

**FILED**

APR 21, 2016

Court of Appeals  
Division III  
State of Washington

No. 33965-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

CAMERON J. PETERSON,

Appellant.

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

The Honorable Judge John O. Cooney

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APPELLANT'S OPENING BRIEF

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### **A. SUMMARY OF ARGUMENT**

Cameron J. Peterson was charged with first degree assault with a firearm against Gregory Zielke Jr. (Count I) and second degree assault against Gregory Zilke Sr. (Count II). Mr. Peterson asserted self-defense and defense of others and the jury was instructed accordingly. The jury found Mr. Peterson not guilty of first degree assault (Count I), but guilty of second degree assault (Count II), and he now appeals that conviction on two grounds.

First, it was the State's burden to prove beyond a reasonable doubt the absence of defense of others, and insufficient evidence was presented to show that Mr. Peterson was not defending another person, Paul Cook. Mr. Peterson respectfully requests the second degree assault conviction be dismissed for insufficient evidence.

Second, during closing arguments the State committed prosecutorial misconduct by misstating the law on defense of others, lessening its burden of proof and resulting in prejudice. Mr. Peterson respectfully requests the case be reversed and remanded for a new trial.

Mr. Peterson preemptively objects to any appellate costs, should the State be the prevailing party on appeal.

## **B. ASSIGNMENTS OF ERROR**

1. The evidence was insufficient to convict the defendant of second degree assault when the State failed to prove the absence of the defense of others.
2. The State committed prosecutorial misconduct by misstating the law to the jury during closing and rebuttal closing.
3. The State lessened its burden of proof by misstating the law to the jury in closing and rebuttal closing.
4. An award of costs on appeal against the defendant would be improper when the defendant is indigent.

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

Issue 1: Whether there was insufficient evidence to convict the defendant of second degree assault when the State failed to prove the absence of defense of others.

Issue 2: Whether the State's misstatements of the law in closing and rebuttal closing arguments constituted prosecutorial misconduct.

Issue 3: Whether this Court should refuse to impose costs on appeal.

## **D. STATEMENT OF THE CASE**

One evening Paul Cook was in a tavern in Spokane waiting for a ride home. (RP 524–525). Paul<sup>1</sup> was playing pool with friends when a man he had never seen before, Gregory Zielke Sr. (Gregory), approached

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<sup>1</sup> For the ease of the reader, individuals shall be referred to herein by their first names. No disrespect is intended toward these individuals.

him. (RP 525, 528). Gregory grabbed Paul, and accused Paul of owing him \$50 for a pool trick. (RP 525, 528). When Paul denied the allegation, Gregory persisted in harassing Paul. (RP 525–526, 528). Gregory was "belligerent drunk" and outweighed Paul by 150 pounds. (RP 428, 528). Paul was so bothered by Gregory's harassment that he spoke to the bartender about it. (RP 525–26). Although the bartender spoke to Gregory, it appears the break from harassment lasted only a few minutes. (RP 526). Gregory began harassing Paul about the \$50 again. (RP 526). Paul had told Gregory to "go away" and leave him alone, but Gregory was persistent. (RP 528).

Finally, after Gregory had asked Paul to "go outside" more than once, Paul "had had enough" of the harassment and told Gregory "let's go outside." (RP 526, 534). The two started heading towards the tavern door, and when Paul turned his back to open the front door, he heard a crash and felt "something go past [his] legs." (RP 526–527, 530, 534). When Paul turned around, he saw Gregory lying on the ground. (RP 527).

At trial, Cameron J. Peterson admitted he struck Gregory in the head. (RP 429, 519, 527).

Mr. Peterson testified he had never seen his friend, Paul, argue with anyone before, and he was shocked to see Paul arguing with Gregory. (RP 426). Prior to the blow, Mr. Peterson noticed the argument was

starting to escalate, and he observed Gregory take his off his glasses, become louder, and get in a “bit of a rage.” (RP 428). Mr. Peterson stated that “[s]omething was wrong” and that Gregory was “going in a rage and ...was clearly out of control.” (RP 430). Mr. Peterson had never met Gregory before. (RP 430).

