

NO. 34837-7-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON DONTE WILLIAMS, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- A. WILLIAMS DID NOT OBJECT TO THE REVENGE/RETALIATION INSTRUCTION ON THE MIXED-MOTIVE GROUNDS HE ARGUES HERE. DID WILLIAMS FAIL TO PRESERVE HIS CLAIM OF ERROR ON INSTRUCTION 26, WHICH, WHEN CONSIDERED IN THE CONTEXT OF THE EVIDENCE, THE COMPLETE SET OF JURY INSTRUCTIONS, AND THE ARGUMENTS OF COUNSEL, ACCURATELY STATED THE LAW AND STANDARDS GOVERNING SELF-DEFENSE? (ASSIGNMENT OF ERROR NO. 1)
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II. STATEMENT OF THE CASE¹

The State adopts and supplements the facts recited by appellant Jason Donte Williams in his Statement of the Case. RAP 10.3(b). The State's additional relevant facts are cited in the argument section below, as needed.

¹ The State follows Mr. Williams's designation of the record, citing to the 13 volume verbatim report of proceedings of the August 25 through September 13, 2016 pretrial hearings and trial as RP at __. 1RP at __ refers to the single volume verbatim report of proceedings of the August 17 and 22, 2016 pretrial hearings and the November 2, 2016 sentencing hearing.

III. ARGUMENT

A. WILLIAMS DID NOT OBJECT TO THE REVENGE/RETALIATION INSTRUCTION ON THE MIXED-MOTIVE GROUNDS HE ARGUES HERE. WILLIAMS FAILED TO PRESERVE HIS CLAIM OF ERROR ON INSTRUCTION 26, WHICH, WHEN CONSIDERED IN THE CONTEXT OF THE EVIDENCE, THE COMPLETE SET OF JURY INSTRUCTIONS, AND THE ARGUMENTS OF COUNSEL, ACCURATELY STATED THE LAW AND STANDARDS GOVERNING SELF-DEFENSE

1. *Williams waived his claim of instructional error when he failed to object at trial on the mixed-motive grounds now asserted. He cannot show manifest constitutional error under the facts of this case. This Court should refuse to entertain his claim of error.*

Instruction 26 told the jury: “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. Williams objected to Instruction 26 at trial, but not on the mixed-motive grounds he now argues. RP 2476-79. He did not assert he was in any way angry or vengeful in addition to being reasonably afraid for himself and his wife. *Id.* He did not suggest the court insert “solely” in the second sentence between “done” and “in retaliation,” or in any other way narrow the language lifted verbatim from *State v. Studd*, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999).

Appellate courts generally refuse to entertain a claim of error not raised in the trial court “unless it relates to ‘a manifest error affecting a

constitutional right.’ ” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) (quoting RAP 2.5(a)(3)²). “The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *Id.* (citing *Seattle v. Harclaon*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960)).

This general rule specifically applies to claimed jury instruction error in criminal cases through CrR 6.15(c),³ the rule requiring counsel and the defendant to afford the trial court opportunity to correct any error by making timely and well stated objections. *Id.* (citing *Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976); *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 97 S. Ct. 1730 (1977) (describing analogous federal rule)). Parties are required to “state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused.” CrR 6.15(c). “The rule comes from the

² RAP 2.5(a)(3) provides in pertinent part: “(a) Errors raised for first time on review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right.”

³ CrR 6.15(c) provides: “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.”

principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter.” *State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756, 760 (2009) (citing *Harclaon, supra*, 56 Wn.2d at 597).

That did not happen here. Here, Williams did not comply with CrR 6.15(c). He failed to raise the mixed-motive argument when he objected to Instruction 26. He opposed the instruction because, in the press of trial, defense counsel had been unable to find the cited language in the *Studd* opinion and asserted if it was there, it was dicta.⁴ RP 2475. In failing to object below on the grounds now asserted, Williams deprived the trial court of the opportunity to evaluate the merit of this claim of error. He has not preserved this issue for review unless he can demonstrate giving the instruction was a manifest constitutional error. RAP 2.5(a)(3). It is not.

