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No. 36038-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

KAZ MCKENZIE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Kaz McKenzie and his neighbor, Wayne Foss, had an ongoing dispute about the ownership and treatment of Mr. McKenzie's dog. Mr. Foss desperately wanted the dog for himself, and would routinely hide the dog in his apartment. The situation eventually came to a head and resulted in a physical fight between Mr. McKenzie and Mr. Foss in the common room of their apartment building. As a result of the fight, Mr. McKenzie was charged with second-degree assault.

The trial that ensued was constitutionally deficient in many respects. First, the trial court admitted Mr. McKenzie's statements to police, despite the fact that the statements were made in a custodial setting without *Miranda* warnings. The trial court also prevented Mr. McKenzie from presenting his theory of the defense by excluding an important witness from testifying and giving a "first aggressor" jury instruction. Finally, the prosecutor engaged in various forms of misconduct that prejudiced Mr. McKenzie's right to a fair trial.

Due to the violations of Mr. McKenzie's constitutional rights, this Court should reverse his conviction and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred when it admitted Mr. McKenzie's involuntary statements to police in violation of the Fifth Amendment and Article I, § 9. CP 65–66.

2. The trial court's erroneous decision to exclude a defense witness prevented Mr. McKenzie from presenting self-defense in violation of the Sixth and Fourteenth Amendments as well as Article I, § 22. RP 268–69.

3. Prosecutorial misconduct prejudiced Mr. McKenzie's right to a fair trial in violation of the Sixth and Fourteenth Amendments as well as Article I, § 22.

4. The trial court erred in giving a "first aggressor" jury instruction, preventing Mr. McKenzie from presenting his theory of the case in violation of the Fourteenth Amendment and Article I, § 22. CP 27.

5. The \$200 criminal filing fee and \$100 DNA fee should be stricken. CP 52–53.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To protect the right against self-incrimination, law enforcement must warn an individual of their right to remain silent as well as their right to counsel prior to a custodial interrogation. Whether an interrogation is "custodial" turns on an objective analysis of whether a reasonable person in the individual's position would believe they were in police custody.

Here, Mr. McKenzie testified that there were three officers present in the hallway of his apartment building during his questioning and that these officers blocked all exits and the door to his apartment. Neither Mr. McKenzie nor the arresting officer testified that Mr. McKenzie was informed that he was free to leave or terminate the interview. Mr. McKenzie did not receive *Miranda* warnings prior to questioning. Should Mr. McKenzie's statements to law enforcement have been suppressed as involuntary?

2. Defendants have a constitutional right to present relevant and material witnesses to establish a defense. Habit evidence is relevant to prove that the conduct of a person on a particular occasion was in conformity with the habit. Here, Mr. McKenzie sought to introduce testimony from Patrick Kinchler, the head building manager at his apartment, that Mr. Foss had a habit of carrying a large knife prominently displayed on his belt. The trial court excluded Mr. Kinchler as a witness. Did this the exclusion of Mr. Kinchler violate Mr. McKenzie's right to present witnesses in his defense?

3. Prosecutorial misconduct may deprive a defendant of their constitutional right to a fair trial. Such misconduct is grounds for reversal if there is a substantial likelihood it impacted the jury's verdict. Here, the prosecutor commented on the credibility of witnesses, referred to Mr.

McKenzie as a vigilante while looming over and pointing at him, drew inferences not supported by the record, referenced his own military service, and misstated the law to the jury. Was the prosecutor's misconduct prejudicial to Mr. McKenzie?

4. Jury instructions must permit the defendant to present his theory of the case. A "first aggressor" instruction informs the jury that self-defense is not available if the defendant provoked or commenced the fight. Here, there was no evidence presented that Mr. McKenzie provoked the need to act in self-defense. Did the first aggressor instruction deprive Mr. McKenzie the ability to claim self-defense?

5. The legislature recently passed amendments to the State's legal financial obligation system to prohibit the imposition of criminal filing fees on indigent defendants. These changes also specify that a DNA fee should not be imposed if the defendant's DNA was previously collected as a result of a prior conviction. The supreme court recently held these statutory changes apply retroactively to cases that were pending on direct appeal when the statutes were amended. Here, Mr. McKenzie was indigent at the time of appeal and had also previously been convicted of a felony. Should Mr. McKenzie's \$200 criminal filing fee and \$100 DNA fee be stricken?

D. STATEMENT OF THE CASE

1. Mr. McKenzie and Mr. Foss had a long-standing feud over Mr. McKenzie's dog that resulted in two physical altercations.

Kaz McKenzie purchased an eight-week-old puppy and named her Twyla. RP 310–311. Unbeknownst to Mr. McKenzie, Wayne Foss, who lived in the same apartment building as Mr. McKenzie, had previously arranged to purchase Twyla. RP at 313. However, this arrangement fell through, and Mr. McKenzie's purchase of Twyla greatly upset Mr. Foss and his fiancé, Loerita Gayman, who wanted the puppy for themselves. RP at 202, 204, 314.

The door to Mr. McKenzie's apartment was in need of repair and would not stay closed. RP at 204. As a result, Twyla and Mr. McKenzie's other dog, Bella, would occasionally escape from the apartment into the common area of the building. RP at 204, 312. When this occurred, Mr. Foss and Ms. Gayman would take the dogs into their apartment and refuse to return them to Mr. McKenzie. RP at 316–17. Mr. McKenzie reported these incidents to the apartment management and law enforcement, but no action was ever taken. RP at 317.

