

NO. 34837-7-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JASON WILLIAMS,

Appellant.

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

The Honorable John D. Knodell, Judge  
The Honorable David G. Estudillo, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred when it instructed the jury in its Instruction 26 that self-defense was an act of necessity and an accused does not have the right of self-defense if his action was done in retaliation or revenge.

2. Prosecutorial misconduct in closing argument denied appellant his right to a fair trial.

Issues Pertaining to Assignments of Error

1. Mr. Williams's defense was self-defense and defense of his wife. Instructions on self-defense must more than adequately convey the law. Here, the court's Instruction 26 told the jury that self-defense was an act of necessity and did not permit an act done in revenge or retaliation. Did the trial court's instruction erroneously limit the jury's consideration of Mr. Williams's defenses to whether a reasonable person would have believed the necessity to act in self-defense, fail to make the relevant standard of self-defense and defense of another manifestly clear to the average juror, and relieve the prosecution of its burden to disprove self-defense in violation of Mr. Williams's right to a fair trial?

2. Was the court's Instruction 26 an improper judicial comment on the evidence?

3. The prosecutor told jurors to find a reasonable doubt about whether Mr. Williams was guilty they were required to assign a reason

and articulate that reason. Given that the law is clear that jurors are not required to articulate a reason for their doubts and several cases have condemned similar articulation arguments as prosecutorial misconduct, was the prosecutor's argument flagrant and ill intentioned misconduct requiring reversal?

B. STATEMENT OF THE CASE

1. Procedural Facts

Jason Williams was charged by amended information filed August 24, 2016 with seven counts. CP 28-35. In each count the State alleged Williams committed the crimes while armed with a firearm. Id; RCW 9.94A.533(3).

Count 1 charged the first degree murder of Christian Guerra. CP 29. Count 2 charged the attempted first degree murder of Priscilla Abalos. Id. Count 3 charged the attempted first degree murder of Cynthia Martinez. CP 31. Count 4 charged the attempted first degree murder of Luis Urbina. CP 32. In all four counts the State alleged the murder and attempted murders were committed with either premeditated intent, extreme indifference to human life, or in the commission of a felony. CP 29-33; RCW 9A.32.030(1)(a), (1)(b) and (1)(c).

In Counts 5, 6 and 7, Williams was charged with the first degree assault of Abalos, Martinez and Urbina respectively. CP 33-35. In each

of those counts the State alleged in the alternative that the assaults were either committed with a firearm, deadly weapon or means likely to produce death or great bodily harm (RCW 9A.36.011(1)(a)), or caused the infliction of great bodily harm (RCW9A.36.011(1)(c)). Id.

A jury found Williams not guilty of first degree murder as charged in Count 1 but guilty of the lesser included offense of second degree murder. CP 99-100. It found Williams not guilty of the attempted first murders as charged in Counts 2, 3 and 4 but guilty of the first degree assaults as charged in Counts 5, 6 and 7. CP 102-104, 106, and 108. The jury also found Williams was armed with a firearm in the commission of each crime. CP 111, 115, 117, and 119.

Williams was sentenced to an exceptional sentence below the standard range of 174 months on Count 1, and 102 months on Counts 5, 6 and 7. CP 132-133. The terms of the sentences included a 60-month firearm enhancement for each count. Id. The sentences were ordered to run concurrent except for the four firearm enhancements, which were ordered to run consecutive to each other. CP 133. As a result Williams was ordered to serve a total of 40 years. Id.

2. State's Case

Cynthia Martinez and her roommate, Priscilla Abalos, made plans to celebrate Abalos's birthday. RP 511-512, 612-613.<sup>1</sup> They met Abalos's boyfriend, Luis Urbina, and a friend, Chris Guerra, whose birthday it was as well, and drove in Abalos's car, a white Fusion, to a restaurant where they spent the next hour and a half drinking. RP 512-514, 615-616, 828. Guerra then suggested they move the party to Neppel's Dockside Pub. RP 514.

They arrived at Neppel's a little after midnight and continued to drink. RP 515, 562-565, 617, 829. While they were there a fight broke out and everyone was told to leave. RP 516, 618. The four decided to go to a Jack-in-the-box restaurant to get something to eat. RP 517, 619, 831. They were all drunk. Abalos was too drunk to drive so Martinez drove Abalos's Fusion because she was a "heavy drinker" and better able to hold her alcohol. RP 518, 561-563, 619, 829. Abalos sat in the front passenger seat, Guerra sat in the back seat behind Martinez, and Urbina sat in the back seat behind Abalos. RP 518, 831.

That same day Williams and his wife, Martha Mejia, attended Mejia's uncle's wedding ceremony at her uncle's home. RP 1015. The

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<sup>1</sup> RP refers to the verbatim report of proceedings of the August 25 through September 13, 2016 pretrial and trial, which consists of 13 volumes. 1RP refers to the verbatim report of proceedings of the August 17, August 22, 2016 pretrial hearings and the November 2, 2016 sentencing hearing, which consists of one volume.

wedding took place at about 8:00 p.m., and following the ceremony some of the adults decided to go to the Broadway Grill to celebrate. RP 1016. Williams and Mejia drove to the restaurant in their black Yukon SUV, after going home first to change their clothes. RP 1016, 1018.