Williams throws a constitutional blanket over his entire argument, asserting “[a] jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.” Br. of Appellant at 27 (citing *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) (internal quotation marks omitted)). He speculates: “the

⁴ Jury instructions underwent a number of iterations as the parties addressed them piecemeal during trial breaks. The State does not disparage defense counsel for failing in the midst of trial to immediately put his finger on *Studd’s* discussion of these two sentences.

instruction *likely* foreclosed the jury from considering Williams's self-defense claim, was misleading and shifted the burden proof[.]” *Id.* (emphasis added).

To support this speculation, Williams misrepresents the State's closing argument, claiming the State told the jury *even if Williams feared for his and his wife's life*, he was not entitled to claim self-defense or defense of another if he acted out of retaliation or revenge. Br. of Appellant at 27 (emphasis added), citing RP 2691. The State said nothing of the sort. At that location in the record, the State said:

[t]he state is saying to you in this case, under these facts and what happened here, that Mr. Williams acted deliberately, he acted out of revenge, frankly, he's just been in two fights with Mr. Guerra, had lost those, and he was exacting his revenge. And in retaliation for what had been done to him.

RP 2691. Nowhere did the State did tell jurors a legitimate claim of self-defense could be defeated if they found Williams acted out of revenge and retaliation. The State never argued “that if [the jury] 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.” Br. of Appellant at 27. At no point did the State assert “Williams had no right to even claim self-defense, even if the jury also believed he reasonably fear [sic] that he and his wife faced imminent

harm.” *Id.* Instead, the State’s argument boiled down to: “[T]he fight was over. The fight had been over for some time. Mr. Williams made a conscious choice after that second fight was over to go get a gun. There was no threat to his wife going on as he suggests.” RP 2690.

Exceptions to RAP 2.5(a) must be construed narrowly. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (citing *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)). “To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest and (2) the error is truly of constitutional dimension.” *O’Hara, supra*, 167 Wn.2d at 98, (citing *Kirkman*, 159 Wn.2d at 926).

Assuming *arguendo* an error affecting self-defense instructions implicates a constitutional interest, the next question is whether any error here was manifest. *Id.* For the error to be “manifest,” Williams must show actual prejudice. RAP 2.5(a)(3). Actual prejudice, in turn, requires a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* (internal quotation marks omitted) (quoting *Kirkman, supra*, 159 Wn.2d at 935).

Whether consequences are identifiable depends on the sufficiency of the trial record. *Id.* “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.’ ” *Id.* (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

Williams asserts Instruction 26 should have stated: “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 *solely* in retaliation or revenge.” Br. of Appellant at 19 (emphasis in original). But neither side’s theory of the case contemplated a mixed-motive slaying. Williams testified and argued he was terrified for himself and his wife, did not want to fight, and only intended to fire warning shots when he killed Guerra. RP 2151-54. The State argued Williams executed Guerra after the fight was over, when no reasonable person would perceive ongoing danger. RP 2690-91. While each side is entitled to instructions embodying its theory of the case, “it is error to give an instruction which is not supported by the evidence.” *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289, 303 (1993) (citing *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986)). Neither side presented a mixed-motive alternative scenario in which Williams was both fearful and angry.⁵ Insertion of the word “solely” would have been confusing to the

⁵ During the conference concerning Instruction 26, the State argued because there was mixed *evidence* concerning *which party was the actual first aggressor*, Instruction 26 appropriately helped the jury understand self-defense is different than retaliation or revenge. RP 2476-77. Neither side argued Williams’s *motives* might have been mixed. *Id.*

jury, contrary to the parties' evidence and arguments, and contrary to the language approved in the *Studd* opinion.

Williams apparently chose not to argue his motives might have been a mix of reasonable fear and anger-driven revenge because that fact pattern is inconsistent with his theory of the case—that he shot at Guerra solely in self-defense, and only as a warning, out of reasonable fear for his safety and the safety of his wife, and that he had no intent to kill his attacker. RP 2151-54. The instruction as given allowed him to argue his theory of the case. He fails to show how the approved language of the retaliation-revenge instruction, in the context of this trial, actually affected his rights; “it is this showing of actual prejudice that makes the error ‘manifest’, allowing appellate review.” *McFarland, supra*, 127 Wn.2d at 333 (citing *Scott, supra*, 110 Wn.2d at 688; *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992)).