A few weeks later, there was a physical altercation between Mr. McKenzie and Mr. Foss. RP at 322–23. Blows were exchanged, and Ms. Gayman's son, Nicholas Losche, got involved and bit Mr. McKenzie on

the arm. RP at 323. This altercation led to disorderly conduct charges against Mr. McKenzie, Mr. Foss, and Mr. Losche that were later dropped. RP at 203–204, 222–224, 316.

Several months after the fight, Mr. McKenzie encountered Mr. Foss in the apartment building and told him politely but firmly to stop interfering with his dogs. RP at 175, 179, 320. In response, Mr. Foss swore at Mr. McKenzie. RP at 320. This interaction led to increased tension between Mr. Foss and Mr. McKenzie. RP at 323–24.

Shortly after that interaction, Mr. McKenzie walked into the common area of the apartment building and encountered Mr. Foss and Mr. Foss' cousin.¹ RP at 325. According to Mr. McKenzie, Mr. Foss had the handle of a long knife handle sticking out of his belt. RP at 326. Mr. McKenzie believed Mr. Foss was discussing with his cousin how to take possession of Twyla. RP at 325.

Concerned that Mr. Foss was plotting to take his dog, Mr. McKenzie punched Mr. Foss and a fight ensued. RP at 327–28. According to Mr. McKenzie, he placed Mr. Foss in a choke hold to prevent him from reaching for his knife. RP at 329. The commotion attracted the attention of Ms. Gayman and Mr. Losche. RP 209–210, 229–

¹ Mr. Foss and his cousin referred to each other “brothers” during trial but were in fact related as first cousins. *See* RP 176–77, 192.

230. As a crowd gathered, several other fights broke out simultaneously.
Id. at 170–72, 211, 231–32, 280–81, 341, 343–45.

After the fighting ended, Mr. McKenzie returned to his apartment.
RP 329. Police arrived at the building, and several officers knocked on
Mr. McKenzie’s apartment door. RP 129, 134–35. Mr. McKenzie came
outside of his apartment to talk to the officers in the hallway. RP 129.
According to Mr. McKenzie, there were three officers present during his
questioning, and one of the officers blocked the hallway exits while
another officer leaned on his door, which swung outwards. RP 135–36.
Mr. McKenzie did not feel he could leave or end the conversation without
provoking a negative reaction from the officers. RP 136. None of the
officers advised Mr. McKenzie of his *Miranda* rights. RP 130.

Mr. McKenzie felt coerced to answer the officers’ questions. RP
136. He informed the officers that he had initiated the fight with Mr. Foss.
RP 139–40. At the end of the conversation, Mr. McKenzie was arrested
for second-degree assault. RP 136. Only after he was arrested,

handcuffed, and put in a police car did any of the officers read Mr. McKenzie his *Miranda* rights. RP 130, 136.

2. Mr. McKenzie is convicted of second degree assault after a flawed trial.

Prior to trial, the court held a hearing to determine whether Mr. McKenzie's statements to police were admissible. RP 125–46. Mr. McKenzie testified that he was intimidated by the presence of three officers, that he did not feel free to leave, and that his statements were not voluntary. RP 134–38.

Officer Eugene Baldwin testified there were only two officers involved in the questioning, and described Mr. McKenzie as “cooperative” and stated “there was [sic] no detention parameters involved.” RP 129–30. However, Officer Baldwin admitted there were a minimum of four officers in addition to a supervisor at the apartment building. RP 132. Officer Baldwin acknowledged “there was a lot of going back and forth and discussion” between him and these other officers during his questioning of Mr. McKenzie. RP 132.

While the trial court acknowledged that there was a factual dispute about how many officers were present during Mr. McKenzie's questioning, it found that Mr. McKenzie was not “detained and he remained free to leave at his will Mr. McKenzie was never seized by

[Spokane Police Department] and he made his statements voluntarily.” CP 65–66. Accordingly, the court concluded that Mr. McKenzie’s statements were admissible at trial. *See id.*

During the ensuing jury trial, eyewitnesses gave varying accounts of the altercation between Mr. Foss and Mr. McKenzie. One factual dispute centered on whether Mr. Foss was carrying a large knife at the time of the fight. Mr. Foss testified he only had a small pocketknife in his pocket. RP 199. Mr. Foss’ cousin testified there was a large, two-foot long Bowie knife visible on the table in the common room when the fight began, but that it belonged to him, not Mr. Foss. RP 181–82. Ms. Gayman testified Mr. Foss owned a large knife, but that it was in their shared apartment at the time of the fight. RP 221. Mr. McKenzie, his brother, Richard Brown, and the responding building manager, Amber Lawsha – who was dating Mr. Brown at the time of trial – all testified that Mr. Foss was carrying a large knife on his hip at the time of the fight. RP 278–79, 282, 326, 341.

Mr. McKenzie also sought to introduce testimony from Patrick Kinchler, another building manager, that Mr. Foss had a habit of carrying a large knife prominently displayed on his belt. RP 266. However, the trial court excluded Mr. Kinchler as a witness on the basis that his

observations of Mr. Foss's knife occurred "in a different location at a different time," not on the day of the fight. RP 268–70.