Mr. Peterson said it looked to him like Gregory was going to “go after” Paul. (RP 428). Mr. Peterson also said no one was doing anything about the situation, despite the fact that the bartender was right behind Mr. Peterson. (RP 428). Knowing that Paul was disabled from a back injury and had never been in a fight before, Mr. Peterson did not think Paul would be able to handle Gregory. (RP 426, 428). Mr. Peterson admitted several thoughts were going through his head at the time: he was not sure if he should call the cops because nothing had happened yet, but also did not want to call the cops in the middle of a fight because it would be over before help could arrive. (RP 429).

When it looked like things were escalating, Mr. Peterson jumped between Paul and Gregory, and Gregory lurched at Mr. Peterson. (RP 429, 473, 476). Out of reflex, Mr. Peterson struck Gregory in the head. (RP 429, 519). Afterwards Mr. Peterson stepped back, and as other people surrounded Gregory, Mr. Peterson knew there could be more trouble so he fled the bar. (RP 430–431, 476).

Paul later testified that if Mr. Peterson had not struck Gregory, Paul probably “would have hit him.” (RP 528).

The bartender, Joetta Adams, testified she thought Gregory was arguing with people by the pool table on the evening of the incident. (RP 126–127). Joetta observed that Gregory “was trying to argue with this older man” but Joetta decided that they were just talking. (RP 137). Joetta noted that Gregory is a big guy with a really loud voice, and that he “gets obnoxious sometimes and people get irritated with him.” (RP 136). Joetta claimed she did not think it was necessary to intervene at the pool table before the blow occurred. (RP 128). However, she later admitted feeling the need, at one point, to go check on the men to see if there was an argument, particularly because Gregory was speaking so loudly. (RP 139). Not long after, Joetta saw Mr. Peterson hit Gregory in the back of the head. (RP 127). It is unclear whether Mr. Peterson used a drink glass to strike Gregory. (RP 127–129, 136).

Gregory admitted to consuming at least four drinks the night of the incident. (RP 75). He testified he was playing pool and was standing by steps when someone struck him in the back of the head. (RP 76). He did not see who struck him, and did not know who Mr. Peterson was. (RP 77, 79). Gregory claimed he was struck by someone for no reason and by someone he had never met. (RP 85–86). He also stated he “didn’t really

argue with no one” that night, but that there “was a guy that came up . . . on the pool table and he was kind of butting in our pool game.” (RP 79). He also claimed neither one of them tried to fight the other. (RP 79).

Dale Lewis testified he saw a man strike another man with a drinking glass in the back of the head. (RP 338).

Gregory Zielke Jr. testified that a man was pestering his father (Gregory) about playing pool, but that no threats were exchanged. (RP 166). He did not see Mr. Peterson strike his father. (RP 166).

Later, Mr. Peterson testified he was brutally assaulted outside the bar by Gregory Zielke Jr., and that Mr. Peterson used a gun to defend himself. (RP 435–442).<sup>2</sup>

The State charged Mr. Peterson with first degree assault with a firearm against Gregory Zielke Jr. (Count I) and second degree assault against Gregory (Count II). (CP 40). The case proceeded to a jury trial. (RP 74–535). Witnesses testified consistent with the facts stated above. (RP 73-535).

The jury was instructed on the elements of second degree assault. (RP 554; CP 152). The jury was also instructed on the law of self-defense

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<sup>2</sup> The jury found Mr. Peterson “not guilty” of this assault against Gregory Zielke Jr., in Count I (first degree assault with a firearm). (RP 608; CP 165).

and defense of others. (RP 555–557; CP 156–160). The pertinent jury instructions are as follows:

It is a defense to a charge of First or Second Degree Assault that the force used, attempted, or offered to be used was lawful as defined in this instruction.