Williams did not preserve his challenge to Instruction 26. This court should decline to review his assertions of error.

2. *The first sentence of Instruction 26, considered in the context of all jury instructions and argument of counsel, does not conflate the objective and subjective standards of self-defense and defense of others.*

Williams argues the first sentence of Instruction 26, that “self-defense is an act of necessity,” removed the subjective element of his own

perceptions and perspective from the jury's consideration by conflating the objective and subjective standards of self-defense and defense of others. Br. of Appellant at 23-24. He claims "[t]he instruction effectively told the jury that even if [he] subjectively feared imminent harm *and that was reasonable* his acts nonetheless had to be *necessary in fact*." *Id.* (emphasis added). His argument should be rejected.

Williams invites this Court to isolate the first sentence of Instruction 26, ignore the second sentence, ignore the remaining jury instructions, and disregard argument of counsel. "Jury instructions are to be read as a whole and each instruction is read in the context of all others given." *State v. Brown*, 132 Wn.2d 529, 605, 940 P.2d 546 (1997). The jury was given a comprehensive packet of instructions concerning self-defense, starting with Justifiable Homicide—Defense of Self and Others, 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.02 (WPIC). CP 62. This instruction, Instruction 16, told the jury it should find the slaying of Christian Guerra justified if Williams (1) reasonably believed Guerra or his friends intended to inflict death, great personal injury, or substantial bodily harm upon either Williams or his wife; (2) reasonably believed danger of such harm was imminent; and (3) used the force and means a reasonably prudent person would use "under the same or similar conditions as they reasonably appeared to [Williams],

taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.” *Id.* Instruction 17 repeated the justifiable homicide conditions for homicide committed in the actual resistance of an attempt to commit a felony. CP 63.

Early in his closing remarks, the prosecutor said: “Keep in mind the burden of proof is always at this table. The burden of proof never shifts to the defense table.” RP 2563. He continued: “The defense brings up self-defense, but that issue doesn’t stay there, that issue comes over to this table, the State’s table, and the State has the burden of proof to disprove self-defense beyond a reasonable doubt.” *Id.*

After reviewing testimony and other evidence with the jury, the prosecutor said: “I’ve got another component in this case that makes it, you know, something that you’re going to really have to think about. And that is the instructions on justifiable homicide and self-defense.” RP 2582. He said: “Instruction 16,” then paused to remind the jury “the state must disprove self-defense or defense of others beyond a reasonable doubt.” RP 2583. He argued:

[Y]ou do have to take into account, *place yourself in the defendant’s shoes*, but that word reasonable is there again, and *the defendant has to reasonably believe that death or great personal injury is imminent to him*. In addition, the force and means have to be reasonable. *It has to appear to the slayer that the force and means are reasonably necessary.*

Id. (emphasis added). Instruction 18, WPIC 16.04.01, focused on the actor's perceptions, stating: "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 64. Instruction 19, WPIC 16.07, also emphasized the actor's subjective perception:

"A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another 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 65 (emphasis added). The prosecutor explained, "there doesn't have to be actual danger. But the defendant has to have a good faith and reasonable grounds for acting if there is no actual danger." RP 2584. That the jury must consider Williams's viewpoint was also clearly stated in Instruction 20, WPIC 17.05:

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 he is being attacked to stand his ground and defend against such attack by the lawful use of force. The law does not impose a duty to retreat.

CP 66; RP 2519. Toward the end of his direct closing argument, the prosecutor again emphasized the subjective component when he

summarized Williams's defense, saying: "The defendant says that the killing of Christian Guerra was justified, that if you stand in my shoes and know what I know and experience what I experienced, you will agree with me that the killing of Christian Guerra is justified." RP 2590.

Of course, defense counsel also emphasized the evidentiary weight of Mr. Williams's perspective. He told the jury, "[T]he law favors Jason in this entire case. . . . Jason is entitled to act on appearances. Of course he is. Jason is entitled to act on appearances in defending himself or another. If he believes in good faith that it happened, and he certainly did believe that." RP 2616-17. Counsel continued:

He later believed that he was in danger, actual danger, great personal injury, even though it develops afterwards that he was mistaken as to the extent of the danger. That's what Instruction 19 means. He may have been mistaken that these people were tailgating, he may not be mistaken. Who knows?