During the cross-examination of the responding building manager, Amber Lawsha, the prosecutor for the State engaged in aggressive questioning tactics and had to be reminded by the trial court not to badger the witness. RP 287–95. The trial court also sustained an objection on the basis that the prosecutor's tone was "antagonistic and sarcastic." RP 292. Despite objections, the prosecutor made repeated comments about Ms. Lawsha's testimony, implying she lacked credibility. *See* RP 294–95. During his closing argument, the prosecutor commented explicitly on Ms. Lawsha's credibility. RP 383. The prosecutor also characterized Mr. McKenzie's actions as "vigilantism" and loomed over Mr. McKenzie while pointing at him. RP 380–81, 383. Also during closing, the prosecutor referred to facts not in evidence, referenced his own military service, and misstated the legal standard for Mr. McKenzie's defenses. *See* RP 384–85, 409.

Prior to deliberations, the jury received instructions on Mr. McKenzie's right to defend his dogs and himself. CP 28–32. At the State's request and over Mr. McKenzie's objections, the jury also received a "first aggressor" instruction, which stated the jury must reject self-defense if it found "beyond a reasonable doubt that the defendant was the

aggressor, and that defendant's acts and conduct provoked or commenced the fight." CP 27. The jury returned a guilty verdict, rejecting Mr. McKenzie's defense that the use of force was lawful. RP 415; CP 35–36.

The trial court subsequently rejected Mr. McKenzie's request for a mitigated sentence, *see* CP 61–64, and imposed a standard range sentence of 15 months. CP 49. The court also imposed 18 months of community custody, anger management classes, a \$500 victim penalty assessment, \$200 criminal filing fee, and \$100 DNA collection fee. CP 50–53.

E. ARGUMENT

1. Mr. McKenzie's statements to police should have been suppressed because they were made in the context of a custodial interrogation.

a. Police must advise a suspect of their *Miranda* rights prior to a custodial interrogation.

The Fifth Amendment and article I, section 9 of the state constitution together protect the right against compelled self-incrimination. *See* U.S. Const. amend. V; Const. art. I, § 9. In accordance with these constitutional protections, law enforcement must warn an individual of their right to remain silent as well as their right to counsel prior to a custodial interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602 (1966); *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). Without these warnings, an individual's statements are

presumed involuntary and cannot be admitted as evidence of guilt at trial. *Heritage*, 152 Wn.2d at 214; *see also State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004) (“*Miranda* warnings were designed to protect a defendant’s right not to make incriminating statements while in police custody.”)

Whether an interrogation is “custodial” turns on an objective analysis of “whether a reasonable person in the individual’s position would believe he or she was in police custody to a degree associated with formal arrest.” *Lorenz*, 152 Wn.2d at 36–37 (citations omitted). The custodial nature of an interrogation is a question of law reviewed *de novo*. *Id.* at 36.

b. Mr. McKenzie was in custody when police interrogated him.

This Court examines the totality of the circumstances in determining the custodial nature of a police encounter. *See State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728 (2013); *see also State v. Sakawe*, 2018 WL 3738185 at *7, 4 Wn. App. 2d 1067 (Aug. 6, 2018) (not published)² (citing *Rosas-Miranda*). Relevant factors in determining whether an at-home interrogation is custodial include: “(1) the number of law enforcement personnel and whether they were armed; (2) whether the

² *Sakawe* is not reported; Mr. McKenzie cites it and other unreported cases as persuasive authority. *See* GR 14.1(a).

suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.” *United States v. Craighead*, 539 F.3d 1073, 1084 (9th Cir. 2008); *Rosas-Miranda*, 176 Wn. App. at 783 (quoting *Craighead*).

Here, the four *Craighead* factors support the conclusion that Mr. McKenzie was in custody during his interrogation. Concerning the first factor, Mr. McKenzie testified there were three officers present in the apartment building hallway during his questioning, while Officer Baldwin testified there were at least five officers at the apartment building and “there was a lot of going back and forth and discussion” between him and these others officers. RP 132, 135. “[W]hen the number of law enforcement personnel far outnumber the suspect, the suspect may reasonably believe that, should he attempt to leave, he will be stopped by one of the many officers he will encounter on the way out. The suspect may also believe that the large number of officers was brought for the purpose of preventing his departure.” *Craighead*, 539 P.3d at 1084–85. Here, by all accounts, Mr. McKenzie was significantly outnumbered by the number of police officers on the scene.

Concerning the second factor, Mr. McKenzie testified that while he was being questioned, one officer blocked the exits in the hallway while another blocked the door to his apartment. RP 135–36. Blocking any means of escape contributes to the custodial nature of a police encounter. For example, the Ninth Circuit has recognized that an officer “leaning with his back to the door in such a way as to block [the defendant’s] exit from the room” made it “objectively reasonable for [the defendant] to believe he was under guard.” *Craighead*, 539 F.3d at 1086; *see also Sprosty v. Buchler*, 79 F.3d 635, 642–43 (7th Cir. 1996) (blocking suspect’s driveway and exit from the home contributed to a custodial environment); *State v. Dennis*, 16 Wn. App. 417, 421–22, 558 P.2d 297 (1976) (defendant was in custody due to “officer’s unwelcome presence and his insistence on remaining in a position where he could monitor and thus restrict the occupant’s freedom of movement within their home.”). Here, Mr. McKenzie testified the only exits were guarded by police, which would lead a reasonable person to believe that they were not free to leave or end the interrogation. *See Craighead*, 539 F.3d at 1086.