Coincidentally, at about midnight the wedding party too decided to go to Neppel's (the witnesses also referred to Neppel's as the Sand bar). RP 1022. Mejia admitted she was intoxicated, and because it was near the Broadway Grill they walked to Neppel's. RP 1939. While at Neppel's they drank and danced until the fight broke out. RP 1940. Williams and Mejia left and decided to go back to Mejia's uncle's house to pick up their children who were still there following the wedding. RP 1941.

Mejia drove and Williams sat in the front passenger seat. RP 1941-1942, 1969. As they were driving they noticed a car following them. Williams thought it was "weird" that they were being followed so he told Mejia to drive into the Jack-in-the box. RP 2093. They did not intend to buy any food. Id.

Mejia entered the drive through lane where customers order food from their cars. RP 2093. Martinez entered the drive through behind Mejia's Yukon. There was another car in the drive through lane in front of the Yukon ordering food. RP 518, 570-571, 620, 990.

After a few minutes Mejia and Williams decided to leave. RP 1942. Martinez testified that when Mejia put the Yukon in reverse to back out of the drive through lane to leave, Abolas, who sitting in the front passenger seat of the Fusion, reached over and began honking the horn. RP 524, 676. Martinez testified that Abolas then opened her door and yelled at Mejia to stop because Abolas was afraid that Mejia was going to hit her car. RP 524. Abolas, however, testified that after she honked she actually got out of the car, walked between the Fusion and the Yukon, which she admitted was a mistake, and with her hands indicated the space between the two cars and yelled at Mejia to stop. RP 624-625, 678, 704. Abolas then got back in the car. RP 624-625.

Martinez testified that she was about to back up to let Mejia and Williams out but Mejia got out of the Yukon and walked to where Guerra was sitting, in the back seat behind Martinez, and words were exchanged between Mejia and Guerra. RP 527. Abolas, however, testified that when Mejia got out of the Yukon she walked up to where Martinez was sitting and yelled at Martinez to “move out of my fucking way.” RP 625. Urbina, on the other hand, testified that Mejia got out of the Yukon and stood between the Yukon and Abolas’s car and started doing something with her phone. RP 829, 831-833.

At some point Mejia started arguing with Guerra. Abolas testified that Guerra and Urbina got out of the car and Guerra went up to Mejia and told her to clam down. RP 627, 683-684. Mejia then yelled for Williams to help her. RP 530, 627-628, 687, 833. Martinez and Abolas testified that Williams then got out of the Yukon, walked over to where Mejia and Guerra were standing, and started arguing with Guerra. RP 531-532, 630. Urbino, however, testified he and Guerra both got out of the car when Williams started walking towards the Fusion. RP 834.

Williams and Guerra then started fighting between the two cars. RP 533-534, 631. Guerra did most of the hitting and Williams fell to the ground. RP 584-585. While Williams was on the ground Guerra started “whaling” on him. RP 632-633. While Guerra was beating Williams, Urbina grabbed and tossed Mejia. RP 537, 633, 836. Martinez said that Urbino then joined Guerra and he too hit Williams. RP 589-591. Urbino, on the other hand, testified that he did not recall hitting or kicking Williams. RP 876-878. Williams, however, was badly beaten. RP 690.

After beating Williams, Guerra got back into the Fusion and Martinez started to back up but she hit a curb. RP 538, 539, 633. Urbino who did not get back into the Fusion with Guerra, followed the car as Martinez backed up. RP 591-593, 634.

According to Martinez, it was then that Mejia took out her phone, and when Martinez asked Mejia what she was doing Mejia told Martinez she was taking pictures of the Fusion's license plate. RP 541-542, 544. Abolas got partially out of the Fusion and confronted Mejia. RP 646. Abolas said Mejia then came over to where Abolas was sitting and reached inside the car and grabbed Abolas by the hair. RP 647. Martinez hit Mejia's hand and pulled Abolas back into the car. RP 547-548. The car's door was still open and Abolas kicked Mejia in the chest. RP 649. Urbina then grabbed Mejia again and pulled her away from the car and Mejia went to the ground. RP 548, 650, 840.

In the meantime, Williams got up of the ground following the beating he took, and came over to where Guerra was sitting in the Fusion and swung at Guerra through the open window. RP 638, 835. Guerra got out of the car and he started hitting Williams again. RP 647, 836-837, 888. Abalos was unsure if Guerra had Williams on the ground during this second altercation but she admitted Guerra was winning the fight. RP 721.

James Carpentier and Alfredo Sabedra were the two Jack-in-the box employees working that night. At about 1:30 a.m. they heard a car in the drive through lane honking its horn. RP 757, 988-89. They looked out

and saw a group of people fighting in the drive through lane between an SUV and a car behind it. RP 764, 989.

Carpentier, who went to school and played football with Guerra, saw a black man who he identified as Williams fighting with a taller white man, who he found out the next day was Guerra. RP 756, 764-766, 810. He also saw another man moving a woman out of the way and Guerra hitting Williams while Williams was on the ground and trying to get up. RP 773, 778, 820-821. Carpentier admitted that he told police shortly after the incident he saw three people kicking and stomping on Williams while Williams was on the ground. RP 775-776, 780, 809, 814, 818, 820, 1166.