RP 2617. Later, counsel described the beatings Guerra inflicted on Williams, saying: "It also tells you what should be going through Jason's [head]. If it was you, if it was you, what would be going on through your mind is that I'm going to get my butt kicked again. I'm scared for me." RP 2643. Counsel argued his client was "scared for his wife." *Id.* He said: "And remember, the jury instruction says he can rely on appearances. The law favors Jason." RP at 2645.

Describing the earlier assault on Williams’s wife, counsel told the jury: “Jason is entitled to fear for another assault to come.” RP 2648. After reciting events immediately leading up to Guerra’s shooting, defense counsel again said: “So he is entitled, entitled, the jury instructions say he is entitled to these appearances.” RP 2650. Counsel argued lack of evidence of a second gun did not prove Guerra was unarmed, then said: “And don’t forget, [Guerra] did not have to have it, a deadly weapon, if it appeared to Jason that he did.” RP 2652.

Division Two of the Court of Appeals rejected a mixed-motive challenge to a similar instruction which stated: “The right of self defense does not permit action done in retaliation or revenge.” *State v. Miles*,⁶ No. 46633-3-II, <https://www.courts.wa.gov/opinions/pdf/466333> at 12 (Wash. Ct. App. Aug. 16, 2016). There, the defendant argued the instruction “misstated the law regarding killings ‘done in retaliation’ because [e]ven if the slayer has other thoughts or feelings, a homicide is justifiable if it qualifies as self-defense.” Division Two disagreed, citing the Supreme Court’s approval in *Studd. Id.* at 12-13. “There is a fundamental distinction between actions taken to retaliate and actions taken in self-

⁶ Cited pursuant to GR 14.1 This decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. *Crosswhite v. Wash. Dep’t of Social and Health Services*, 197 Wn.App. 539, 544, ___ P.3d. __ (2017)

defense, and that distinction revolves around the reasonable anticipation of imminent danger.” *Id.* at 13 (citing *State v. Janes*, 121 Wn.2d 220, 240 850 P.2d 495 (1993)). The Court found the instruction, considered in the context of the court’s instructions as a whole, “adequately conveyed this distinction.” *Id.*

In the context of all the other jury instructions related to justifiable homicide, and considering the focus on Williams’s subjective viewpoint argued by both sides, there is no possibility any juror could have thought the law limited Williams’s claim of justifiable homicide to acts the jury believed were objectively necessary in fact.

c. The second sentence of Instruction 26, considered in the context of the evidence, all jury instructions, and the arguments of counsel, accurately stated the law and did not shift to Williams the burden of proving self-defense/defense of others.

Williams next isolates the second sentence of Instruction 26: “The right of self-defense does not permit action done in retaliation or revenge.” Br. of Appellant at 24. Now focused only on the second sentence, he reiterates his complaints about the first sentence. As argued above, taken in context with the remaining self-defense instructions, Instruction 26 in its entirety did not confuse the relevant legal standard for justifiable homicide. In particular, Instruction 19 eliminated the possibility of an adverse inference by stating: “Actual danger is not necessary for a

homicide to be justifiable.” CP 65. Nothing in the record indicates Instruction 26 effectively told the jury Williams had no right to claim self-defense if it found his acts were done in reasonable fear of imminent, serious harm but were also motivated by anger.

Williams’s failure to raise this objection at trial is consistent with his theory of the case. Williams asserted his only motivation was fear for himself and his wife. He testified that after his first beating, he approached the white car and banged on the closed rear passenger window, screaming at the occupants to move their car and let him and his wife leave. RP 2118. He denied punching Guerra through an open window. *Id.* “I was just banging on the window like back up the car, let us go.” *Id.* He denied any interest in fighting at that point. RP 2119. He denied ordering Guerra out of the car or telling Guerra he was going to kick his ass. RP 2191.

