1983). A party who objects on one basis may not raise a different ground on appeal. *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993).

The appellant has waived this claim of error.

Generally, a party who fails to object to jury instructions in the trial court waives a claim of error on appeal. RAP 2.5(a)<sup>8</sup>; *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010); *State v. Smith*, 174 Wn. App. 359, 364, 298 P.3d 785 (2013).

It is a fundamental principle on appeal that a party may not assert a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied under RAP 2.5. RAP 2.5 is principled as

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<sup>8</sup> RAP 2.5(a) states an appellate court may refuse to review any claim of error which was not raised in the trial court.

it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749. This rule supports a basic sense of fairness, perhaps best expressed by the court in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

*Strine*, 176 Wn. 2d at 749-50.

As this court observed in *State v. Guzman Nuñez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012): “[T]he general rule [RAP 2.5] has specific applicability with respect to claimed errors in jury instructions in criminal cases through CrR 6.15(c),<sup>9</sup> requiring that timely and well stated objections be made to instructions given or refused ‘in order that the trial

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<sup>9</sup> CrR 6.15(c) states: “**Objection to Instructions.** Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.”

court may have the opportunity to correct any error.” *Accord, State v. Sublett*, 176 Wn.2d 58, 75-76, 292 P.3d 715, (2012) (any objections to the instructions, as well as the grounds for the objections, must be put in the record to preserve review).

Consequently, the appellant has waived his claim of error by failing to provide a specific objection at the time of trial which would have allowed the trial court an opportunity to rule on the matter and develop an appropriate record for review.

**B. THE TRIAL COURT’S INSTRUCTION 19 WAS A CORRECT STATEMENT OF THE LAW AND IT ALLOWED THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE.**

Standard of review regarding jury instructions.

This court reviews a challenge to a jury instruction de novo, evaluating the jury instruction “in the context of the instructions as a whole.” *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Whether the State produced sufficient evidence to justify an aggressor instruction is a question of law reviewed de novo. *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008).

“Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002). Jury instructions on self-defense must do more than adequately convey the law; they must make the “relevant legal standard manifestly apparent” to the average juror. *State v. LeFaber*, 128 Wn.2d 896, 900,

913 P.2d 369 (1996), *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 101, 217 P.3d 756 (2009) *infra*.

1. The trial court's instructions were not misleading and they properly informed the jury of the applicable law.

Instruction 19 used here is a correct statement of the law and it did not relieve the State of its burden to prove the defendant did not act in self-defense. The Supreme Court has approved substantially similar wording to the instruction given by the trial court in this case. *See*, WPIC 16.04; *State v. Wingate*, 155 Wn.2d 817, 821, 122 P.3d 908 (2005); *State v. Riley*, 137 Wn.2d 904, 908-09, 976 P.2d 624 (1999). There was no error.

2. Appellant was allowed to argue his theory of the case.

Furthermore, the defendant was allowed to argue his theory of the case to the jury with regard to whether he withdrew from the conflict before he shot Mr. Cummings. During closing argument, the defense attorney contended the defendant had retreated and withdrawn from the conflict before he used deadly force.

[DEFENSE ATTORNEY:] Now, there is an instruction in there that talks about a first aggressor. Read that instruction carefully, because it doesn't say that Mr. Montoya started the fight, there's no self-defense. That's not what it says. A person by conduct creates the need to defend themselves. That's what that issue is about. By conduct, not by words. And at that point, at that point that the fight started, there were only words. It was Mr. Cummings who stood up and balled his fists and got in the fight position. It was Mr. Cummings who got in Mr. Montoya's face. He was on the bed to begin with Mr. Montoya several feet away. "What's up? Where's my money? You're Norteno?" "Yes." Fights on. Okay.

And that is not a first aggressor on Mr. Montoya's part. If anybody is a first aggressor there, it's Mr. Cummings.

[DEFENSE ATTORNEY:] Now, even assuming you can consider Mr. Montoya had initiated this fight, *that instruction also tells you that he can utilize and benefit from the right of self-defense if first he has withdrawn from the fight. Well, guess what? He gets kicked in the face. Both people back up. Mr. Montoya, he steps back. Fights over until Mr. Cummings goes for a weapon, which Mr. Montoya did not even attempt to do before that. He's going for a weapon because he's going to kill Mr. Montoya.*

[DEFENSE ATTORNEY:] *He withdrew. He did not offer deadly force until Mr. Cummings attempted it. He is justified in doing that. You cannot use a gun or a knife or any deadly weapon in a fistfight. It is excessive force. And at the point that Mr. Montoya used that gun, it was no longer a fistfight. It was a fight to the death. A sad fact, but a hard fact. It was standing in Mr. Montoya shoes, and I don't think -- well, I would submit to you that there is not a person in this world that would be okay with the idea of letting it be him under those circumstances. Just not natural.*

RP 771-72. (Emphasis added).

Thus, the court's instructions permitted the appellant to argue he had withdrawn and he did not employ deadly force until Mr. Cummings allegedly reached for a weapon.

3. Even if this court finds the alleged error was of constitutional magnitude, the appellant cannot establish the alleged error was manifest because he cannot demonstrate "actual prejudice."

Generally, a party may not raise an issue for the first time on appeal. RAP 2.5(a). As discussed earlier, because the appellant only made a general, and not a specific objection, to the first aggressor instruction at trial, this court must address

whether this case involves a manifest error affecting a constitutional right to determine whether review of the claimed error is appropriate. *See*, RAP 2.5(a).