Carpentier said that after Williams was beaten he saw Guerra go back to the Fusion and Williams get up off the ground and go back to his car. RP 775-776. Carpentier then saw Williams walk to the same car and punch into an open window. RP 785, 787. There was a woman customer in the drive through lane in front of the Williams's Yukon and she yelled for her food so Sabedra told Carpentier they should complete the woman's order and deal with the fight later. RP 990. Carpentier saw the Fusion backing up as he went back to the restaurant's kitchen. RP 787.

Martinez, Abolas and Urbina were unclear about what happened next. Abolas testified after the second beating Williams took from Guerra,

Williams went back to his car, and then started walking towards them tucking a gun into his pants. She yelled that Williams had a gun. RP 650-651. Urbina told police that after the second fight with Guerra, Williams walked back to his car and Guerra followed him. RP 895. Martinez testified she saw Williams walking towards the Fusion with a gun in his hand. RP 550. Urbina, on the other hand, testified that while Guerra and Williams were fighting the second time, he heard Williams say three times that he had a gun. RP 841, 884.

Williams then started firing the gun. Martinez and Abolas ducked. RP 551, 652. Martinez heard bullets hitting the front of the Fusion. RP 550. When Urbina heard the shots he dropped to the ground. RP 843.

Kristopher Hemmerling was also at the Jack-in-the-box. He ordered his food and started to leave but a white car was backed up against the curb blocking the exit. RP 960-963. He saw people arguing and then walk back to their respective cars. RP 964. Hemmerling then saw a black man, Williams, walking from a SUV towards the white car, and a person from the white car, Guerra, walking towards the man. RP 966-967. He said Williams raised his arm and fired a gun. Williams then brought his arm down, did something, brought his arm back up and fired again. RP 91-972. Hemmerling put his car in reverse, ducked and called 911. RP 972-974. Hemmerling then saw the SUV drive across the grass and on to

the street because there was another car in front of it blocking its ability to exit through the drive through lane. RP 975-976.

After the shooting stopped, Abolas looked up and saw Williams and Mejia getting back into their car. RP 654. When Martinez heard tires squealing she opened the car door and saw Guerra on the ground. RP 552. Guerra had been shot and he said he needed to go to the hospital so Martinez and Abalos put Guerra into the car and told Urbina they needed to leave. RP 552-553, 656.

Before the group left, however, Mosses Lake police officer Kevin Hake arrived at the Jack-in-the-box. He was the first officer on the scene. RP 1127. Hake saw Urbina standing beside the Fusion and he spoke to Abolas. RP 1098, 1127-1128. Hake did not see Martinez anywhere. RP 1131. Abalos and Urbina told Hake someone was shot and described Mejia's car and the direction it had gone. RP 657, 1082-1086, 1130. Inexplicably Abalos and Urbina did not tell Hake that it was Guerra who was shot and that he was in their car bleeding. RP 1130, 1828-1829. Because Hake was not told Guerra was in the back seat of the Fusion, Hake left and followed the Yukon. RP 1086, 1131. After Hake left, Abalos and Urbina took Guerra to the hospital. RP 658. Urbina spoke with the 911 operator while on the way to the hospital. RP 862-863.

Hake and other officers followed Mejia's Yukon back to Mejia's uncle's house. RP 1086, 1089. Williams and Mejia had gone into the house. Mejia's uncle's wife testified that Mejia was stunned and started babbling about a shooting. RP 1028. Williams was in shock. RP 1029. The police arrived and described Williams as nodding off, apparently unconscious, and non-responsive. RP 1174, 1188. Mejia was distraught and appeared intoxicated. RP 1407, 1410.

Williams and Mejia were arrested taken to holding cells. RP 1177-1178, 1414. Williams complained to police that his head hurt and he wanted to know where Mejia was and if she was safe. RP 1178-1179. Emergency medical personnel were called to examine Williams, and a doctor advised that Williams needed immediate treatment. RP 1180. Williams was allowed to see his wife and at about 3:00 a.m. he was taken to the hospital. RP 1180-1181, 1838.

Williams's face and eyes were swollen, there were abrasions on his forehead, and he had scrapes and cut marks on his forearm and hands. RP 1498, 1729, 1841-1843. At the hospital Williams was treated for a concussion. He was released at about 5:30 a.m. and taken back to the holding cell. RP 1838, 1846.

A few hours later Detective Brain Jones interrogated Williams. RP 1724-1725; Ex 209. Williams was asleep in the holding cell and still

dressed in a hospital gown. RP 1728. During the interrogation Jones told Williams a person was killed. Williams was surprised and ended the interrogation. RP 1839.

Guerra was shot in the right knee and pelvic area. RP 1329, 144, 1349. The shot to his pelvic caused internal bleeding that proved fatal. RP 1320, 1370. When the autopsy was performed Guerra's blood alcohol level was .11 percent. RP 1372. However, because Guerra was given blood transfusions at the hospital before he died, his blood alcohol level was much higher when he was shot. RP 1374, 1391-1392, 1394.

After Williams and Mejia were arrested, police found a nine-millimeter Beretta on the bedroom floor in Mejia's uncle's house. RP 1023-1025, 1472. It was determined that the bullet that killed Guerra was fired from that gun. RP 1364-1365, 1669. A crime scene investigator opined that three bullets fired from the gun hit the Fusion. One bullet hit the hood just above the grill, one hit the lower grill and one hit below the driver's side headlight. RP 1541-1547. In addition to bullet fragments, there were a number of shell casings that were fired from that gun as well as unfired cartridge found at the scene. RP 1638-1667. In the cargo area of the Yukon police found empty shotgun and pistol ammunition boxes. RP 1460, 1742-1743. In the Yukon's front passenger compartment there was a nine-millimeter ammunition box. RP 1114, 1422, 1753.