Williams specifically denied trying to shoot Guerra, claiming he cocked his weapon and fired at Guerra—two times—only as warning, to try to get Guerra to stop. RP 2151. He claimed Guerra was threatening him as he advanced, “like, I’ll come and get you, like MF, you know.” RP at 2153. “I was just trying to shoot low. I didn’t want to - - I didn’t want to kill the man. That wasn’t my objective at all.” RP 2153-54. He said: “I was just trying to stop them from assaulting me and my wife.” RP 2154. He told the jury he fired the gun as his last resort. *Id.* He said he felt secure

for himself and his wife only when Guerra dropped to the ground after the second shot. RP 2155. Williams said he was still scared as he and his wife fled the drive-through by driving over the curb. RP 2252. At no point did Williams say he was angry or that he wanted to get back at Guerra for the beatings. RP 2079-2194; 2241-2305.

Williams now knows the jury did not accept his version of events. Now, he urges this Court to take human nature into account when considering the circumstances surrounding his beatings and the assault on his wife, and find he probably was angry because “anger directed at those responsible is a normal human emotion. That emotion could lead to a desire to retaliate or exact revenge.” Br. of Appellant at 24. That is, Williams asks this Court to determine he might have been angry and his anger might have led to a desire to retaliate while, at the same time, he reasonably feared imminent harm.

To find prejudice, this Court must conclude the jury (1) recognized human nature and discounted Williams’s express denial of being angry; (2) also concluded Williams reasonably feared imminent, serious harm; and (3) disregarding all other jury instructions and argument of counsel, felt constrained to convict by an isolated sentence in a single instruction.

Williams cannot use the appeal process to convert his unsuccessful defense strategy—“I was not at all angry. I was scared”—to an entirely

different theory—"I might have been angry but I was still scared." Under RAP 2.5, "[t]he general rule is that one cannot voluntarily elect to submit his case to the jury and then, after an adverse verdict, claim error which, if it did exist, could have been cured or otherwise ameliorated by some action on the part of the trial court." *State v. Rinkes*, 70 Wn.2d 854, 859, 425 P.2d 658 (1967) (citing *State v. Perry*, 24 Wn.2d 764, 167 P.2d 173 (1946)). Two policies are behind the preservation of error doctrine. One, as discussed previously, is that parties are obligated to draw attention to errors, issues, and theories to afford the trial court opportunity to correct errors and omissions at the trial level. *In re Det. of Audett*, 158 Wn.2d 712, 725-26, 147 P.3d 982 (2006).

An even more important factor, however, is the consideration that the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

Id. at 726 (quoting 2A Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE RAP 2.5(1), author's cmt. 1 at 192 (6th ed. 2004)).

It is even less appropriate for Williams to claim a new theory of the case, and resulting error, based on speculative "facts" directly contradicting his own testimony. This Court should find Instruction 26 accurately stated the law as it relates to the facts of this case and the

theories and arguments of the parties at trial and deny review of alternative theories raised for the first time on appeal.

- d. Instruction 26 is not an unconstitutional judicial comment on the evidence and does not unduly emphasize the State's theory of the case. The remaining instructions precluded any potential for speculation concerning the judge's personal opinions.*

Williams's assertion that Instruction 26 was an unconstitutional judicial comment on the evidence is unsupported by Washington law and the facts of this case. He asserts that because the entire incident took only a matter of minutes from the first assault to Williams's firing twice at Guerra, jurors *could have* interpreted the instruction to mean the judge had personally drawn the inference "Williams was angry because of the assaults and from that inference to the further inference that his anger motivated his actions."⁷ Br. of Appellant at 29. He argues the jury could have interpreted the instruction to mean the judge believed the evidence proved retaliation or revenge. *Id.*

This objection was not raised below, and for reasons argued previously, should not be entertained here.

⁷ This is the inference Williams now urges upon this Court in his "human nature" argument.

The argument also is contrary to law. The law and reasoning underlying Instruction 26 comes from *State v. Janes, supra*, where our Supreme Court said:

the objective aspect . . . 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.”

121 Wn.2d at 240 (quoting *People v. Dillon*, 24 Ill. 2d 122, 125, 180 N.E.2d 503 (1962)). The Supreme Court quoted this language when it upheld a jury instruction using the same language as Instruction 26. *State v. Studd, supra*, 137 Wn.2d at 550. In *Studd*, the Court held “that the instruction correctly stated the law, and did not unfairly emphasize the State’s theory of the case or, in any way, comment upon the evidence.” *Id.* at 550.