The use of, attempt to use, or offer to use force upon or toward the person of another is lawful when used, attempted, or offered by a person who reasonably believes that he is about to be injured, or by someone lawfully aiding a person who he reasonably believes is about to be injured, in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using, or offering to use, the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used, attempted, or offered to be used by the defendant was not lawful. 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 156; RP 555–556).

One who acts in defense of another, reasonably believing the other to be the innocent party and in danger, is justified in using force necessary to protect that person even if, in fact, the person whom the actor is defending is the aggressor.

(CP 157; RP 556–557).

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. Notwithstanding the requirement that lawful force be "not more than is necessary," the law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonably effective alternative."

(CP 158; RP 557).

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

(CP 159; RP 557).

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 160; RP 557).

In her closing argument, the prosecutor argued that Mr. Peterson did not lawfully use self-defense or defense of others. (RP 560–578, 597–603). The prosecutor made the following statements<sup>3</sup>:

If a reasonably prudent person, you guys, would not have used the same force and means under the same or similar conditions, then self-defense is not available.... You can't find self-defense. If you would have done something else, then self-defense does not apply.

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<sup>3</sup> Mr. Peterson asserted self-defense and defense of others on both Counts I and II, and the trial court instructed the jury accordingly. (CP 46, 156–160; RP 580–581). Therefore, some of the State's closing arguments regarding the defense of others in Count II (second degree assault) is comingled with its arguments surrounding Count I (first degree assault with a firearm). (RP 560–578, 597–603).

....

There is no reasonable belief that . . . [Paul] was about to be injured. And if you find there's no reasonable belief that he was about to be injured or that anybody else was about to be injured, then you have to deny him his self-defense claim.

....

[Mr. Peterson] didn't use reasonable alternatives. He didn't call the police. He didn't contact management.

....

Did [Mr. Peterson] use reasonable alternatives? Well, what would you guys have done?

(RP 571 - 574).

And during rebuttal argument the prosecution made the following statements:

[W]e reviewed the self-defense instructions with you now a couple of times but what is the phrase that is possibly more important than anything else that is replete in these instructions is reasonable person. How would a reasonable person act. What would a reasonable person do. Yeah, you can take into consideration what Mr. Peterson knew or thought he knew or, you know—but what would you, as a reasonable people, do with that information?

....

What would you have done, because that's ultimately the analysis . . . .

(RP 599, 603).

Defense counsel did not object to these arguments. (RP 560–578, 597–603).

The jury found Mr. Peterson not guilty of first degree assault with a firearm against Gregory Zielke Jr. (Count I), and guilty of second degree assault against Gregory (Count II). (CP 165–166; RP 608).

The judgment and sentence states that “An award of costs on appeal against the defendant may be added to the total legal financial obligations.” (CP 208). An order of indigency on file indicates Mr. Peterson’s impoverished status. (CP 236–238).

Mr. Peterson timely appealed. (CP 217–235).

#### **E. ARGUMENT**

**Issue 1: Whether there was insufficient evidence to convict the defendant of second degree assault when the State failed to prove the absence of defense of others.**

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). “When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt.” *State v. L.B.*, 132 Wn. App. 948, 952, 135 P.3d 508 (2006) (citing *State v. Acosta*, 101 Wn.2d 612, 615–16, 683 P.2d 1069 (1984)).

Where a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most

favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)).