This court has held: “[i]nstructional errors do not automatically constitute manifest constitutional error.” *Guzman Nunez*, 160 Wn. App. at 163. Appellate courts analyze claims of error involving self-defense instructions on a case-by-case basis to determine whether the claimed error is manifest constitutional error. *O’Hara*, 167 Wn.2d at 104.

As the *O’Hara* court stated:

After determining the error is of constitutional magnitude, the appellate court must determine whether the error was manifest. “‘Manifest’ in RAP 2.5(a)(3) requires a showing of actual prejudice.” To demonstrate actual prejudice, there must be a “‘plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.’” In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.”

*State v. O’Hara*, 167 Wn.2d at 99. (Citations omitted).

Specifically regarding RAP 2.5(a)(3), the Supreme Court has indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Whether or not the claimed error was manifest requires the appellant to demonstrate “actual” prejudice. *O’Hara*, 167 Wn.2d at 99.

In *O’Hara*, the Supreme Court stated: “[t]he focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review.” *O’Hara*, 167 Wn.2d at 99–100.

The appellant has not established any actual prejudice. The trial court’s failure to provide a different definition of the first aggressor instruction as urged by the defendant on appeal does not constitute an error of constitutional dimension.<sup>10</sup> Relying on a general due process claim, he argues the court’s first aggressor instruction relieved the State of its burden of proof. It did not. The trial court in the present case met its constitutionally mandated requirement because it instructed the jury as to each element of murder and instructed the jury it was the state’s burden to disprove self-defense beyond a reasonable doubt. Resultantly, the defendant has not raised an issue of constitutional magnitude to this court

In addition, the appellant’s claim that the trial court should have provided a broader definition of the first aggressor instruction is without merit because a

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<sup>10</sup> The “constitution only requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule.” *State v. Fowler*, 114 Wn.2d 59, 69–70, 785 P.2d 808 (1990), *overruled on other grounds*, *State v. Blair*, 117 Wn.2d 479, 486, 816 P.2d 718 (1991). This requirement also applies to a self-defense jury instruction, to the extent that the instruction creates an additional fact the State must disprove beyond a reasonable doubt. *O’Hara*, 167 Wn.2d at 105.

failure to provide a definitional instruction is not a manifest constitutional error that may be raised for the first time on appeal. *See, State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011) (“As long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude.”) *See, Scott*, 110 Wn.2d at 691 (failure to define “knowledge” in a burglary instruction was not a manifest constitutional error); *State v. Ng*, 110 Wn.2d 32, 44–45, 750 P.2d 632 (1988) (failure to define “theft” in a robbery instruction was not a manifest constitutional error); *State v. Pawling*, 23 Wn. App. 226, 232–33, 597 P.2d 1367 (1979) (failure to define “assault” in first degree burglary instruction was not a manifest constitutional error).

Thus, nothing suggests the trial court’s failure to provide a broader definition of first aggressor rises to the level of a manifest constitutional error.

C. EVEN IF THE DEFENDANT HAD REQUESTED THE PROFFERED LANGUAGE AT THE TIME OF TRIAL, THE TRIAL COURT WOULD NOT HAVE ABUSED ITS DISCRETION BY REFUSING TO GIVE IT. DEFENDANT CLEARLY DID NOT MANIFEST A GOOD-FAITH INTENTION TO WITHDRAW FROM THE ALTERCATION AND REMOVE ANY JUSTIFIABLE FEAR MR. CUMMINGS MAY HAVE BEEN EXPERIENCING AFTER HE WAS STUCK MULTIPLE TIMES BY THE DEFENDANT.

The theory of self-defense presumes that the defendant is not the initial aggressor, while the theory of revived self-defense allows an initial aggressor the right of self-defense once he or she has withdrawn from the conflict. *State v.*

*Craig*, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). Whether to issue a first aggressor instruction based on the evidence adduced at trial is a decision reserved to the trial court's discretion. *State v. Walker*, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998).

A party “is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory.” *State v. Williams*, 132 Wn.2d 248, 259–60, 937 P.2d 1052 (1997); *State v. Ponce*, 166 Wn. App. 409, 415–416, 269 P.3d 408 (2012). *Accord*, *Carle v. McChord Credit Union*, 65 Wn. App. 93, 106, 827 P.2d 1070 (1992) (“A jury should not be instructed on issues of fact not presented by the evidence.”).

Specifically, an initial aggressor who provoked the altercation cannot successfully invoke the right to self-defense to justify or excuse causing bodily harm to the other person engaged in the conflict “unless he in good faith had first withdrawn from the combat at such a time and *in such a manner as to have clearly apprised his adversary* that he in good faith was desisting, or intended to desist, from further aggressive action.” *State v. Craig*, 82 Wn.2d at 783–84, citing *State v. Wilson*, 26 Wn.2d 468, 174 P.2d 553 (1946).<sup>11</sup> (Emphasis added).

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<sup>11</sup> The defendant’s argument that the court’s first aggressor instruction “essentially” directed a verdict on the defendant’s claim of self-defense is without merit. He relies on *State v. Peterson*, 73 Wn.2d 303, 438 P.2d 183 (1968). In *Peterson*, the defendant was verbally and physically abused while attending a party. He left the party and later returned with a drawn pistol. An argument took place and ended. Peterson’s pistol discharged, and the victim was injured.