The fact that Williams shot Guerra within a minute or so of his second beating forced the jury to confront a less clear-cut case of retaliation than if he left the scene and came back later with a gun. Williams does not explain how the more challenging decision could have led the jury to think the judge had adopted the State’s theory of the case when, immediately after the jury was seated and before opening statements, the judge told the jury his “reaction to witnesses, testimony or

exhibits is not evidence.” RP 405. Reading from the preliminary instruction, the judge said: “If it appears to you that I convey a message, whether by words or conduct, of my opinion on the believability of a witness, or the proper weight to be given some evidence, you should completely disregard that apparent message. It is not evidence.” RP 405-06.

Before closing argument, the court read Instruction 1, WPIC 1.02, emphasizing again the court rendered no comment on the evidence in the case. The instruction read:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of the testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during the trial *or in giving these instructions*, you must disregard this entirely.

CP 46-47; RP 2508 (emphasis added). During closing, the State talked about Instruction 1 and the judge’s role as a gatekeeper, deciding which evidence comes in and which evidence stays out. RP 2557.

But the judge has not intentionally told you what to think about that evidence. In fact, there’s an instruction that says, you know, if you think the judge has commented on the evidence, just disregard that, and it’s up to you to decide how important the evidence is. The judge says it comes in or comes out, but doesn’t tell you what to think about it.

RP 2558.

Instruction 26 accurately stated the law. The judge told the jury he expressed no personal opinions whatsoever. The State emphasized that point. Jurors are presumed to follow the court's instructions. *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). There is no basis to believe the jury got itself all confused and convicted Williams after concluding the judge thought he was guilty.

5. *Instruction 26 could not have "infected" the three assault verdicts because substantial evidence demonstrated Williams intended to fire at someone or something other than Guerra when he plugged three bullets into the front of the occupied Fusion.*

Williams's final claim of instructional error is that the combined influence of Instruction 26 and the transferred intent instruction, WPIC 10.01.01, infected Williams's three convictions for first degree assault. Br. of Appellant at 30. First, he asserts Instruction 26 "denied" Williams's self-defense claims, forcing the jury to find he intended to kill Guerra. *Id.* From that, he argues the jury "likely" satisfied the intent element of each of the three assault convictions by transferring his intent to kill Guerra to an intent to assault three other people, two inside the Fusion and one on across the car from Guerra who happened to be assaulting Williams's wife. *Id.* The argument fails. Williams cannot demonstrate how interplay between the revenge/retaliation instruction and the instruction on transferred intent could have caused the jury to believe Williams intended

to shoot Guerra when he fired directly at the Fusion as Guerra stood off to one side. Williams testified he could see a male assaulting Williams's wife by the rear of the Fusion as Guerra approached from the other side. RP 2142-43. He said his wife was screaming for help and he saw her hit the ground after the man hit her. RP 2144. That was when he went to his vehicle, got his gun, and started walking back toward the Fusion. RP 2145. He said he knew he had to protect his wife. RP 2147. His wife and her attacker were on the side of the Fusion opposite the side Guerra was on. RP 2152.

There were three bullet "defects" in the front of the Fusion. RP 1531. One was on the hood, just above the grill. RP 1541. One was low on the grill, between the driver-side headlight and the Ford insignia. RP 1545. That bullet continued through the radiator and possibly into the transmission. RP 1546. A graze defect over the top of the hood was a bullet strike. RP 1545, 1547. Trajectory rods showed Williams was "obviously" standing in front of the vehicle when he fired all three shots. *Id.* Guerra was not standing in front of the Fusion when Williams shot him. He was standing to the driver's side, in line with the front quarter panel. RP 1890. Mr. Urbina and Williams's wife were diagonally opposite, at the rear passenger side of the car. RP 1889.