As to the third factor, it is undisputed that Mr. McKenzie was interviewed alone. “The Supreme Court highlighted isolation from the outside world as perhaps the crucial factor that would tend to lead a

suspect to feel compelled to provide self-incriminating statements.”
Craighead, 539 F.3d at 1086–87 (citing *Miranda*, 384 U.S. at 445–46).

To the final factor, neither Mr. McKenzie nor Officer Baldwin testified Mr. McKenzie was informed that he was free to leave or terminate the interview; in fact, Mr. McKenzie explicitly testified he did *not* feel that he could terminate the interview. *See* RP 136. “If a law enforcement officer informs the suspect that he is not under arrest, that statements are voluntary, and that he is free to leave at any time, this communication greatly reduces the chance that a suspect will reasonably believe he is in custody.” *Craighead*, 539 F.3d at 1087; *see also Lorenz*, 152 Wn.2d at 37–38 (suspect was not in custody because she was informed that she was free to leave at any time and signed a statement to that effect). Here, Officer Baldwin did not testify he or any other officer present explicitly indicated to Mr. McKenzie he had the power to leave or end the interrogation. *See* RP 129–132.

Taken as a whole, the *Craighead* factors tip in favor of a finding that Mr. McKenzie was in custody when he made incriminating statements concerning the fight with Mr. Foss. Accordingly, Mr. McKenzie’s statements should have been suppressed to protect his constitutional right against self-incrimination. *See State v. Spotted Elk*, 109 Wn. App. 253, 262, 34 P.3d 906 (2001) (“Generally, evidence obtained directly or

indirectly through exploitation of an unconstitutional police action must be suppressed.”)

c. The admission of Mr. McKenzie’s custodial statements requires reversal of his conviction.

“The State bears the burden of proving a constitutional error harmless beyond a reasonable doubt.” *See State v. Rhoden*, 189 Wn. App. 193, 203, 356 P.3d 242 (2015). The State cannot meet this burden, because there is reasonable doubt that the jury would have reached a different result had Mr. McKenzie’s statements been suppressed. *See id.* at 202–203. Officer Baldwin testified at length at trial about the statements Mr. McKenzie made to him, *see* RP 244–46, 254–57, including that there was a “long-running feud” between him and Mr. Foss and that Mr. McKenzie “freely admitted that he swung first at Mr. Foss.” RP 244–45. Officer Baldwin also testified that Mr. McKenzie could not describe anything “Mr. Foss had done that day or that night against him, his apartment, or his dog.” RP 245.

The admission of these statements clearly undercut Mr. McKenzie’s defense of self and defense of his dogs. There was conflicting testimony at trial concerning whether Mr. Foss and Mr. McKenzie had a verbal altercation shortly before the assault. *See* RP 175, 202, 320. Further, although Mr. McKenzie admitted at trial that he swung

first, this admission was necessary to provide context and counter Officer Balwin's testimony. RP 327 (testimony by Mr. McKenzie that "[b]eing certain I was walking into yet another attempt to steal my dog, I swung.") Because the admission of Mr. McKenzie's statements to law enforcement was not harmless, this Court should reverse and remand for a new trial with instructions to suppress the statements. *See Rhoden*, 189 Wn. App. at 203.

2. The exclusion of Patrick Kinchler as a witness denied Mr. McKenzie his right to present a defense.

a. Mr. McKenzie has the right to present a defense.

Both the Sixth Amendment and article I, section 22 of the state constitution "guarantee an accused the right to compulsory process to compel the attendance of witnesses." *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); *see also* U.S. Const. amend. VI; Const. art. I, § 22. A defendant "has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *see also* U.S. Const. amend. XIV. This right pertains to those witnesses that are both relevant and material to the defense. *See Washington*, 388 U.S. at 23; *see also State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). Evidence which is even minimally relevant must be

admitted unless the State can show it would prejudice the fairness of the proceedings. *See State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). This Court reviews a claim of a denial of the right to present a defense *de novo*. *Id.* at 719.

Under ER 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The evidentiary rules further recognize that “[e]vidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit.” ER 406. “In determining whether the conduct rises to the level of a habit, the court must consider the regularity of the acts and the similarity of circumstances.” *State v. Young*, 48 Wn. App. 406, 411, 739 P.2d 1170 (1987).

- b. Mr. Kinchler’s testimony was both relevant and material, and not prejudicial to the proceedings.

Mr. McKenzie sought to introduce testimony from Patrick Kinchler, the head building manager, that Mr. Foss had a habit of carrying a large knife prominently displayed on his belt. RP 266. The trial court excluded Mr. Kinchler as a witness on the basis that his observations of Mr. Foss’s knife occurred “at a different location on a different time.” RP

268–70. This ruling was made in error, as Mr. Kinchler’s testimony was both relevant and material to Mr. McKenzie’s defense.

Mr. McKenzie’s theory of self-defense relied on his perception of the threat posed by Mr. Foss, which rested in part on the assertion that Mr. Foss was carrying a large knife at the time of the fight. *See State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993) (“self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.”); RP 397–98 (closing argument of defense counsel referencing Mr. Foss’s knife, and how it made him a “threatening and imposing figure, and he knows that he instigated this conflict with my client”).