In the present case, there was no evidence suggesting the defendant had withdrawn from the combat at such a time and in such a manner as to have clearly apprised Mr. Cummings that he was ending the conflict.

[Defense Attorney:] Did you expect him to be there?

[Defendant:] No, no, I didn't. I didn't even expect to be there even that long. It was just the reason why I stayed there was because I had the phone call. The girls were being loud, four girls or women, they were being loud, so I went into the back room to use the phone. So when I go in, I see the side profile of Smiley. And we go into the room. And he has his back towards me and I'm like, "Hey, you got my money?" And he turns around and sits down. And I see that he's wearing red shoes and white, the red sweater, and I was confused. I didn't know for sure if he was Norteno or not. And I asked him, "Are you a Norteno?" And he jumps up off the bed and like pulls his pants up with both his hands, pulls his pants up and he balls his fists up and bringing them up and, "Yeah, what's up." I thought he was going to hit me, so I punched him in his mouth, hit him in his mouth one time. And he fell back on the bed and I was leaning over him and we were fighting. I hit him maybe three,

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Peterson contended that he was innocent of the assault charge because the pistol discharged accidentally. The defense was that the pistol had been discharged involuntarily. The court found while it was clear that Peterson possessed the ability to form the required intent, the question was whether or not he had done so. The court reversed because the instructions, as given, permitted a conviction without the jury finding that Peterson acted intentionally. In another words, the court's instruction included the offending language that assumed Peterson's act of knifing the victim was an intentional and voluntary act, the very thing he tried to refute.

The trial court's instructions in the present case did not permit such a verdict. The court's instructions correctly advised the jury of the elements and burden of proof of first and second degree murder, and that each had to be proved beyond a reasonable doubt in order to convict and the proper elements of self-defense and the State's burden to disprove self-defense beyond a reasonable doubt. *Peterson* is inapposite to the present case.

maybe four times in his face and head area. And somehow, while we were fighting, he got his foot in between us. I don't remember if it was his right or left foot. But he kicked me in my face, cut my bottom lip on the inside and hit my nose. And I kind of stumbled back like, all right, you know, whatever, I'm cool.

[Defense Attorney:] What do you mean by that?

[Defendant:] I'm done, you know. Have a seat, you know. I looked to see where he was at and he just -- he gives me this crazy evil look like he's just disgusted and reaches with his right hand real fast over the left side of his body and

[Defense Attorney:] Let me stop you there. Where was he at that point?

[Defendant:] He slid back all the way towards the wall on the bed and he just barely had his ankles hanging off of the bed like he was like laying back.

[Defense Attorney:] Is that where you believed the gun was?

[Defendant:] I was told it was in between the mattresses on the closest side to the closet, so, yes.

[Defense Attorney:] Go ahead.

[Defendant:] And then after he gives me that crazy look, he just reaches real fast, crosses his body with the right side of his hand. And I apologize to the courts, but excuse my language, but I just like, "Oh, shit, the gun." And I just pulled the revolver out from the front of my pants, and I was ready to run to the right to try to get out of the room, and I pointed the gun in his direction and fired one shot.

[Defense Attorney:] Let me stop you there for a moment. What, if anything, did you think that Cummings was going to do when you saw him reaching?

[Defendant:] That he was going to get the gun and shoot me, try to kill me.

[Defense Attorney:] Go ahead.

[Defendant:] So after I fired the one shot, I go and I'm not all the way out of the room, I bump into the door frame. So I step back and take off running down the hallway. Mindee's Aunt Keli was doing something at the counter. I don't -- I didn't take the time to stop to see what she was doing. I don't remember what she was doing. I go to the back door and the deadbolt is on there, and I couldn't get it unlocked because the blood kept slipping.

RP 664-66.

Although the defendant's theory of the case was self-defense, his actions did not communicate clearly, or, even vaguely, to Mr. Cummings his intention to withdraw or abandon the conflict. If true, his unexpressed intention was not sufficient to support the addition of the "revived self-defense" language to the first aggressor instruction.

As a result, he would not have been entitled to a broader instruction on first aggressor even if he had requested one at the time of trial because there was no evidence to support it. *See, State v. Dennison*, 115 Wn.2d at 618, 801 P.2d 193 (1990) (trial court properly refused self-defense instruction where defendant's action did not clearly manifest good faith intention to withdraw from burglary or remove decedent's fear. An aggressor may invoke the right to self-defense if he clearly manifests a good-faith intention to withdraw from the altercation and removes any justifiable fear the original victim may be experiencing); *Currie*, 74 Wn.2d at 198, (defendant who precipitated conflict was obligated to retreat or

abandon encounter before being entitled to self-defense instruction); *State v. Brown*, 3 Wn. App. 401, 404, 476 P.2d 124 (1970) (insufficient evidence to permit jury to conclude that defendant intended to desist from further aggressive action);

D. UNDER THE CIRCUMSTANCES IN THE PRESENT CASE, DEFENSE COUNSEL’S PERFORMANCE DID NOT FALL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND DID NOT PREJUDICE THE DEFENDANT’S TRIAL.

The defendant next claims his trial counsel’s failure to request “a revived self-defense” instruction amounted to ineffective assistance of counsel.

Standard of review for ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, the defendant must establish both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Jones*, 2015 WL 3646445, 1 (Wash., 2015); *State v. Hendrickson*, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996).