During jury instruction conference, Williams argued the transferred intent instruction was irrelevant “as it applies to the Fusion, the three gunshots to the Fusion.” RP 2472. The State pointed out one of the three passengers in the Fusion was injured by “what he believed to be a bullet fragment strike to his arm, that . . . he did not have that injury prior to the shots being fired[.]” RP 2472. The State recounted Williams’s testimony that he was focused on his wife, who was screaming from the side of the Fusion opposite Guerra, and whom Williams believed was being assaulted by the other male passenger, Mr. Urbina. RP 2473. The State recited other trial evidence, including a video showing Williams pointing his pistol horizontally at the Fusion, not at the sky or at the ground. *Id.* The State concluded: “So he may have intended to assault Mr. Urbina, because he perceived that Mr. Urbina was assaulting [Williams’s] wife, and that that [intent] is transferred to anybody who suffered as a result of that assault.” RP 2473-74. After the State went through this evidence, defense counsel said: “Your Honor, we don’t have strong opposition to [the transferred intent] instruction. We’re satisfied with that.” RP 2475.

In closing, defense counsel emphasized all Williams’s shots were fired low. “His testimony was he shot [Guerra] first low, and he tried to shoot low. *And he shot the car low.* Five shots, three, four, five. Five

shots. All low. The fifth shot in [Guerra's] hip." RP 2653. Counsel argued this was proof Williams was not trying to kill Guerra, "he wasn't trying to kill him at all. Either with or without premeditation." RP 2654-55.

Uncontroverted evidence, including Williams's own testimony, showed he fired three shots directly at the Fusion where he believed his wife was being assaulted by the other male passenger. Williams was in front of the Fusion. Guerra was on the side opposite Williams's wife, the car between them. With Guerra standing away from the car and another person assaulting Williams's wife, it is unlikely the jury thought Williams fired at the occupants of the Fusion while trying to kill Guerra. The Court should reject this claim of error.

B. WILLIAMS DID NOT OBJECT AT TRIAL TO THE STATE'S IMPROPER CLOSING COMMENT CONCERNING REASONABLE DOUBT. WILLIAMS WAIVED OBJECTION BECAUSE HE CANNOT DEMONSTRATE THE COMMENT WAS SO FLAGRANT AND ILL-INTENTIONED A TIMELY CURATIVE INSTRUCTION COULD NOT HAVE CORRECTED ANY RESULTING CONFUSION.

The State concedes it was improper to tell the jury it could find guilt beyond a reasonable doubt if it could not articulate or talk about any lingering doubt it may have had. Under the facts of this case, the State's error does not require reversal because it did not deprive Williams of a fair trial. *State v. Allen*, 182 Wn.2d 64, 373, 375, 341 P.3d 268 (2015) (misstating the law is prosecutorial misconduct; improper statements must

also be prejudicial). The statement came immediately after the State's insistence that "[t]he burden of proof is always at this table. It's always at the state's table. The burden of proof never shifts to the defense table." RP 2563. Counsel did not object to the improper statement. *Id.*

When defense counsel fails to object to an improper statement, the standards of review are based on a defendant's duty to object. *State v. Emery, supra*, 174 Wn.2d at 761 (citing 13 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 4505, at 295 (3d ed. 2004)). " 'This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.' " *Id.* at 761-62.

Timely objection prevents further improper remarks. *Id.* at 762. Timely objection also prevents potential abuse of the appellate process. *Id.* The *Emery* court reiterated a long-standing concern in this regard: that if not required to object, a defendant could "simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." *Id.* (quoting *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006) (remaining internal citations omitted)). Under this heightened standard of review, Williams is deemed to have waived any error unless he establishes the State'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 (citing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)).

Williams asserts proof the State’s misconduct was flagrant and ill-intentioned can be found in the sheer number of cases disapproving “fill in the blank” arguments on reasonable doubt. Br. of Appellant at 30-31. In other words, the State should have known better. But when a defendant fails to object, reviewing courts must focus more on whether the resulting prejudice could have been cured than on the flagrant or ill-intentioned nature of the remark. *Emery*, 174 Wn.2d at 762. “ ‘[M]isconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom.’ ” *Id.* (quoting *State v. Navone*, 186 Wash. 532, 538, 58 P.2d 1208 (1936)). “ ‘The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?’ ” *Id.* (quoting *Slattery v. City of Seattle*, 169 Wash. 144, 148, 13 P.2d 464 (1932) (alteration in original)).