The Jack-in-the-box security cameras captured some of the incident. Ex. 101; Ex. 129. The time stamp on the video was inaccurate, however. RP 1774.

### 3. Defense Case

Mejia and Williams met each other in Atlanta Georgia about five years earlier. They have a young son. RP 1930-1932. On the Halloween before the incident their home was broken into and ransacked. RP 1933, 2081. The break-in scared Mejia and Williams so Williams, who works nights, bought a .22 caliber gun for his wife for her protection. RP 1934, 2084. Williams also borrowed a nine-millimeter gun from his friend. RP 2084, 2095. Because of the break-in whenever the family returned home Williams would go inside first to make sure there was nobody there before he allowed the rest of the family inside. RP 1934-1935, 2083.

Williams testified that he and Mejia left Neppel's and were going to go back to Mejia's uncle's house to pick up their young son when he noticed a car was closely following them. Williams told Mejia, who was driving, to pull into the Jack-in-the-box drive through lane. RP 2093-2094.

Mejia's memory was effected by the head injury she suffered during the incident but she recalled that after she drove into the Jack-in-the box drive through lane she and Williams decided to leave so she put the

Yukon in reverse. There was a car behind her and people in the car yelled at her. RP 1942-1943. Mejia got out, walked towards the car and asked the driver to let her back out. Id. A man who was sitting in the back behind the driver got out of the car and he and Mejia started arguing. The man then pushed her and she fell back and hit her head and the ground. 1942-1943. When she got up off the ground another man came towards her from the right side of the car so she screamed for Williams to help her. RP 1943-1946.

Williams testified that as his wife started to back up, the car behind honked and a woman got out of the front passenger door and started screaming at them. RP 2097. Mejia then got out to ask the driver of the car to move. Williams, who was still sitting in the car, heard a woman swearing at Mejia and screaming what sounded like racial slurs. P 2094. A man then got out of the car and confronted Mejia. Williams thought that the people in the car might have intended to rob him and his wife because that sort of thing happened frequently in Compton where he grew up. RP 2100-2103.

Williams then saw the man swing at Mejia and Mejia screamed for help. RP 2104. He had never seen his wife hit before and his "heart dropped." RP 2109. Williams got out of the Yukon and two other men got out of the other car. RP 2105-2106. Williams confronted the man who

had attacked Mejia and a fight started. RP 2106-2109. The other men joined the fight, and consistent with Abolas's testimony Williams fell to the ground. The men then stomped on him and kicked him in the face as he tried to get up. RP 1950, 2110. As he was being beaten Williams noticed one of the men rummaging through his car and was afraid the man would find the gun Williams had in the car. RP 2112-2113. As the beating continued Williams also saw one of the men grab Mejia. RP 2115. Williams then momentarily blacked out. RP 2111. Mejia witnessed Williams's beating and was afraid the men were going to kill her husband. RP 1950.

The beating finally stopped and Williams got up off the ground and walked back to where Mejia was standing next to the driver's side of their car. RP 2116. Mejia was dazed but told Williams she was alright and he told her to get back into the car. Williams then walked over to the Fusion, which had moved further back, and screamed at the driver to back up so they could leave. Williams did not punch at anyone in the car but he did bang on the window. RP 2118-2119, 2190.

The car started to move and Williams started walking back to his car, however, when Williams turned around he saw one of the men from the other car walking towards him. RP 2120-2125. The man had a dark grey object in his left hand. RP 2126-2130. At that point Williams

noticed one of the other men attack Mejia again and she fell to the ground. RP 2144-2145. Williams heard Mejia say something about a gun when the man who was coming towards him grabbed Williams by the shoulder and hit him in the face with an object. RP 2131-2132. He dropped to the ground. RP 2134. When he got up off the ground he heard Mejia scream for help. He was scared. He ran to his car and grabbed the gun from passenger door where it was stored. RP 2134-2136. The gun was already loaded but Williams did not know how many bullets were in the gun. RP 2138.

After Williams got the gun he walked towards the other car and one of the men that had beaten him started coming towards him again. RP 2141, 2145. Williams was nervous, scared and afraid for Mejia's and his life. RP 2146-2148. Williams wanted to scare the attackers so he screamed that he had a gun and he cocked it. The man (Guerra) kept coming towards Williams and was cutting off Williams's access to Mejia so Williams cocked the gun again and fired warning shots. The man was undeterred so Williams shot again in the man's direction. RP 2149-2155. Williams testified he fired low because he did not want to kill anyone. RP 2153.

When Williams saw Guerra fall to the ground he told Mejia to get back in their car. RP 2155-2156. Williams got in the driver's seat and thought he heard gunshots so he quickly drove away. RP 2156, 2166.

Williams drove to Mejia's uncle's house. When they arrived at the house Mejia's uncle was in bed. Williams told Mejia's uncle he was jumped, and he dropped the gun on the bedroom floor. RP 2157-2158.