Specifically, to establish ineffective assistance of counsel based on the failure to propose a jury instruction, the defendant must show (1) that he was entitled to the instruction, and, (2) the failure to request the instruction was not a legitimate tactical decision. *State v. Cienfuegos*, 144 Wn.2d 222, 228, 25 P.3d 1011 (2001); *See, State v. Powell*, 150 Wn. App. 139, 154–55, 206 P.3d 703 (2009).

Deficient performance.

The defendant argues his lawyer's performance fell below an objective standard of reasonableness because his lawyer failed to request "a revived self-defense" instruction.

A jury instruction must properly inform the jury of the applicable law. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). An instruction that misstates the law is erroneous. *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002). An attorney has a duty to research the applicable law and should reasonably appreciate an error of law in a jury instruction. *See, State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Here, the court's first aggressor instruction number 19 properly stated the law as discussed above. *See, State v. Wingate*, 155 Wn.2d at 821. The fact that defense counsel did not request the "revived self-defense" language is of no consequence because there was no factual or legal basis to do so.

*State v. Dennison*, 115 Wn.2d at 609, is instructive. Dennison was burglarizing an apartment in a house while armed with a gun. *Dennison*, 115 Wn.2d at 612–13. A resident caught Dennison in the home, and Dennison moved to the front porch where he told the resident that he had not taken anything, that "it was all over," and, that he wanted to leave. *Dennison*, 115 Wn.2d at 613. The resident then shot at Dennison, who returned fire, eventually killing the resident. *Dennison*, 115 Wn.2d at 613.

At trial, Dennison argued that he had withdrawn from being the aggressor, reviving his self-defense claim. *Dennison*, 115 Wn.2d at 617. However, the Supreme Court rejected this argument, holding that if Dennison had truly intended to withdraw from the burglary and communicated his withdrawal to the decedent, he would have dropped his gun or surrendered. *Dennison*, 115 Wn.2d at 618. Because Dennison still held his gun, although pointed to ‘the ground, his action did not clearly manifest a good faith intention to withdraw from the burglary or remove the victim's fear.’ *Dennison*, 115 Wn .2d at 618. It is important to note that the Supreme Court held that Dennison was not even entitled to assert self-defense. *Dennison*, 115 Wn.2d at 616.

Here, the trial court did instruct on self-defense and first aggressor. Although, on appeal, the defendant claims he withdrew from the altercation or attempted to demonstrate his asserted withdrawal in good faith; he did not. Lacking in the defendant’s argument on appeal is any factual basis in the record from which his lawyer could have requested the “revived self-defense” language be inserted into the first aggressor instruction. He did not produce any evidence at the time of trial in which a jury could have concluded that he manifested a clear intent to Mr. Cummings that he intended to withdraw from the fight and remove any justifiable fear Mr. Cummings may have been experiencing after being beaten by the defendant.

The defendant's lawyer had no factual basis to request such an instruction and, accordingly, counsel's performance was not deficient. His ineffective assistance of counsel claim fails because he cannot establish deficient performance or prejudice.

E. THE DEFENDANT HAS NOT MET HIS BURDEN OF ESTABLISHING THE DEPUTY PROSECUTOR'S ALLEGED CONDUCT, IN THE CONTEXT OF THE RECORD AND ALL OF THE CIRCUMSTANCES AT TRIAL, AFFECTED THE JURY'S VERDICT.

It is the appellant's burden to establish a prosecutorial misconduct claim.

*In re Glasmann*, 175 Wn.2d 696, 678, 286 P.3d 673 (2012).

Standard of review.

If the defendant objected at trial, this court analyzes whether there is a substantial likelihood that the prosecuting attorney's misconduct prejudiced the defendant by affecting the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

Where the defendant failed to object to the deputy prosecutor's misconduct at trial, this court applies a different, heightened standard of review. *See, Emery*, 174 Wn.2d at 761. Under this heightened standard of review, the defendant must show that the prosecuting attorney's misconduct "was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760–61.

This higher standard of review requires the defendant to show that “(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *Emery*, 174 Wn.2d at 761. This court focuses “more on whether the resulting prejudice could have been cured.” *Emery*, 174 Wn.2d at 762.

The defendant first complains the deputy prosecutor “grilled” the defendant about his gang membership implying that he was more likely to commit the murder simply because he was a gang member.

Contrary to defendant’s argument on appeal that “defense counsel labored to avoid these types of questions,”<sup>12</sup> the defense stipulated to introduction of ER 404(b) gang evidence *before* the commencement of trial:

[DEFENSE ATTORNEY:] That's correct, Your Honor. We had originally had a 404(b) motion that was going to be quite lengthy. The defense is stipulating to 404(b) gang evidence being admissible, and we'll be just proposing a limiting instruction to the Court for that.

RP 13.

[THE COURT:] Okay..... But when you say stipulate to gang evidence, what does that mean? Are you stipulating that your client is a gang member or stipulating that Mr. Cummings is a gang member? What's the stipulation here?

[DEFENSE ATTORNEY:] Your Honor, I interviewed Detective Roberge, who is the State's proposed witness for that evidence. And my understanding is that Mr. Montoya, as well as

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<sup>12</sup> See Appellant’s brief at page 30-31. In addition, there was no pretrial order or agreement prohibiting the complained of questions by the State.