Here, there was a factual dispute between eyewitnesses about whether Mr. Foss was carrying this knife when the fight occurred. Mr. Foss testified that he was only carrying a pocketknife. *See* RP 199. Mr. Foss’ cousin testified that a large knife was present in the common room, but that it belonged to him, not Mr. Foss. RP 181–82. Mr. Foss’ fiancé testified that Mr. Foss’ large knife was in their shared apartment, not the common room. RP 221. In contrast, Mr. McKenzie, his brother, and his brother’s girlfriend all testified that Mr. Foss was carrying a large knife at the time of the fight. RP 279, 326, 341.

Mr. Kinchler, the head apartment manager, had no personal ties to either Mr. McKenzie or Mr. Foss. *See* RP 266. Mr. Kinchler's anticipated testimony centered around how "Mr. Foss is always openly carrying this knife, that it's a large blade, that it's prominently displayed right in the area of where his belt buckle is, that it is intimidating, and that it has caused apprehension even in Mr. Kinchler when he's interacted with Mr. Foss." RP 268. Mr. Kinchler's testimony was relevant and material to Mr. McKenzie's defense because he was disinterested party who could confirm observations of the threat Mr. McKenzie perceived. *See Janes*, 121 Wn.2d at 238.

In *State v. Platz*, this Court expressly recognized testimony that the defendant "usually carried a knife and never left the house without it" constituted habit evidence under ER 406. *See State v. Platz*, 33 Wn. App. 345, 351, 655 P.2d 710 (1982). The *Platz* court also held this evidence was relevant to whether the defendant in that case could have inflicted stab wounds on the victim. *See id.* Similarly here, Mr. Kinchler's testimony concerning Mr. Foss' habit of "*always* openly carrying this knife" on his hip was habit evidence, and was also relevant to whether Mr. Foss was carrying a knife immediately prior to the fight. *See* RP 268 (emphasis added); ER 401, 406. *Platz's* reasoning demonstrates Mr. Kinchler's testimony was both relevant to Mr. McKenzie's defense under ER 401 as

well as admissible habit evidence under ER 406. Further, the exclusion of Mr. Kinchler as a witness violated Mr. McKenzie's constitutional right to present a defense. *See Maupin*, 128 Wn.2d at 924.

Mr. Kinchler's testimony was not prejudicial to the "fairness of the fact-finding process." *Jones*, 168 Wn.2d at 721. It was "crucial evidence relevant to the central contention of a valid defense." *State v. Duarte Vela*, 200 Wn. App. 306, 320–21, 402 P.3d 281 (2017) (quoting *Young*, 48 Wn. App. at 413). Here, at least one witness for the State acknowledged that Mr. Foss had an occasional practice of carrying a knife. *See* RP 221 (Mr. Foss' fiancé testifying that Mr. Foss carried a knife as "part of his heritage, but he doesn't always carry it."). Mr. Kinchler's testimony would have provided a neutral perspective to the jury that Mr. Foss had a consistent habit of carrying a knife, which would have in turn supported Mr. McKenzie's self-defense. Mr. Kinchler's testimony was thus integral, not prejudicial, to "the integrity of the truthfinding process." *See Jones*, 168 Wn.2d at 721 (internal citation and quotation marks omitted).

c. The exclusion of Mr. Kinchler's testimony requires a new trial.

The State must prove that error of a constitutional magnitude is harmless beyond a reasonable doubt. *See Maupin*, 128 Wn.2d at 929. The exclusion of Mr. Kinchler was not harmless, because there is a reasonable

doubt that the jury would have reached a different result had he been permitted to testify. *See id.* at 928–29. All of the eyewitnesses who testified at trial had some degree of relationship with either Mr. Foss or Mr. McKenzie that gave them ostensible motives for testifying that Mr. Foss was carrying or not carrying a large knife at the time of the fight. However, Mr. Kinchler was a neutral third party with no apparent ties to either Mr. Foss or Mr. McKenzie, *see* RP 266, 268, and thus his impartial testimony may have swayed the jury. “[I]t is impossible to conclude a reasonable jury would have reached the same result beyond a reasonable doubt” had Mr. Kinchler been permitted to testify, and thus the error was not harmless. *See Maupin*, 128 Wn.2d at 930.

Because Mr. McKenzie was denied the right to present witness testimony in support of his defense and this error was not harmless, this Court should reverse the conviction and remand for a new trial. *See Washington*, 388 U.S. at 23; *Maupin*, 128 Wn.2d at 930.

3. The prosecutor engaged in prosecutorial misconduct that prejudiced Mr. McKenzie’s right to a fair trial.

The right to a fair trial is protected by the Sixth and Fourteenth amendments as well as article I, section 22 of the state constitution. *In re Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012) (citations omitted); *see also* U.S. Const. amend. VI, XIV; Const. art. I, § 22. “Prosecutorial

misconduct may deprive a defendant of his constitutional right to a fair trial.” *Id.* at 703–704 (citing *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984)). Prosecutorial misconduct is grounds for reversal if it is prejudicial, *i.e.*, if there is a substantial likelihood it impacted the jury’s verdict. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011); *also State v. Lindsay*, 180 Wn.2d 423, 440, 326 P.3d 125 (2014).

Here, the prosecutor engaged in several instances of misconduct that violated Mr. McKenzie’s right to a fair trial. This section will address each instance of misconduct in turn.

a. The prosecutor improperly commented on the credibility of a witness.