Williams testified that as a result of the beating he took, he was eventually taken to the hospital where he was treated for a concussion. RP 2159. While Jones was interrogating him he felt groggy and his head was pounding. RP 2160; 2284. Williams told Jones about the .22 he bought for his wife but he did not mention the nine-millimeter because Jones only asked him what guns he owned and he did not own the nine-millimeter. He had borrowed it from a friend. Williams explained his friend had also given him the box of ammunition that was found in his car. RP 2244-2246.

C. ARGUMENTS

1. THE COURT'S NONSTANDARD  
REVENGE/RETALIATION INSTRUCTION DENIED  
WILLIAMS'S HIS RIGHT TO A FAIR TRIAL.

The court instructed the jury that, "Justifiable homicide committed in the defense of the slayer, or 'self-defense' is an act of necessity. The right of self-defense does not permit action done in retaliation or revenge."

CP 73 (Instruction 26). The instruction effectively and improperly told the jury that even if Williams's subjectively feared imminent harm and that fear was reasonable his acts had to be necessary in fact, and that he could not claim self-defense if it found his acts were motivated by retaliation or revenge, even if those acts were in response to a reasonable fear of imminent harm. Because the instruction focused the jury on the objective element of a self-defense claim and did not properly qualify that the right of self-defense does not permit action done *solely* in retaliation or revenge, the instruction improperly shifted the burden of proof, was misleading, and when read in conjunction with the instructions as a whole failed to adequately convey the law on self-defense. As a result Williams was denied his right to a fair trial.

a. Self-defense Instructions and Standard Of Review

Due process requires the State to prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). An accused is entitled to proper instructions on self-defense whenever there is "some" evidence of the lawful use of force. State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). When self-defense is properly raised, the State is obligated to prove the absence of self-defense beyond a reasonable doubt. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d

177 (2009); State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984); State v. McCreven, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013).

This Court's review of a challenged jury instruction is *de novo*. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Self-defense instructions are subject to heightened scrutiny. State v. Woods, 138 Wn.App. 191, 197, 156 P.3d 309 (2007). Jury instructions must more than adequately convey the law of self-defense. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Self-defense instructions as a whole must make the relevant legal standard manifestly apparent to the average juror. State v. LeFaber, 128 Wn.2d at 900 (internal quotation marks omitted) (quoting State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (quoting State v. Painter, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980))), *abrogated on other grounds by* State v. O Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). Instructions that misstate the law of self-defense affect an accused Sixth and Fourteenth Amendment rights to due process and to a jury trial. Kyllo, 166 Wn.2d at 862; U.S. Const. amend. VI; U.S. Const. amend. XIV.

b. Instruction 26 Erroneously Conflated the Subjective and Objective Self-Defense and Defense of Other Standard

Evidence of the lawful use of force “is evaluated ‘from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.’” State v. Walden, 131 Wn.2d at 474 (quoting State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). This standard necessarily incorporates both subjective and objective elements:

The subjective portion requires the jury to stand in the shoes of the defendant and consider all the facts and circumstances known to him or her; the objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done.

Id.; *see also* Werner, 170 Wn.2d at 336-37.

The State proposed Instruction 26 from language in State v. Studd, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999), where an identical instruction was given. In Studd, petitioner Cook argued the instruction should not have been given because it was not an approved patterned instruction. The Court rejected that argument finding the instruction comported with the reasoning in Janes. It did not address whether the instruction was misleading, failed to adequately convey the law of self-defense, shifted the burden of proof or denied petitioner the right to present his self-defense claim.

The issue in Janes was whether the trial court failed to consider evidence that showed Janes' subjectively believed the need to act in self-defense in denying his self-defense claim. Janes, 121 Wn.2d at 236. The Janes Court ruled the trial court failed to consider the defense evidence in light of Janes' subjective knowledge and perceptions and that it "may have given undue consideration to the length of time between the alleged threat and the homicide; the justifiable homicide statute requires imminence, not immediacy." Id. at 242. In dicta, the Court also briefly discussed the objective element of self-defense. It commented that as a general proposition:

"The objective aspect also keeps self-defense firmly rooted in the narrow concept of necessity. No matter how sound the justification, revenge can never serve as an excuse for murder. '[T]he right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge.'" People v. Dillon, 24 Ill. 2d 122, 125, 180 N.E.2d 503 (1962).

Id. at 240.

The Court's observation, that as a general proposition a defendant is not entitled to claim self-defense if the defendant is the first aggressor or assaults or murders another in retaliation or revenge, does not mean the proposition can be properly incorporated into a jury instruction.<sup>2</sup> Here, the

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<sup>2</sup> See State v. Alexander, 7 Wn. App. 329, 335, 499 P.2d 263 (1972) ("The law is well established that the fact that certain language is used in an appellate court decision does not mean that it can be properly incorporated into a jury instruction."); see also State v. Williams, 28 Wn.App. 209, 212, 622 P.2d 885, *review denied*, 95 Wn.2d 1024 (1981).

instruction incorporating the Janes Court's observation denied Williams his right to a fair trial because it conflated and confused the subjective and objective elements of self-defense.

Under the subjective element of a self-defense claim, "the defendant's actions are to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable." State v. Wanrow, 88 Wn.2d 221, 240, 559 P.2d 548 (1977). Under the subjective element jurors were only required to find that Williams reasonably feared imminent harm to himself or his wife. Janes, 121 Wn.2d at 238-239. Given this subjective element, the jury did not need to find actual imminent harm. Id.