Mr. Cummings, are known gang members and he will testify to how he has that information. And so based on my interview with him, we're stipulating that both of them are gang members and to the testimony regarding how he has come into that knowledge.

RP 14-15.

Later, during a discussion of the defendant's motions-in-limine, defense counsel stated:

[DEFENSE ATTORNEY:] Yes, Your Honor. No. 10 is in regards to Officer Roberge. As the Court is aware, there has been a stipulation that testimony that both Mr. Cummings and Mr. Montoya are in gangs and as to what that membership entails. The specific motion on No. 10 is that Officer Roberge not testify as to Mr. Montoya's motive or intent. It's under 702, as well as personal knowledge. Officer Roberge would have no knowledge as to Mr. Montoya's intent at the time or motive at the time. Rather, he could testify to gang affiliations and his knowledge about gangs, but we're asking that he keep it to that.

[THE COURT:] Okay. Mr. Cipolla.

[DEPUTY PROSECUTOR:] Your Honor, I believe the Court read the State's brief as to 404(b) evidence. The gang expert can testify as to motive or intent based upon gang affiliation. And being that he is an expert, he can specifically say that this would give certain specific status or respect as motivated by his gang affiliation. I think that would be relevant.

[THE COURT:] It's a fine line. I take it this person has testified before as a gang expert.

[DEPUTY PROSECUTOR:] Yes, Your Honor.

[THE COURT:] So you have the foundation. You have what he relied on. And there is a fine line, and I agree with Ms. Nagle that Officer Roberge is not going to be able to testify specifically as to having any knowledge about what was in Mr. Montoya's mind at any given time. He can testify as an expert about gang behavior

and what goes along with that in terms of motivation to do things and that type of thing. We just have to watch that, and the defense is going to have to watch how the questions are phrased and object if one crosses that bright line.

RP 77-78; CP 37 (State's brief regarding admission of gang affiliation evidence under ER 404(b); CP 63 (Defendant's motions-in-limine).

At the time of trial, the defense called a gang intelligence officer from the Spokane Police Department on direct examination who identified the defendant as a Sureno gang member; Mr. Cummings as an active Norteno gang member; and they were rival gang members. RP 624.

During cross examination of the gang expert, the expert stated that Norteno and Sureno are rival gangs, and, they are not necessarily required to confront each other or kill each other on site. RP 625.

Moreover, the defendant testified during direct examination that he initially joined a gang because he had to "either swim with the sharks or sink to the bottom." RP 653. He became a full-fledged Sureno at age 13. He also discussed the consequences of a Soreno gang member's presence in Norteno territory. RP 656. During his younger years, he and others would spray paint the neighborhood to signal the gang territory in the particular community. RP 653. He also stated that if he entered a rival gang member's territory, such as a Norteno, at

a minimum, here would be a fight, and, the fight could progress if the rival gang member had weapons. RP 656.<sup>13</sup>

The defendant also asserted on direct examination that he bagged some methamphetamine for Mr. Cummings one to two months before the date of the murder. RP 657-58. It was his intent to sell the drug to Mr. Cummings. RP 657. He did not get paid when he initially provided the drugs to Mr. Cummings. RP 659. Immediately preceding the murder, he asked Mr. Cummings if he had his money for the drugs. RP 664.

During cross examination of the defendant, the following exchange took place between the deputy prosecutor and defendant:

[DEPUTY PROSECUTOR:] Why did you join a gang?

[DEFENDANT:] Not how you're stating it incorrectly. I said either sink to the bottom or swim with the sharks.

[DEPUTY PROSECUTOR:] Are you a shark now?

[DEFENDANT:] I guess you could say that.

[DEFENSE ATTORNEY:] Your Honor, I object to the scope. This is beyond the scope of direct exam.

[THE COURT:] Overruled. Go ahead.

[DEPUTY PROSECUTOR:] Are you a shark now?

[DEFENDANT:] You can say so.

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<sup>13</sup> Gang expert Officer Roberge testified, during direct examination by the defense, that Norteno and Sureno gang members are, in general, rival gang members.

[DEPUTY PROSECUTOR:] Yeah. One of the things, when you're in a gang, one of the things that gets you status in the gang is killing a rival gang member, isn't it?

[DEFENDANT:] It could be in certain occasions, certain instances.

[DEPUTY PROSECUTOR:] Well, most occasions if you kill a rival gang member, your status in your gang increases, correct?

[DEFENDANT:] It can.

[DEPUTY PROSECUTOR:] Now when you join a gang, the intent of joining a gang is so you can commit crimes and not work or be a member of regular society; is that correct?

[DEFENDANT:] Incorrect.

[DEPUTY PROSECUTOR:] You don't join a gang to commit crimes?

[DEFENDANT:] No, sir.

[DEPUTY PROSECUTOR:] I mean, do you not commit crimes when you're in a gang?

[DEFENSE ATTORNEY:] Objection, Your Honor.<sup>14</sup>

[THE COURT:] Overruled.

[DEFENDANT:] Can you repeat the question?

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<sup>14</sup> “With regard to objections to evidence, it has long been the rule in this jurisdiction that an objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review. Objections must be accompanied by a reasonably definite statement of the grounds therefore so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect.” *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). (Citations omitted).

[DEPUTY PROSECUTOR:] So you're saying you don't commit crimes when you join a gang?

[DEFENDANT:] Are you speaking about myself or everybody?

[DEPUTY PROSECUTOR:] Yourself and others in your gang.

