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Court of Appeals  
Division III  
State of Washington  
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No. 36473-9-III

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

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STATE OF WASHINGTON, Respondent

v.

LISA MICHAEL, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY  
THE HONORABLE JUDGE JULIE MCKAY

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REPLY BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR IN REPLY

A. The Prosecutor Misstated The Law In Rebuttal Argument

Which Prejudiced Ms. Michael's Right To A Fair Trial.

LEGAL ISSUE: Where the trial court did not provide the jury a "first aggressor" instruction, did the prosecutor prejudicially misstate the law in closing argument by telling the jury it did not matter if the alleged victim used the "deadly weapon" first?

II. STATEMENT OF FACTS

Ms. Michael relies on the statement of facts presented in her opening brief.

III. ARGUMENT IN REPLY

A. The Prosecutor Committed Prosecutorial Misconduct By Misstating The Law And It Unfairly Prejudiced Ms. Michael.

The court in this case declined to give the jury a "first aggressor" instruction, because it was unclear as to who the aggressor was in the interaction. 1RP 246.

In closing argument, the prosecutor said,

The first injury doesn't matter. If you read your instruction, it's an assault. It's that—if Lisa Michael, if you find that she struck, touched or in any offensive manner did any of those things to Selena Joe *it doesn't matter if Selena Joe got the*

*vase first*. It just matters what happened in the beginning of that assault.

2RP 274. As argued in appellant's opening brief, this was an incorrect statement and it served to covertly provide the jury a first aggressor instruction.

The State contends the prosecutor's remarks were proper because they "did not include the salient elements of a first aggressor instruction" and the prosecutor did not argue that Ms. Michael's acts created the necessity for self-defense. (Br. Of Resp. at 14). While technically correct that the prosecutor did not recite the elements of a first aggressor instruction, he instead offered a short-hand version by stating what mattered was "what happened in the beginning of that assault."

Ms. Michael was charged with assault second degree, not any events before the alleged assault. The prosecutor argued something that was not rightfully before the jury: that when Ms. Michael allegedly hit Ms. Joe (presumably assault in the fourth degree), it no longer mattered that Ms. Joe hit her with the vase first. In rebuttal argument, the State introduced and argued the idea of first aggressor negation of self-defense. This misled and

confused the jury, as no first aggressor instruction had been given to them.

The State is correct that Ms. Michael's counsel did not object. Thus, to prevail on a prosecutorial misconduct claim, she is required to establish the conduct was improper, was prejudicial in the context of the entire record, and was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

In order to show prejudice, she must show a substantial likelihood the misconduct affected the jury's verdict. *In re Glassman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Here there is a direct link between the prosecutor's remarks and the jury's question to the court. The question is whether the prosecutor's remarks created an unacceptable risk of an impermissible factor, a first aggressor argument, which resulted in an unfair conviction. The answer is yes.

The State wanted a first aggressor instruction. The court denied it. So, instead, the State wove a first aggressor rationale into its argument - which in context negated Ms. Michael's claim of self-defense as to the specific charge: use of the vase to commit an

assault. The prosecutor told the jury that regardless of Ms. Joe's attack, it only mattered that Ms. Michael struck Ms. Joe with the vase.

The State cites to *State v. Ng*, 110 Wn.2d 32, 750 P.2d 632 (1988) for the proposition that an appellant cannot rely on the collective thought processes of the jury, as they "inhere in the verdict" cannot be used to impeach a verdict. (Br. Of Resp. at 15). *Ng* is inapplicable here.

*Ng* did not concern prosecutorial misconduct. In *Ng*, the appellant argued the jury instructions created an ambiguity, citing to jury questions, copies of the instructions marked by the jury during deliberations, and statements made by individual jurors after the trial. *Id.* at 43. The Court held the jury question about whether duress could apply to lesser degree offenses did not create an interference that the entire jury was confused, or that any confusion was not clarified before the final verdict. The Court concluded there was no abuse of discretion in the court's decision to refer the jurors to the instructions as given. *Id.* at 44.

*Ng*, was based on *State v. Crowell*, 92 Wn.2d 143, 594 P.2d 905 (1979),; *State v. McKenzie*, 56 Wn.2d 897, 355 P.2d 834 (1960) and *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651

(1962). The salient issue in each of the cited cases, as with *Ng*, does not apply in this case.

In *Crowell* the question was whether a defendant should get a new trial because of statements by the bailiff to the jury. The Court held the bailiff's unauthorized statements required a new trial. *Crowell*, 92 Wn.2d at 144. The Court held that by asking the juror about the awareness of alternative verdicts, specifically a hung jury, the trial court erred. That specific questioning amounted to a probe of the juror's mental processes. *Id.* at 146-147. The case did not involve a prosecutor making a statement after being denied a first aggressor instruction.

In *McKenzie*, the trial judge relied on an affidavit of one of the jurors alleging a juror argued something the trial court had prohibited. *McKenzie*, 56 Wn.2d at 900. By considering and acting on the basis of the affidavit, the trial judge allowed the juror to attest to a matter inhering in the jury verdict. This was error. Again, this case does not involve a juror attestation, it involves prosecutorial misconduct and a juror question submitted to the court about that improper statement.

The improper statement in this case was flagrant and ill-intentioned and an instruction could not have cured the resulting

prejudice; and the prejudice had a substantial likelihood of affecting the verdict. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

Where a statement is made which is inherently prejudicial and of such a nature that it will impress itself on the minds of the jurors, a subsequent instruction to disregard the statement cannot be said to remove the prejudicial impression. *State v. Beard*, 74 Wn.2d 335, 341, 444 P.2d 651 (1968).

This matter should be reversed. *State v. Davenport*, 100 Wn.2d 757, 767, 675 P.2d 1213 (1984).

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Michael respectfully asks this Court to reverse and vacate her conviction. In the alternative, she asks the Court to remand for consideration of an exceptional downward sentence.

Respectfully submitted this 8<sup>th</sup> day of January 2020.



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## CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on January 8, 2020, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Spokane County Prosecuting Attorney at SCPAAppeals@spokanecounty.org and to Lisa Michael/DOC#707586, Eleanor Chase House, 427 W. 7<sup>th</sup> Ave, Spokane, WA 99204.



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**January 08, 2020 - 9:24 AM**

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