By telling the jury "'self defense' is an act of necessity," Instruction 26 directs the jury to find that Williams's acts were in fact necessary. The instruction effectively told the jury that even if Williams subjectively feared imminent harm and that fear was reasonable his acts nonetheless had to be necessary in fact. In other words, the jury was instructed that Williams's shooting was only justified if it found that act was objectively necessary. The objective element, however, only comes into play in determining what a reasonably prudent person would do in the same situation given all the facts and circumstances as they appeared to the defendant and the defendant's subjective fear of imminent harm. State

v. Walden, 131 Wn.2d at 474; State v. Graves, 97 Wn.App. 55, 62, 982 P.2d 627 (1999). The instruction's first sentence that "self defense is an act of necessity" removes any subjective element from the jury's evaluation of self-defense. The instruction improperly limited Williams's self-defense and defense of another claims to those acts the jury objectively believed were necessary in fact.

c. Instruction 26 Confused the Relevant Legal Standard, was Misleading, and Improperly Shifted the Burden to Williams to Prove he did not act in Self-Defense or in Defense of his Wife

The second sentence in the instruction that "[t]he right of self-defense does not permit action done in retaliation or revenge" is even more problematic in this case. Human beings can feel a myriad of emotions in response to a particular situation. Where, like here, a person is beaten and witnesses their spouse being assaulted, anger directed at those responsible is a normal human emotion. That emotion could lead to a desire to retaliate or to exact revenge. Anger, however, does not foreclose the emotion of fear where the person reasonably believes the perpetrators of the beatings and assault intend to inflict further imminent harm, and the normal human response is to protect himself or herself or spouse from that harm. Emotions of anger and fear are not mutually exclusive. An accused self-defense and/or defense of another claim can

not be defeated because he or she may feel other emotions so long as the accused reasonably fears imminent harm.<sup>3</sup>

Here, Williams may have experienced anger in response to the beating he took from Guerra and Urbina and for the assault on his wife, but he did not claim that he had a legal right to use force in retaliation for the assaults he and his wife suffered. He did not submit any evidence or advance any legal theory that would have permitted acquittal if he acted out of retaliation or sought revenge.

Williams testified that following the first beating he took and the initial attack on his wife, he saw his wife being assaulted again and when he started back to his car to get a gun to protect her, he was again attacked and the during the attack he was hit with an object his attacker was carrying. Following that attack he heard his wife scream for help and fearing for his life and his wife's life he retrieved the Beretta for protection. When he screamed he had a gun hoping that would stop the attackers Guerra came towards him with the object in his hands and

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<sup>3</sup> See RCW 9A.16.020(3) ("The use, attempt, or offer to use force upon or toward the person of another is not unlawful ... [w]hen used by a party about to be injured ... in preventing or attempting to prevent an offense against his or her person ... in case the force is not more than is necessary."); see also, 9A.16.050 (1) and (2) ("Homicide is justifiable when...(1) [i]n the lawful defense of the slayer, or his...wife ... when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or (2) [i]n the actual resistance of an attempt to commit a felony upon the slayer.")

blocked Williams from access to his wife. That is when he fired the gun. Williams testified that he was afraid that either he or his wife faced continued imminent harm, which led him to take action to protect both he and his wife from that harm.

These facts sufficiently established that Williams reasonably feared imminent harm to himself or his wife and that his action was a response to that fear. It is the province of the jury to decide whether he reasonably believed that he was in imminent danger of death or great bodily harm, in light of all the facts and circumstances known to him. State v. Kelly, 102 Wn.2d 188, 197, 685 P.2d 564 (1984) (citing Warrow, 88 Wn.2d at 234); see State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999) (the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses).

While the court's other self-defense instructions conveyed the law of self-defense, including the State's burden to prove absence of self-defense,<sup>4</sup> the instruction that, "[t]he right of self-defense does not permit action done retaliation or revenge", confused the relevant legal standard, was misleading and shifted the burden to Williams to prove his acts were *not* motivated by revenge or retaliation. If the instruction had read, "the right of self-defense does not permit action done *solely* in retaliation or

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<sup>4</sup> CP 62-66; CP 72.

revenge” it arguably would have adequately convey the proper legal standard in conjunction with the other self-defense instructions. It did not.

The instruction effectively told the jury that if Williams acted in retaliation or out of revenge, even if he also feared for his and his wife’s life, he was not entitled to claim self-defense or defense of another. That is what the State the argued. RP 2691. The instruction had the effect of telling the jury that if it believed Williams’s acts were motivated by retaliation or revenge it need not even consider whether his acts were reasonable or whether the State proved the absence of self-defense, because Williams had no right to even claim self-defense, even if the jury also believed he reasonably fear that he and his wife faced imminent harm.