[THE COURT:] That's a fair distinction, and it goes to his objection.

[DEPUTY PROSECUTOR:] Okay.

[DEPUTY PROSECUTOR:] You join your gang. Did you commit crimes?

[DEFENDANT:] Objection, Your Honor.

[THE COURT:] Sustained.

[DEPUTY PROSECUTOR:] Generally speaking, a person who joins a gang, are they supposed to commit crimes for their gang?

[DEFENDANT:] I can't answer for anybody else but only myself.

[DEPUTY PROSECUTOR:] Really. So you don't know what other gang members do?

[DEFENDANT:] I am here to speak on my own actions.

[DEPUTY PROSECUTOR:] So you're basically refusing to answer the question. You don't know or you just don't want to answer it?

[DEFENDANT:] If you rephrase the question and ask me about myself in particular.

[DEPUTY PROSECUTOR:] Sir, you're not here to tell me how to ask a question. You're refusing to answer the question; is that correct?

[DEFENDANT:] No.

[DEPUTY PROSECUTOR:] So you don't know whether gang members don't join gangs to commit crimes? You don't know the answer to that question?

[DEFENSE ATTORNEY:] This already –

[THE COURT:] Overruled.

[DEFENDANT:] No.

RP 669-71.

Evidence of gang affiliation is presumed prejudicial. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009); *State v. Asaeli*, 150 Wn. App. 543, 579, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001 (2009).

If expert testimony on gang behavior does not both (1) show adherence by the defendant or the defendant's gang to those behaviors and (2) tend to prove the elements of the charged crime, then its relevance will not outweigh the risk that the jury will draw a forbidden inference. *State v. DeLeon*, 185 Wn. App. 171, 197, 341 P.3d 315 (2014).

However, when evidence of gang membership can be connected to the crime, such evidence is admissible. *Scott*, 151 Wn. App. at 526-27. “Courts have regularly admitted gang affiliation evidence to establish the motive for a crime or to show that defendants were acting in concert.” *Id.* at 527.

1. The gang membership questioning was necessary, in part, to establish premeditation.

The premeditation required to support a first degree murder conviction “must involve more than a moment in point of time.” RCW 9A.32.020(1); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987). Gang membership can be relevant to establish premeditation. *State v. Boot*, 89 Wn. App. 780, 789–90, 950 P.2d 964 (1998), *review denied*, 135 Wn.2d 1015 (1989) (testimony on gangs established that killing someone heightened a gang member's status. Mr. Boot acknowledged he was a gang member).

In the present case, the defendant donned in his gang colors; gloved and armed with a firearm; immediately began beating Mr. Cummings after asking him for his money for the drug debt and after inquiring of Mr. Cummings’ about his gang affiliation - whether he was a Norteno. Although there was no expert testimony regarding why a particular gang member may a commit crime against a rival gang member, the defendant did testify on direct examination that if he met up with a rival Norteno, there would, at a minimum, be a fight. Certainly there was an inference that the killing was in response to Mr. Cummings gang identity. The deputy prosecutor did not commit misconduct by asking the defendant questions about why he would commit a crime as a gang member.

2. The deputy prosecutor's questioning was necessary to establish intent and motive.

In *DeLeon*, this court found gang evidence is also relevant to establish motive, which is permitted under ER 404(b). *DeLeon*, 185 Wn. App. at 190. It is also permitted to establish intent. *State v. Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995).

Certainly, the deputy prosecutor could ask questions, based upon gang membership, why a Soreno would assault a Norteno upon sight. Certainly, upon direct examination, there was an inference that gang affiliation would be the impetus for a Soreno committing a crime against a Norteno gang member or other types of crime. Accordingly, there was no misconduct committed by the deputy prosecutor.

3. The defense stipulated to ER 404(b) evidence being admitted at trial and the defense also opened the door to such questioning.

Here, the defense stipulated to ER 404(b) evidence being introduced at the time of trial. A stipulation is typically an admission “that if the State's witnesses were called, they would testify in accordance with the summary presented by the prosecutor.” *State v. Wiley*, 26 Wn. App. 422, 425, 613 P.2d 549 (1980). *In re Detention of Moore*, 167 Wn.2d 113, 121, 216 P.3d 1015 (2009).<sup>15</sup>

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<sup>15</sup> It is understandable why it was a tactical decision for the defense to introduce this type of evidence. The defense wanted to portray the defendant in a sympathetic light to the jury with respect to its line of questioning and answers given by the defendant about his childhood.

Although it is not clear as to what that stipulation was regarding ER 404(b) evidence, the defendant cannot now complain about the deputy prosecutor's questioning regarding that type of evidence.

Improper remarks by a prosecutor are not grounds for reversal "if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." *State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007).

More importantly, the defense opened the door to gang type evidence and questioning when it called gang expert Roberge as a witness to discuss Soreno and Norteno gangs and the relative status of the defendant and victim at the time of the murder; when it questioned the defendant about his gang lifestyle while growing up and into adulthood; and when it asked why gang crimes are committed "either swim with the sharks or sink to the bottom." The defendant also admitted on direct examination to the felony crime of selling methamphetamine. *See, State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995), *review denied*, 129 Wn.2d 1007 (1996) (introduction of inadmissible evidence opens the door to cross-examination that normally would be improper).