It is lawful to use force in defense of another person under certain circumstances. RCW 9A.16.020(3). Here, the trial court instructed the jury the use of force is lawful when used “by someone lawfully aiding a person who he reasonably believes is about to be injured, in preventing or attempting to prevent an offense against the person” and “the force is not more than is necessary.” (CP 156; RP 555–556); WPIC 17.02 (Lawful Force—Defense of Self, Others, Property). The jury was instructed that force is lawful when using it “as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time” of the incident. (*Id.*). Also, a person who acts in defense of another, “reasonably believing the other to be the innocent party and in danger” may act in defense of another even if mistaken as to whom is the aggressor. (CP 157; RP 556–557); WPIC 16.04.01 (Aggressor—Defense

of Others). The trial court further instructed there is no duty to retreat, and retreat is not a “reasonably effective alternative” to be considered by a jury. (CP 158; RP 557); WPIC 17.05 (Lawful Force—No Duty to Retreat). Force can also be lawful even if actual danger does not exist. (CP 159; RP 557); WPIC 17.04 (Lawful Force—Actual Danger Not Necessary). Finally, force is deemed necessary and lawful if it “reasonably appeared to the actor at the time” that “no reasonably effective alternative” appeared to exist and “the amount of force used was reasonable.” (CP 160; RP 557); WPIC 16.05 (Necessary—Definition). *See also State v. Penn*, 89 Wn.2d 63, 568 P.2d 797 (1977) (a person may use force to protect another from a third person when the facts as they appear to the protector create a reasonable apprehension of danger to the other although such appearance may later be determined to be erroneous, the degree of force does not exceed that which the actor or the other would be justified in using to protect himself, and the protector believes his intervention necessary to protect the other).

There is insufficient evidence to support Mr. Peterson’s second degree assault conviction because he acted in lawful defense of Paul. *See* RCW 9A.16.020(3); *State v. L.B.*, 132 Wn. App. at 952 (2006) (citing *State v. Acosta*, 101 Wn.2d at 615–16); *State v. Penn*, 89 Wn.2d 63; and WPIC 16.04.01, 16.05, 17.02, 17.04, 17.05. The testimony showed that

Gregory “grabbed” Paul, repeatedly harassed him even after Paul asked him to stop, was belligerently drunk, weighed approximately 150 pounds more than Paul, and was so loud that Gregory drew the attention of the bartender. (RP 139, 428, 525–526, 528). Mr. Peterson testified he knew Paul had a back injury, was not the type of person to get into altercations with others, saw that no one else in the bar was going to get involved to try to stop a fight, and observed Gregory take his glasses off and become angrier. (RP 426, 428). Mr. Peterson also said several options of how to react were going through his head—whether to call police or not—showing he considered his alternatives. (RP 429); WPIC 16.05 (force is lawful if it “reasonably appeared to the actor at the time” that “no reasonably effective alternative” appeared to exist and “the amount of force used was reasonable”).

Mr. Peterson was justifiably concerned about what would happen to Paul if he and Gregory stepped outside the bar. Mr. Peterson aided someone he believed was about to be injured (CP 156); he used appropriate force given the size of Gregory and the fact that Gregory lunged at Mr. Peterson (CP 156); Mr. Peterson had reasonable grounds to believe Paul was the innocent party and not the aggressor (CP 157); there was no legal duty to retreat (and the law instructs that is not a “reasonable alternative”) (CP 158); and the force was necessary as no reasonably

effective alternative appeared to exist to Mr. Peterson and the two men were on the verge of a fight (CP 160; RP 428–429, 526). Gregory lunged at Mr. Peterson as Mr. Peterson attempted to get between the two men, and Mr. Peterson did what he naturally had to do—he swung back. (RP 429, 473, 476).

Taking all the facts in the light most favorable to the State, no rational trier of fact could have found the absence of defense of others beyond a reasonable doubt. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). Given the possibility of a physical altercation occurring between Gregory—a man described as “belligerent drunk” and Paul—a man with a back disability and approximately 150 pounds lighter than Gregory—there was insufficient evidence that Mr. Peterson’s use of force was unreasonable and more than was necessary.

Mr. Peterson respectfully requests his conviction for second degree assault be reversed and the charge dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (stating “[r]etrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.”) (quoting *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

**Issue 2: Whether the State’s misstatements of the law in closing and rebuttal closing arguments constituted prosecutorial misconduct.**

To establish a claim of prosecutorial misconduct during closing argument, an appellant must show that the prosecuting attorney's remarks were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015) (citing *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011)). If a defendant fails to object to the misstatements of the law, “the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *Id.* at 375 (citation omitted).