Williams asserts prejudice flowing from the State’s remarks could not have been cured, arguing any correcting instruction would have necessarily confused the jury because telling jurors they did not have to articulate a reason to acquit would have conflicted with first sentence of WPIC 4.01. Br. of Appellant at 35. Williams does not cite any authority for this argument, nor can he. It is contrary to Washington law.

Emery addressed the State’s use of a “fill-in-the-blank”⁸ argument, presented alongside “declare the truth” arguments and including a visual slide presentation. *Id.* at 750-51. The Court concluded both defendants “fail[ed] to show that the prosecutor’s comments engendered an incurable feeling of prejudice in the mind of the jury.” *Id.* at 762. The statements were not the type the Court has held to be inflammatory, so they did not engender an “inflammatory effect. *Id.* at 763. The error was that the “remarks could potentially have confused the jury about its role and the burden of proof.” *Id.* These remarks are not per se incurable. *Id.* (citing *State v. Smith*, 144 Wn.2d 665, 679, 30 P.3d 1245, 39 P.3d 294 (2001)).

The statements in *Emery*, like the statements here, were similar to statements analyzed in *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008), where the defendant did object at trial. *Emery*, 174 Wn.2d at 763. Those “misstatements were cured, even though the court’s [curative] instruction was imperfect.” *Id.* at 764. The statements in *Emery*— including the fill-in-the-blank argument—“could have been cured by a proper instruction.” *Id.*

[T]he court could have properly explained the jury’s role and reiterated that the State bears the burden of proof and the defendant bears no burden. *Such an instruction would*

⁸ The prosecutor said “[I]n order for you to find the defendant not guilty, you have to ask yourselves or you’d have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in that blank.” *Emery* at 750-51.

have eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's improper remarks.

Id. (emphasis added). Surely the trial judge in Williams's case, assisted by counsel, could have crafted a curative instruction correcting the misstatement and putting the jury back onto the proper analytical footing.

Emery is also instructive when assessing whether the prosecutor's misstatements likely affected the verdicts. "In analyzing prejudice, [reviewing courts] do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *Emery*, 174 Wn.2d at 764 n. 14 (citing *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007)). There, the Supreme Court noted that in the context of the total closing argument, "the prosecutor clearly and repeatedly stated that the State bears the burden of proof and quoted the law directly from the jury instructions." *Id.* The prosecutor here clearly and repeatedly kept the burden of proof on his side of the table. The *Emery* argument "came at the end of an eight-day trial and was limited to nine sentences." *Id.* Argument here came at the end of a nearly-two-week trial and was limited to one sentence. Although the evidence in this case was not as "probably overwhelming" as the evidence in *Emery*, it included video footage of the shooting and testimony from two eye-witnesses uninvolved in the incident. The jury acquitted Williams

of first degree murder and convicted on the lesser second degree murder charge. CP 129, 132. The jury also acquitted Williams of attempted murder of Guerra's three friends, finding him guilty of the lesser first degree assault charges. CP 129-30, 132. These acquittals demonstrate the jury recognized its reasonable doubt on the more serious allegations.

Finally, in this case as in *Emery*, "the jury instructions stated a proper definition of 'reasonable doubt' and expressly directed jurors 'to disregard any remark, statement or argument that is not supported by ... the law in [the court's] instructions.'" 174 Wn.2d at 764 n. 14. Here, "[t]he instructions also explained that 'the defendant has no burden of proving that a reasonable doubt exists.'" *Id.* Reviewing courts presume juries follow their instructions. *Id.*

A timely instruction from the court could have cured any possible prejudice here, just as it did in *Emery*. Williams should be found to have waived the error.

C. COSTS ON APPEAL

The State does not intend to seek costs.

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IV. CONCLUSION

This Court should affirm Williams's convictions.

DATED this 8th day of September, 2017.

Respectfully submitted,

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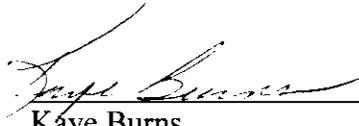
DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington,
the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this
matter by e-mail on the following party, receipt confirmed, pursuant to the
parties' agreement:

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Dated: September 8, 2017.


Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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