F. THE DEFENDANT HAS NOT MET HIS BURDEN TO ESTABLISH THE ALLEGED MISCONDUCT, IF ANY, DURING THE DEPUTY PROSECUTOR'S CLOSING ARGUMENT WAS SO FLAGRANT AND ILL-INTENTIONED THAT AN INSTRUCTION WOULD NOT HAVE CURED ANY ALLEGED PREJUDICE.

As discussed above, the defendant bears the burden to establish the remarks made during closing argument were improper as well as their prejudicial effect. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

Standard of review.

This court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Turner*, 167 Wn. App. 871, 882, 275 P.3d 356 (2012). Prosecutors have “wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury.” *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997); *Turner*, 167 Wn. App. at 882.

Where, as here, defense counsel fails to object during closing argument, and, where a defendant raises the issue for the first time on appeal, the defendant must also show “that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice.” *State v. Walker*, 182 Wn.2d 463, 477-478, 341 P.3d 976 (2015).

1. Remarks made by the deputy prosecutor during closing argument were reasonable based upon the evidence and the inferences drawn from the evidence.

In the present case, the defense never objected during the deputy prosecutor's closing argument.

The defendant complains about the following remarks by the deputy prosecutor in full and complete context:

Mr. Montoya would have you believe in his testimony that he was afraid of Aaron Cummings. He's almost twice the size of Aaron Cummings. Mr. Cummings was laying on a bed. If he wanted to beat him, he would have beat him. That's the fact. Mr. Montoya testified at length about the fact of joining a gang and how by joining a gang, he wanted to be the shark. He didn't want to be eaten up. He wanted to be the big dog; that he talked about increasing his status in a gang by doing violent acts, by committing crimes, by even committing homicide. Mr. Montoya joined a gang by his own choice. He made choices to commit crimes. He made a choice on this date to be carrying a gun that he admitted he legally couldn't carry because he was a convicted felon. He made the choice to confront Aaron Cummings.

RP 752.

Just the walking up, based upon the testimony you heard about gangs, just the walking up and confronting a rival gang member made Mr. Montoya the aggressor. There are no other facts even based upon his own testimony.

But even based upon the three women, Mr. Cummings responded yes, he got beat. There was a separation. Then, according to Ms. Pupo and Ms. Deligt, the defendant stepped back, pushed back, reached in and pulled out his gun. Mr. Cummings was laying on the bed. With his gloved hand, with a gun that he's not supposed to have, he shoots, basically, at point blank range, Mr. Cummings. He shoots him. Now, not trying to scare him. You saw pictures of the bedroom. You saw the layout. I would suggest to you if you're four or five feet away and you're a gang member and violence is

the way you do business, you know how to scare somebody with a gun and not hit them. I think you can draw that inference. So do the facts as Mr. Montoya talked about them make sense? No.

RP 748-49.

Earlier in the defendant's testimony during direct examination, and, in addition to his other comments about gangs, he remarked that the number "13" is significant in his gang as it represents "street soldiers." RP 654. He also admitted, without objection, on cross examination that in certain situations, killing a rival gang member could increase a member's status in his gang. RP 669. He also made the remark about "swimming with the sharks" during direct examination.

In closing argument, prosecutors have wide latitude in closing to draw reasonable inferences from the evidence. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). This court does not look at the comments in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008).

It was reasonable for the deputy prosecutor to draw the inference that because the defendant confronted Mr. Cummings, a rival gang member; immediately struck him multiple times after asking him if he was a Norteno; and, without delay killed him; that he did so to increase his status in his gang. In addition, by the defendant's own admission, he said there would be a fight upon

contact with a rival gang member. The deputy prosecutor's remarks were not improper.

2. The deputy prosecutor's inquiry into the names and addresses of the witnesses referenced by the defendant who could have corroborated his version of events was proper.

It is well settled that when a party opens up an area on direct examination, he or she contemplates that the rules will permit cross-examination within the scope of the direct examination. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

Here, the defendant claimed on direct examination that he learned about a firearm in the residence at 1607 North Wall from an unidentified fellow gang member. RP 663. The gang member asked him to retrieve the firearm from the crime scene because the gang member did not want it taken. RP 663-64. The defendant explained that he put gloves on before traveling to the residence because he did not want his fingerprints on the weapon as it could cause "legal" problems for him. RP 663-64. The defendant offered this testimony as a reason for his belief why the victim may have been armed. RP 665.

He also claimed several months before the incident he had gone to an unidentified acquaintance's house to do some tattoo work. RP 656. More specifically, the following exchange took place:

[DEPUTY PROSECUTOR:] Now you were talking about you went to an acquaintance's house to do a tattoo; is that correct?

[DEFENDANT:] Yes, sir.

[DEPUTY PROSECUTOR:] Who is that acquaintance?

[DEFENDANT:] Here to speak of my actions alone, with all due respect.

[DEPUTY PROSECUTOR:] So you're refusing to answer the question?

[DEFENDANT:] I'm refusing to get anybody else involved that doesn't need to be involved.

[DEPUTY PROSECUTOR:] Is that right?

[DEFENDANT:] Yes, sir.

[DEPUTY PROSECUTOR:] Thank you.

[DEFENDANT:] You're welcome.

[DEPUTY PROSECUTOR:] So you're at this other person's house that you don't want to talk about?

[DEFENDANT:] Yes.

[DEPUTY PROSECUTOR:] To talk about -- so that person can't corroborate what you're saying; is that what you're saying?