“A prosecuting attorney commits misconduct by misstating the law.” *Allen*, 182 Wn.2d at 373 (citation omitted). A prosecutor’s arguments to the jury must be confined to the law contained in the trial court’s jury instructions. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012).<sup>4</sup> If a prosecutor “mischaracterizes the law and there is a substantial likelihood that the

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<sup>4</sup> *State v. Walker*, 164 Wn. App. 724, 265 P.3d 191 (2011) was remanded by the Washington Supreme Court, 175 Wn.2d 1022, 295 P.3d 728 (2012), but was later affirmed in an unpublished decision, *State v. Walker*, 173 Wn. App. 1027 (2013), *review denied*, 177 Wn.2d 1026, 309 P.3d 504 (2013).

misstatement affected the jury verdict, the defendant is denied a fair trial.”  
*Id.* at 736 (citation omitted).

Prosecutorial misconduct is particularly egregious. *Allen*, 182 Wn.2d at 380. “The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” *Id.* (citation omitted); *also Walker*, 164 Wn. App. at 736 (citation omitted). “This is because the jury knows that the prosecutor is an officer of the State.” *Allen*, 182 Wn.2d at 380 (quotations omitted). “It is, therefore, particularly grievous that [an] officer would so mislead the jury regarding a critical issue in the case.” *Id.* (citation and quotations omitted).

In *State v. Walker*, the prosecutor misstated the law on defense of others in closing argument. *Walker*, 164 Wn. App. at 734–37. The prosecutor stated that the reasonableness standard in defense of others could be met if the “jury would have taken the same action in defense of another.” *Id.* at 734–735 (emphasis added). However, this statement was improper:

The reasonableness standard *is not whether the jury would have done it, too*. Rather . . . the standard is that a person may “employ such force and means as a reasonably prudent person would use under the same or similar conditions *as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident*” . . . . Nothing in the instruction requires the jury to substitute its subjective

belief about how any juror would have responded in the situation.

*Id.* at 736 (citations omitted) (emphasis added).

The court determined that the prosecutor’s misstatements “encouraged the jury to make its decision personal” rather than judging the events objectively. *Id.* at 736. For this reason, the prosecutor’s misconduct created “an enduring and resulting prejudice incurable by a curative instruction.”<sup>5</sup> *Id.* at 736, n. 7.

The case here is akin to *Walker*. *Walker*, 164 Wn. App. at 734-37. The same instruction was given to the jury in this case as in *Walker*. *Id.* at 736; *see also* CP 156; WPIC 17.02 (Lawful Force—Defense of Self, Others, Property). Also, during closing argument the prosecutor in this case made the same type of improper misstatements about the law that the prosecutor did in *Walker*: the prosecutor here also repeatedly told the jury to consider what they would have done. *See id.* at 734–736; *see also* RP 571, 573–574, 599, 603. The “reasonableness standard” is “not whether the jury would have done it, too.” *See id.* at 736. Rather, the standard is “that a person may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to

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<sup>5</sup> The defendant in *Walker* objected to the prosecutor’s misstatement of the law; but the court noted that even had the defendant failed to object, the more demanding standard of prejudice (“an enduring and resulting prejudice incurable by a curative instruction”) would have been met. *State v. Walker*, 164 Wn. App. 724, 736 n. 7, 265 P.3d 191 (2011).

the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.” *Id.* at 736; *see also* CP 156. The prosecutor’s statements here were improper.

Further, because the prosecutor asked the jury to consider what it “would have done,” she also misstated the law on reasonable alternatives to defense of others. (RP 574). The trial court instructed the jury on reasonable alternatives as follows:

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

CP 160; RP 557.