A “ ‘jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.’ ” Walden, 131 Wn.2d at 473, 932 P.2d 1237 (quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). A constitutional error cannot be deemed harmless unless it is harmless beyond a reasonable doubt. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998). Because the instruction likely foreclosed the jury from considering Williams’s self-defense claim, was misleading and shifted the burden proof, the improper instruction was not harmless beyond a reasonable doubt and Williams’s

convictions should be reversed and remanded for a new trial. Werner, 170 Wn.2d at 337-338.

d. Instruction 26 was an Unconstitutional Comment on the Evidence

Judges may not “charge juries with respect to matters of fact.” Const. art. IV, § 16. A judge can neither convey a personal attitude nor instruct jurors that factual matters have been established as a matter of law. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The comment need not be expressly made; it is sufficient if it is implied. Id. A statement is a judicial comment if the court’s attitude can be inferred. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); *accord* State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

Judicial comments are presumed prejudicial and are only harmless if the record affirmatively shows no prejudice could have resulted. Levy, 156 Wn.2d at 725. This is a higher standard than that normally applied to constitutional errors. Id.

One of the State’s theories of the case was that Williams acted out of revenge. RP 2586, 2691. Instruction 26 commented on the evidence by conveying to the jury that the judge believed Williams acted out of

revenge or retaliation, it unduly emphasized the State's theory of the case<sup>5</sup>, and, as previously shown, it undermined the subjective element of the self-defense standard.

This was not a case where Williams was beaten and his wife assaulted and he later got a weapon and then went looking for the attackers. The entire transaction occurred in minutes. There was no direct evidence that Williams's actions were motivated by revenge. Evidence Williams acted in retaliation or out of revenge required inferring that Williams was angry because of the assaults and from that inference to the further inference that his anger motivated his actions. Jurors could have interpreted the instruction as an indication the judge drew those inferences and believed that the evidence proved Williams acted in retaliation or out of revenge.

e. Williams's Convictions Should be Reversed

The instruction directed the jury to Williams's defenses to the homicide ("Justifiable homicide..."). The court, however, also instructed the jury on transferred intent. CP 71 (Instruction 24).<sup>6</sup> That instruction told the jury that if Williams intended to assault another but harmed a third

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<sup>5</sup> In charging the jury, the trial judge should avoid instructions that unduly emphasize or minimize one party's theory of the case. 13 Ferguson, Wash. Prac., Criminal Practice and Procedure, § 3909 (3d ed. 1989).

<sup>6</sup> "If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with the intent to assault the third person." CP 71.

person, he was deemed to have acted with the intent to assault the third person. Id. By denying Williams's self-defense of defense of his wife claims, the jury necessarily found the intent element of second degree murder satisfied, and therefore it likely found the intent element of first degree assaults under the transferred intent instruction. Thus, the erroneous Instruction 26 infected the jury's assault convictions as well as the murder conviction.

In sum, Instruction 26 was a comment on the evidence, overemphasized the State's theory of the case, undermined the subjective element of the self-defense standard, was confusing and misleading, and relieved the State from proving Williams did not act in self-defense or defense of another. Williams's convictions should be reversed.

## 2. PROSECUTORIAL MISCONDUCT IN CLOSING DEPRIVED WILLIAMS OF A FAIR TRIAL.

During closing argument the prosecuting attorney told the jurors:

I would just suggest to you that when you've had a chance to fully discuss the case and you've got a decision to make and, you know, you might have a doubt about something. But if you can't assign a reason to that doubt, if you can't articulate or talk about what that doubt is, at that time you're beyond a reasonable doubt.

RP 2563.

This argument ran afoul of several recent Washington Supreme Court and Court of Appeals decisions barring such arguments. In light of

these decisions, this Court should hold the prosecutor's misconduct was flagrant and ill intentioned, and reverse.

Prosecutors are officers of the court and have an independent duty to ensure the accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When there is a substantial likelihood that improper comments affected the jury's verdict, the accused's rights to a fair and to an impartial jury are violated. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

It is improper for a prosecutor to argue that jurors must have a reason for having a reasonable doubt because the law does not require that a reason be given for a juror's doubt. State v. Kalebaugh, 183 Wn.2d 578, 585, 355 P.3d 253 (2015). This type of misconduct has typically occurred through so-called fill-in-the-blank arguments, which imply that jurors must be able to articulate its reasonable doubt by filling in the blank and, in turn, subtly shifts the burden to the defense. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

In State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011) *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012), for instance, the prosecutor argued, "If you were to find the defendant not

guilty, you have to say: I had a reasonable doubt[.] What was the reason for your doubt? My reason was \_\_\_\_\_.” Walker, 164 Wn. App. 731-32 (quoting clerk’s papers). The Walker court held that “[e]ven if the prosecutor’s comments did not qualify as a fill-in-the-blank argument, his PowerPoint slide told the jury it had to articulate a reason before it find Walker not guilty . . . .” Id. at 731. This shifted the burden of proof to Walker. The prosecutor’s comments were improper. Id. at 732.

In State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), the prosecutor argued that in order to find Anderson was not guilty jurors had to say, “I don’t believe the defendant is guilty because, and then you have to fill in the blank.” Anderson 153 Wn. App. at 431. The Anderson court stated that arguments telling jurors they must articulate a reason for having reasonable doubt constituted misconduct:

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find Anderson not guilty, the prosecutor made it seem as though the jury had to find Anderson guilty unless it could come up with a reason not to. Because we begin with the presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that Anderson was responsible for supplying such a reason to the jury in order to avoid conviction.

Id.