In cross-examining Amber Lawsha, the building manager and girlfriend of Mr. McKenzie’s brother, the prosecutor engaged in “antagonistic and sarcastic” questioning and had to be reminded by the trial court not to badger the witness. RP 288, 292. When Ms. Lawsha indicated that the prosecutor’s aggression was starting to make her feel uncomfortable, the prosecutor replied, “Don’t care.” RP 288. And when Ms. Lawsha expressed confusion about a line of questioning, asking “Is

that a question, sir?, Again, I'm –" The prosecutor cut her off, responding sarcastically, "Yeah. Try answering it." RP 288.

Despite a sustained objection to his tone, *see* RP at 292, the prosecutor repeatedly commented on Ms. Lawsha's credibility during cross examination. In one particular heated exchange, the prosecutor clearly indicated he found Ms. Lawsha's testimony incredible:

Q. Ms. Lawsha, *don't you think it's a little bit convenient* that the cameras for this dayroom went out just before this happened?

A. Actually, no, I don't.

Q. Yeah? *You don't think it's convenient* that you and another assistant manager just managed to show up with someone else who assaulted another tenant and the cameras just *magically* happened to stop working?

A. No, because the cords were cut by mice. We had mice in the building and they had eaten the cords. We have previously replaced them since then, sir.

Q. *I'm sure that's what happened.*

RP 294–95 (emphasis added). During closing, the prosecutor acknowledged he “went hard” at Ms. Lawsha, but not at another witness, stating “[a]t least [the other witness] told the truth.” RP 383. The court sustained an objection that the prosecutor was vouching for the credibility of witnesses. RP 383.

“It is impermissible for a prosecutor to express a personal opinion as to the credibility of a witness.” *Lindsay*, 180 Wn.2d at 437 (citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). “It constitutes

misconduct, and violates the advocate-witness rule, which prohibits an attorney from appearing as both a witness and an advocate in the same litigation.” *Id.* (internal citation and quotation marks omitted). A defendant may be prejudiced when it is “‘clear and unmistakable’ that counsel is expressing a personal opinion.” *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)).

Here, the prosecutor clearly and unmistakably expressed a personal opinion about Ms. Lawsha’s testimony. He commented on her answers in an antagonistic and sarcastic tone, stated “I’m sure that’s what happened” in response to one of her answers, and expressed a belief that she had lied during closing argument. The prosecutor’s expression about his personal belief that Ms. Lawsha was not credible was misconduct that prejudiced Mr. McKenzie. *See Brett*, 126 Wn.2d at 175.

b. The prosecutor used arguments and tactics to inflame the passions and prejudices of the jury during closing.

In his closing argument, the prosecutor repeatedly referred to Mr. McKenzie as a vigilante. *See* RP 379 (“So we’re talking about vigilantism instead, right?”); RP 380 (“You can’t just attack somebody because they have been poking you and getting on your nerves and you’re mad at them. That’s vigilantism.”); RP 381 (“Don’t be a vigilante. Call the police.”)

The prosecutor also loomed over and pointed at Mr. McKenzie during closing arguments, drawing a warning from the trial court. RP 383.

“The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.” *In re Glasmann*, 175 Wn.2d at 677 (citations and internal quotation marks omitted). “[A] prosecutor must seek convictions based only on probative evidence and sound reason.” *Id.* (citations and internal quotation marks omitted). Here, by repeatedly labeling Mr. McKenzie a vigilante while looming over him and pointing at him, the prosecutor made “a deliberate appeal to the jury’s passion and prejudice . . . rather than properly admitted evidence.” *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

The issue presented at trial was whether Mr. McKenzie was guilty of second-degree assault or whether he acted in defense of self or defense of his dogs, not whether he acted as a “vigilante.” “A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.” *Belgarde*, 110 Wn.2d at 508. The prosecutor’s labeling Mr. McKenzie a vigilante while looming over him and pointing was an attempt to portray Mr. McKenzie as a dangerous

aggressor and thus prejudice the jury. *In re Glasmann*, 175 Wn.2d at 677–78.

c. The prosecutor referred to facts not in evidence.

In closing, the prosecutor argued that “[y]ou can infer that Mr. McKenzie knew he wanted to beat up Wayne Foss, and so he called assistant managers to come control the crowd. Hey, I need some help. I want to beat this guy up, come watch everybody. Right? Sounds good.” RP 384. This statement was not supported by the record. Amber Lawsha, one of the building managers, testified that she received a phone call from a tenant in the building “letting me know that I needed to come back to my building because they felt that there was a lot of hostility there and they did not know if it would become something.” RP 275. She also testified she could not recall who had placed the call. RP 275. Richard Brown, Mr. McKenzie’s brother and also a building manager, testified he had gone over to the apartment building to visit Mr. McKenzie. RP 337. There was no evidence presented at trial that Mr. McKenzie called either Ms. Lawsha or Mr. Brown to “come watch” him beat up Mr. Foss or “control the crowd.”