This jury instruction states the jury is to consider the circumstances “as they reasonably appeared to the actor at the time”—not what the jury “would have done.” (CP 160; RP 557, 574). The prosecutor’s misstatements regarding reasonable alternatives was an improper statement of the law and constituted misconduct. *See Allen*, 182 Wn. 2d at 373 (citation omitted).

A curative instruction would not have overcome the prejudice created by these improper statements. *See Walker*, 164 Wn. App. at 736, n. 7 (“prejudice exists [when] . . . the conduct creates an enduring and resulting prejudice incurable by a curative instruction”). The prosecutor

consistently told the jury that if it would have done something else, then the defendant's claims of defending himself or another did not apply. (RP 571, 573–574). But this is not the law. *See Walker*, 164 Wn. App. at 736; *see also* CP 156. When improperly instructed by the prosecutor, the jury was told they could not find Mr. Peterson's actions reasonable in light of how they, as individuals, would have reacted. (RP 571, 573–574, 599, 603); *see also Walker*, 164 Wn. App. at 736 (prosecutor's misstatements improperly and prejudicially “encouraged the jury to make its decision personal”).

The misstatements of the law also lessened the State's burden to disprove the element of “defense of others.” (CP 156); *also* WPIC 17.02 Lawful Force—Defense of Self, Others, Property (stating the State has burden of proving beyond a reasonable doubt the absence of this defense); *State v. Emery*, 161 Wn. App. 172, 195, 253 P.3d 413 (2011), *aff'd*, 174 Wn.2d 741, 278 P.3d 653 (2012) (misstatement of the law and the presumption of innocence reduces the State's burden and “undermines a defendant's due process rights”) (citation omitted); *State v. Acosta*, 101 Wn.2d 612, 615–16, 683 P.2d 1069 (1984). The jury was supposed to view the situation from the standpoint of a reasonable person taking into account all that the defendant knew at the time of the incident, and the

prosecution instructing the jury otherwise was prejudicial. *See Walker*, 164 Wn. App. at 736; *see also* CP 156.

The State committed prosecutorial misconduct by misstating the reasonableness standard of defense of others, which was Mr. Peterson's defense to the second degree assault (Count II). For these reasons, Mr. Peterson respectfully requests this case be reversed and remanded for a new trial.

**Issue 3: Whether this Court should refuse to impose costs on appeal.**

Mr. Peterson preemptively objects to any appellate costs should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). (CP 38).

Mr. Peterson remains indigent and unable to pay costs that may be imposed on appeal. (CP 236–238). There is no support in the record that the defendant/appellant has the ability to pay such costs on appeal. Also, these costs would be a detrimental barrier to this Appellant's successful reentry into society and imposition of them would be inconsistent with those principles enumerated in *State v. Blazina*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015).

For these reasons, Mr. Peterson respectfully requests that no costs on appeal be assigned to him.

**F. CONCLUSION**

The evidence was insufficient to support Mr. Peterson's conviction for second degree assault against Gregory Zielke Sr. because the State failed to prove the absence of defense of others. Mr. Peterson's conviction for second degree assault must be reversed and the charge dismissed with prejudice.

Should this Court disagree, the case should be remanded for a new trial because the State committed prosecutorial misconduct by misstating the law in closing and rebuttal closing, and the error was prejudicial.

Mr. Peterson also objects to any appellate costs should the State prevail on appeal. The record does not reflect that Mr. Peterson has the ability to pay.

Respectfully submitted this 21st day of April, 2016.



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Laura M. Chuang, WSBA #36707



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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 33965-3-III  
vs. )  
CAMERON J. PETERSON )  
Defendant/Appellant )  
PROOF OF SERVICE )  
\_\_\_\_\_ )

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 21, 2016, I deposited for first-class mailing with the U.S. Postal Service, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Cameron Peterson  
4907 E Fairview  
Spokane, WA 99217

Having obtained prior permission from the Spokane County Prosecutor's Office, I also served the Respondent State of Washington at SCPAAppeals@SpokaneCounty.org using Division III's e-service feature.

Dated this 21st day of April, 2016.



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