Similarly, in State v. Venegas, 155 Wn.App. 507, 228 P.3d 813 (2010), the prosecutor stated, “ ‘In order to find the defendant not guilty,

you have to say to yourselves: “I doubt the defendant is guilty, and my reason is—blank.’ ” Id. at 523. The Venegas court concluded that in employing an improper “ ‘fill-in-the-blank’ ” argument, the prosecutor risked reversal of its conviction. Id. at 523–24.

Like the improper fill-in-the-blank argument, in Williams’s trial the prosecutor told jurors that, in order to have a reasonable doubt, they must be able to point to a reason to doubt. In other words, the prosecutor told jurors acquittal required the articulation of a reason. This shifted the burden to Williams to supply the jurors with a reason to avoid conviction otherwise, according to the prosecutor, the jury was required to return a guilty verdict. The prosecutor’s argument that jurors must be capable of articulating a reason to doubt shifted the burden of proof to Williams, and therefore constituted misconduct. Emery, 174 Wn.2d at 759-60; Walker, 164 Wn. App. at 731-32.

Where, as here, defense counsel does not object to prosecutorial misconduct, reversal is required when the misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Where case law and professional standards are available to the prosecutor and clearly warned against the conduct, such conduct meets the flagrant and ill intentioned standard. In re Pers. Restraint of Glasmann, 175 Wn. 2d 696,

707, 286 P.3d 673 (2012). Here, the prosecutor had the benefit of Emery, Anderson, Walker, and Venegas, each of which held that articulation-of-reasonable-doubt arguments were improper. This Court should hold the prosecutor to the knowledge these cases imputed to his office and the prosecutor's argument was flagrant and ill intentioned.

The flagrant and ill intentioned standard requires reversal where no instruction could have cured the resulting prejudice and the resulting prejudice had a substantial likelihood of affecting the jury verdict. Emery, 174 Wn.2d at 760-61. Here, no instruction was capable of curing the prosecutorial misconduct. At Williams' trial, the court gave the standard reasonable doubt instruction, WPIC 4.01<sup>7</sup>, which reads, in part: A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. CP 50 (Instruction 4). The Washington Supreme Court requires trial courts to give this instruction in every criminal case, at least until a better instruction is approved. State v. Bennett, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007). A reasonable juror could read the instruction to require a reason for the doubt as opposed to a doubt based on reason.

Jury instructions must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average

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<sup>7</sup> 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008).

juror. State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417 (2007) ( quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). Any attempt at a curative instruction informing jurors that they were not required to articulate a reason to acquit would have conflicted with the reasonable doubt instruction that told the jury a reasonable doubt is one for which a reasons exists. In this circumstance any curative instruction would have engendered confusion on how to apply the law as instructed.

The prejudice flowing from the prosecutor's improper argument had a substantial likelihood of affecting the jury's verdicts. Williams's defense to the three assaults and murder was self-defense and defense of his wife, and the jury was instructed on those defenses. CP 62-63. The instructions correctly allocated to the State the burden of proving beyond a reasonable doubt the absence of these defenses. Id; State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Application of the reasonable doubt standard was critical to Williams's defenses. By telling the jurors that they had to articulate a reason for doubting the State failed to prove the absence of Williams's defenses it shifted the burden from the State to Williams to prove his defenses. Thus, the improper argument likely affected the verdicts, particularly in conjunction with the erroneous "necessity/retaliation/revenge" instruction limiting Williams's defense

claims to those acts the jury objectively believed were necessary in fact and requiring Williams to prove he was not angry or upset because of the assaults on he and his wife. Williams's convictions should be reversed.

### 3. APPELLATE COSTS SHOULD BE DENIED

Appellate courts have discretion to deny appellate costs . RCW 10.73.160(1); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612, *review denied*, 185 Wn.2d 1034, 377 P.3d 733 (2016). In the event Williams does not prevail in this appeal, this court should deny any request by the State for appellate costs.

The trial court determined Williams was indigent and entitled to appellate representation and the creation of the appellate record at public expense. CP 125-128; 1RP 134. Based on this determination, Williams is presumed indigent throughout this review. RAP 15.2(f); see Sinclair, 192 Wn. App. at 393 (“We have before us no trial court order finding that Sinclair s financial condition has improved or is likely to improve . . . . We therefore presume Sinclair remains indigent.”).

Moreover, under a recent amendment to RAP 14.2, “When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have

significantly improved since the last determination of indigency.” Williams is incarcerated and serving a 40 year sentence. He has also ordered to pay \$6,350 in restitution and costs. CP 134-135.

Williams is indigent as found by the trial court. Given that Williams is incarcerated and serving a 40-year sentence the State, and is now ordered to pay restitution and fees, it will be unable to show by a preponderance of the evidence a significant improvement in Williams’s financial circumstances since the trial court’s determination he is indigent and entitled to an appeal a public defense. Thus, should the State request appellate costs if this Court finds the State is the substantially prevailing party, this Court should deny the request.

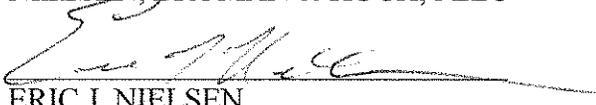
D. CONCLUSION

The court's "necessity/revenge/retaliation" instruction and the prosecutor's improper closing argument denied Williams's his right to a fair trial. Williams's convictions should be reversed.

DATED this 9<sup>th</sup> day of June, 2017.

Respectfully submitted,

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State V. Jason Williams

No. 34837-7-III

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

  
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