[DEFENSE ATTORNEY:] Objection, Your Honor. May we approach?

[THE COURT:] No. If that's an objection to the question, it's sustained.

RP 671-72.

The defendant also would not identify the person who accompanied him to the crime scene before the incident. RP 673.

The defendant also testified he had physical injury after allegedly being kicked by Mr. Cummings. RP 665. On cross examination, the deputy prosecutor asked the defendant if anyone observed his claimed injury. RP 679.

Although defense made a general objection toward the end of this line of questioning, there was no request for a curative instruction.

After conviction, the defense brought a motion to dismiss, and, in the alternative, for a new trial based upon the questions of the deputy prosecutor referenced above regarding the defendant's refusal to provide information during cross examination and an allegation the deputy prosecutor attempted to shift the burden. CP 82; CP 85; CP 86; RP 793-96. The trial court denied the motion. RP 796-97.

Standard of review of the trial court's ruling on prosecutorial misconduct after conviction.

A trial court's ruling on a claim of prosecutorial misconduct is reviewed for abuse of discretion. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The defendant bears the burden of establishing misconduct, and that the conduct was prejudicial. *Cheatam*, 150 Wn.2d at 652. A new trial is not required unless there is a substantial likelihood that the improper argument affected the verdict. *Cheatam*, 150 Wn.2d at 652.

A defendant may be vigorously cross-examined in the same manner as any other witness if he voluntarily asserts his right to testify. *State v. Etheridge*, 74

Wn.2d 102, 113, 443 P.2d 536 (1968)\. The scope of cross examination is within the discretion of the trial court and may be conducted so as to explain, qualify and rebut the defendant's direct testimony, including examination on issues he or she introduced to the jury. *Etheridge*, 74 Wn.2d at 113.

Accordingly, the “opening the door” doctrine governs the admissibility of certain types of evidence at trial. *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008). Under the doctrine, when a party “opens the door” by raising a matter at trial, the opposing party may introduce evidence to explain, clarify, or contradict the party's evidence. *Jones*, 144 Wn. App. at 298. The purpose of the doctrine is to prevent a party from raising a subject and then dropping it at an advantageous time, which “might well limit the proof to half-truths.” *State v. Gefeller*, 76 Wn.2d at 455; *see also*, *State v. Hartzell*, 156 Wn. App. 918, 926, 933–35, 237 P.3d 928 (2010) (a defendant may open the door to otherwise inadmissible hearsay by eliciting an incomplete and misleading hearsay version of events during cross-examination).

Generally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence. *Cheatam*, 150 Wn.2d at 652.

However, and, contrary to the defendant’s argument, a prosecutor may argue reasonable inferences from the evidence presented and may attack a

defendant's exculpatory theory.<sup>16</sup> *State v. Davis*, 133 Wn. App. 415, 422, 138 P.3d 132 (2006), *vacated on other grounds*, 163 Wn.2d 606 (2008). Also, under the missing witness doctrine, the defendant's theory of the case is subject to the same scrutiny as the State's case. *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008); *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

The State may point out the absence of a “natural witness” when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable. *Montgomery*, 163 Wn.2d at 598. The State may then argue, and the jury may infer, that the absent witness's testimony would have been unfavorable to the defendant. *Montgomery*, 163 Wn.2d at 598. Finally, the inference does not shift the burden of proof. *Montgomery*, 163 Wn.2d at 598-99.

As stated previously, a prosecutor's remarks, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel, are in pertinent reply to his or her arguments, and are not so prejudicial that a curative instruction would have been ineffective. *State v. Weber*, 159 Wn.2d at 276.

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<sup>16</sup> In *State v. Rich*, 347 P.3d 72 (Wn. App. Div. 1, 2015), relying on RAP 2.5(a), the Court of Appeals, Division I, refused to consider the defendant's claim that the trial court erred in refusing to instruct on “a missing witness” instruction but allowing the State to make a “missing witness” argument to jury, where defendant failed to object at the time of trial.

A prosecutor is entitled to argue inferences from the evidence and to point out improbabilities or a lack of evidentiary support for the defense's theory of the case. *State v. Russell*, 125 Wn.2d at 87; *State v. Boehning*, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). In fact, a prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case. *State v. Killingsworth*, 166 Wn. App. 283, 291–92, 269 P.3d 1064, *review denied*, 174 Wn.2d 1007 (2012).

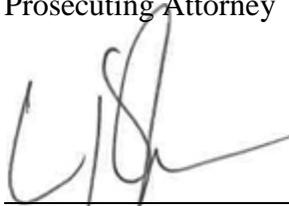
Here, the trial court did not abuse its discretion when it denied the defendant's motion to dismiss, and, the motion for a new trial based upon an allegation of prosecutorial misconduct.

## V. CONCLUSION

For the reasons stated above, the defendant's conviction for murder in the first degree should be affirmed by the court.

Dated this 29 day of June, 2015.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

LOUIS LINCOLN HANSON aka  
LOUIS L. MONTOYA,

Appellant,

NO. 3212-9-1-III

CERTIFICATE OF MAILING

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I certify under penalty of perjury under the laws of the State of Washington, that on June 29, 2015, I e-mailed a copy of the Response Brief in this matter, pursuant to the parties' agreement, to:

Mitch Harrison  
mitch@mitchharrisonlaw.com

06/29/15

(Date)

Spokane, WA

(Place)

*Crystal McNees*

(Signature)