Prosecutors may not “make prejudicial statements that are not sustained by the record.” *State v. McKenzie*, 157 Wn.2d 44, 58, 134 P.3d 221 (2006) (quoting *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432

(2003)). Prosecutors have “no right to mislead the jury” when “not one word of testimony in the record” supports an assertion made in closing argument. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955). Here, there was no testimony that supported the prosecutor’s assertion that Mr. McKenzie called Ms. Lawsha or Mr. Brown to provide backup or crowd control during a pre-planned assault on Mr. Foss. These kinds of “statements so flagrantly made” could not have been cured by an instruction, as “the harm had already been done.” *Id.* at 893; *see also State v. Powell*, 62 Wn. App. 914, 919, 816 P.2d 86 (1991) (“This is one of those cases of prosecutorial misconduct in which the bell once rung cannot be unring.”) (internal citation and quotation marks omitted).

d. The prosecutor improperly referenced his own military service during rebuttal.

In rebuttal argument, the prosecutor referenced his military service in an aside that was completely irrelevant to the facts of the case or the rebuttal argument:

But when you’re – whenever you take off your shoes – my wife and I lived in Hawaii when we were in the service years ago, and we got used to taking off our shoes because of the red dirt out there. But whenever you’re taking off your shoes tonight, think about what a danger you are.

RP 409 (emphasis added).

It is improper for a prosecutor to “throw the prestige of his public office . . . into the scales against the accused.” *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); *see also Monday*, 171 Wn.2d at 677 (quoting *Case*). Appeals to patriotism are similarly improper. *State v. Neidigh*, 78 Wn. App. 71, 79, 895 P.2d 423 (1995); *State v. Perez-Mejia*, 134 Wn. App. 907, 918, 143 P.3d 838 (2006). Additionally, prosecutors are prohibited from offering testimony of personal knowledge in order to ensure that juries “ground their decisions on the facts of a case and not on the integrity or credibility of the advocates.” *United States v. Prantil*, 764 F.2d 548, 553 (9th Cir. 1985).

Here, it was improper for the prosecutor to reference his military service, as it violated the advocate-witness rule. *See id.* Further, the prosecutor’s military service had nothing to do with the facts of the case and served only to bolster the prosecutor’s credibility in the eyes of the jury. *Compare Monday*, 171 Wn.2d at 673 (prosecutor improperly invoked his association with the “popular former King County Prosecutor Norm Maleng” in order to vouch for his case).

e. The prosecutor misstated the law in closing argument.

In closing, the prosecutor stated that Mr. McKenzie’s defenses required an element of “immediacy.” RP 385. Defense counsel objected, noting that “the instructions do not make any inference to immediacy.

That's not required under the law or the instructions." RP 385; *see also* CP 27 (Instruction No. 11). The trial court overruled the objection, stating "it's argument. They'll be instructed to follow the law that's in the instructions." RP 385.

"A prosecuting attorney commits misconduct by misstating the law." *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015); *see also State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) ("The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.") Further, when a court overrules an objection to a misstatement of law, this could "potentially lead[] the jury to believe [the incorrect] standard was a proper interpretation of law." *Allen*, 182 Wn.2d at 378. Here, the prosecutor's injection of an "immediacy" element into Mr. McKenzie's defenses and the court's overruling of defense counsel's objection misled the jury on the correct legal standard to apply during deliberations. Further, the fact that a jury is properly instructed on the law does not give the State license to misstate the correct standard, nor does it necessarily cure the prejudice which follows. *Id.* at 380.

f. The prosecutor's flagrant and ill-intentioned misconduct prejudiced Mr. McKenzie.

A prosecuting attorney commits prejudicial misconduct when “there is a substantial likelihood that the instances of misconduct affected the jury’s verdict.” *Allen*, 182 Wn.2d at 376. Pervasive prosecutorial misconduct can have a “cumulative effect.” *See id.* Prosecutorial misconduct is subject to the cumulative error doctrine, where reversal may be warranted “even if each error standing alone would otherwise be considered harmless.” *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Here, the prosecutor’s flagrant and ill-intentioned misconduct was so pervasive and inflammatory “that no instruction or series of instructions [could] erase their combined prejudicial effect.” *Glasmann*, 175 Wn.2d at 707 (internal citations and quotation marks omitted). Specifically, the prosecutor (1) commented on the credibility of a witness, (2) referred to Mr. McKenzie as a vigilante while looming over him and pointing at him, (3) drew inferences in closing argument that were not supported by the record, (4) improperly referenced his own military service in order to bolster his credibility, and (5) misstated the legal standard for Mr. McKenzie’s defenses. Taken as a whole, the prosecutor’s conduct was so pervasive that no instruction could have cured the substantial likelihood

that it impacted the jury's verdict. *See id.* at 707. Accordingly, this Court should reverse the conviction and remand for a new trial. *See id.* at 714.

4. The “first aggressor” jury instructions improperly deprived Mr. McKenzie of his ability to claim self-defense.

- a. The State must prove each element of the offense as well as the absence of self-defense.

“Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt.” *State v. O’Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009); *see also* U.S. Const. amend. XIV; Const. art. I, § 22. “To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case.” *Id.* (citations omitted). The right to present a defense is “among the minimum essentials of a fair trial” and is constitutionally protected. *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 296 (1973).

“To be entitled to jury instructions of self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt.” *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

“Jury instructions on self-defense must more than adequately convey the

law. Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror.” *Id.* (internal citations omitted).

b. The first aggressor instruction relieved the State of its burden of proving the absence of self-defense.

A “first aggressor” instruction informs the jury that self-defense is not available as a defense if the defendant “provoked or commenced the fight.” *State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989) (internal citations omitted). The provoking act cannot be the charged assault. *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). “[A]n aggressor instruction impacts a defendant’s claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Accordingly, courts should use care in giving an aggressor instruction.” *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). “Few situations come to mind where the necessity of an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such an instruction.” *Id.* at 161 (quoting *State v. Arthur*, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985)).

Here, the jury was provided with a “first aggressor” instruction over Mr. McKenzie’s objections. *See* CP 27 (Instruction No. 10); RP 303–304. This instruction immediately preceded the instruction on

defense of self and defense of property. *See* CP 28 (Instruction No. 11). This so-called “first aggressor” instruction was improperly given because there was no evidence presented that Mr. McKenzie provoked the need to act in self-defense. *See Riley*, 137 Wn.2d at 910. The State’s case encompassed all of Mr. McKenzie’s assaultive conduct, and thus there was no separate “provoking act.” *Kidd*, 57 Wn. App. at 100; *see also State v. Kee*, 431 P.3d 1080, 1082 (2018) (“The provoking act must be intentional, but it cannot be the actual, charged assault.”); CP 2–3 (affidavit of facts); RP 381 (prosecutor’s closing argument that “[y]ou don’t get to walk up to somebody, like Mr. McKenzie testified to, start swinging on them, and then go around and choke them out.”).

This instruction also muddied the waters of Mr. McKenzie’s claimed defenses and appeared to lessen the State’s burden of disproving self-defense. *See Riley*, 137 Wn.2d at 910 n.2; *see also Walden*, 131 Wn.2d at 473. The instruction specifically directed the jury that “self-defense is not available as a defense” if the “defendant’s acts and conduct provoked or commenced the fight.” CP 27. The language of the instruction appeared to effectively remove the State’s burden of proof in disproving Mr. McKenzie’s defenses. *See Riley*, 137 Wn.2d at 910 n.2. As a result, the relevant legal standard was not “manifestly apparent to the average juror.” *See Walden*, 131 Wn.2d at 473 (citations and internal

quotation marks omitted). Accordingly, the first-aggressor instruction deprived Mr. McKenzie of his theory of the defense. *Wasson*, 54 Wn. App. at 160.

c. The erroneous jury instruction requires a new trial.

“Where jury instructions are inconsistent, the reviewing court must determine whether the jury was misled as to its function and responsibilities under the law.” *State v. Irons*, 101 Wn. App. 544, 559, 4 P.3d 174 (2000). The State has the burden of showing that misleading jury instructions are harmless beyond a reasonable doubt. *See id.* “An instructional error is harmless only if it ‘is an error which is *trivial*, or formal, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case.*’” *Walden*, 131 Wn.2d at 478 (quoting *State v. Wanrow*, 88 Wn. 2d 221, 237, 559 P.2d 548 (1977)) (emphasis in the original). Here, the State cannot meet this burden, because the first-aggressor instruction may have undermined Mr. McKenzie’s defenses and obfuscated the relevant legal standard. *See Riley*, 137 Wn.2d at 910 n.2; *see also Walden*, 131 Wn.2d at 473 (erroneous jury instructions were not harmless because the “may have” affected the outcome of the case). Accordingly, this Court should remand for a new trial. *See Walden*, 131 Wn.2d at 479.

5. Pursuant to *Ramirez*, this Court should strike the \$200 criminal filing fee and \$100 DNA fee.

The legislature recently passed amendments to the State’s legal financial obligation system to prohibit the imposition of criminal filing fees on indigent defendants. *See* Laws of 2018, ch. 269, § 17(2)(h). These amendments also specify that a DNA fee should not be imposed if the defendant’s DNA was previously collected as a result of a prior conviction. *See id.* at § 18. The supreme court recently held that these statutory changes apply retroactively to cases that were “pending on direct review and thus not final when the amendments were enacted.” *State v. Ramirez*, 426 P.3d 714, 722 (2018).

Here, the sentencing court imposed a \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h). *See* RP 444; CP 53. At the time of appeal, Mr. McKenzie was indigent, as he had no income or assets, and his only source of support was \$197 a month in public benefits from the Department of Social and Health Services. *See* CP 68–69; *see also State v. Blazina*, 182 Wn.2d 827, 838–39, 344 P.3d 680 (2015) (pursuant to GR 34, “courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program . . . In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty

guideline.”). Under the revised statutory scheme, this Court should remand with instructions that the trial court strike the \$200 criminal filing fee on the basis of indigency, or, in the alternative, to conduct an assessment of whether Mr. McKenzie is indigent.

The sentencing court also imposed a \$100 DNA collection fee pursuant to RCW 43.43.754. RP 444; CP 53. Under the amended statutory scheme, a DNA sample be taken from all individuals convicted of a felony unless the state has previously collected their DNA as a result of a prior conviction. *See* RCW 43.43.754(1)(a); RCW 43.43.7541. Mr. McKenzie has several felony convictions on his record. CP 43. Accordingly, pursuant to the recent statutory amendments, this Court should remand with instructions that the DNA fee be stricken. *See Ramirez*, 426 P.3d at 721–22.

F. CONCLUSION

For the reasons stated above, this Court should reverse the conviction and remand for a new trial. In the alternative, this Court should remand the sentence with instructions to strike \$300 in legal financial obligations.

DATED this 29th day of January, 2019.

Respectfully submitted,

s/ Jessica Wolfe

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36038-5-III
)	
KAZ MCKENZIE,)	
)	
APPELLANT.)	

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