No. 32729-5-II

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THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent.

v.

Kenneth Kyllo

Appellant.

Statement of Additional Grounds

Kenneth Kyllo #294467
Washington State Reformatory A-402
PO Box 777
Monroe WA 98272

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, **Respondent,** **Vs.** **Kenneth Kyllo,** **Appellant.**	**CASE NO: 32729-5-II** **STATEMENT OF ADDITIONAL GROUNDS PURSUANT TO RAP 10.10**

In addition to the issues raised by appellate counsel the appellant would like to bring to the court's attention the following grounds for review. It is the contention of this defendant that the accumulation of numerous errors by the trial court deprived him of a

fair trial.[1] This Court has the authority under RAP 2.5(a)(3) to review error claims whether they be properly preserved or not, if the cumulative effect of all errors denies the defendant the constitutional right to a fair trial.[2] Although it is my contention that many of the errors listed warrant reversal on their own merit, this appellant would ask this court to also view all of the errors in light of, "the total effect of a series of incidents creating a trial atmosphere which threatens to deprive the accused of the fundamentals of due process."[3] "The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible errors materially affects the outcome of a trial."[4]

Following is a list of the issues this defendant wishes to raise before this Court:

Additional Ground # 1

THE APPELLANT WAS DENIED DUE PROCESS OF LAW BY A FAULTY SELF-DEFENSE INSTRUCTION THAT LOWERED THE STATE'S BURDEN OF PROOF.

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[1] US Constitution 5th and 14th Amendments
[2] St. v. Alexander 64 Wn. App 147 150-151, 822 P.2d 1019 (1992)
[3] St. v. Swenson 62 Wn. 2d 259, 382 P.2d 614 (1963)
[4] St. v. Newbern 95 Wn. App. 277, 297, 975 P.2d 721 (1999)

A conviction cannot rest on an ambiguous and equivocal jury instruction.[5] An erroneous to-convict instruction that relieves the State of it's burden of proving every essential element of the charged crime beyond a reasonable doubt constitutes prejudicial error requiring reversal of the conviction. *State v. Cronin* 142 Wn. 2d 568, 14 P.3d 752 (2000).

The Due Process clause of the 14th Amendment protects against conviction unless every fact necessary to constitute a crime is proven beyond a reasonable doubt. *Francis v. Franklin* 105 S. Ct. 1965, 471 U.S. 307, 851 L. Ed 2d 344 (1985).

In the present case the jury was given the following instruction (#13) proposed by defense counsel: "A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful." WPIC 17.04

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[5] *U.S. v. Washington*, 819 F.2d 221 (9th Cir. 1987).

The Washington Supreme Court has criticized the use of the term "great bodily harm" in *State v. Walden.*[6] In that case the Court held that the term "great bodily harm" as well as the definition given injected an impermissible objective standard into the instructions.

Although in the present case, "great bodily harm" was not defined, "substantial bodily harm" was defined in instruction 19. (Attached as Appendix A) That definition requires substantial disfigurement, substantial loss or impairment of function or fracture of any bodily part. It is completely plausible that in considering the act on appearances instruction, the jury would equate "great bodily harm" with "substantial bodily harm" thus creating an impermissible standard.

In *Walden* the Supreme Court reiterated that when self-defense is alleged, "great personal injury" should be defined using WPIC 2.04.01 which defines it as "an injury that the (defendant) reasonably believed, in light of all the facts and circumstances known at the time,

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[6] *State v. Walden*, 131 Wn. 2d 469, 932 P.2d 1237

would produce severe pain and suffering if it were inflicted upon either the defendant or another person."

In the present case no definition was requested or given. This left the jury with the only possible definition of great bodily harm to be the one given for "substantial bodily harm." By this definition the jury would have to believe that the defendant was in fear of substantial disfigurement, substantial loss or impairment of function or fracture of any bodily part. The proper standard would be for the jury to have been instructed that the defendant was in fear of receiving an injury that would produce severe pain and suffering if it were inflicted.

In the present case, as in *Walden,* the instructions as read create an impermissible standard and change the burden of proof. Instead of having to show that the defendant was in fear of severe pain and suffering, the instructions created a requirement that the jury find the defendant was in fear of substantial disfigurement, substantial loss or impairment of function or fracture of any bodily part.

Read as a whole, the jury instructions must make the relevant legal standard *manifestly* apparent to the average juror.[7] A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.[8]

The Court of Appeals Division III recently ruled on a case with essentially the same issue in *State v. Rodriguez*.[9] In *Rodriguez* as in the present case the jury was given the act on appearances instruction with the term "great bodily harm" in the language. The jury was then given the definition of great bodily harm in regards to the first degree assault charge. The Court of Appeals noted that "this is precisely the problem the Supreme Court warned against in *State v. Walden*."[10] The Court further concluded that the net effect was to decrease the State's burden to disprove self-defense.[11]

The proposed and accepted jury instruction regarding act on appearances (#13) should have either had the phrase "great bodily harm" removed or had the term defined as fear of severe pain and

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[7] *State v. LeFaber*, 128 Wn. 2d 896, 900, 913 P.2d 369 (1996)
[8] *Id.* at 900
[9] *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201, (2004).
[10] Id. at 186.
[11] Id. at 187.

suffering. The instructions as read clearly lowered the States burden of proof and substantially prejudiced the defense.

An error in giving or failing to give an instruction will be considered for the first time on appeal if it evades a fundamental constitutional right of accused and would probably change the result of the case.[12] Clearly the faulty instruction addressed here lowered the burden of proof and fundamentally deprived the defendant of his right to a fair trial and due process of law.

Additional Ground # 2

THE APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S PROPOSAL OF A FAULTY INSTRUCTION.

Defendants are constitutionally guaranteed reasonably effective representation by counsel. U.S. Constitution, Amend.6. *Strickland v. Washington.*[13] Ineffective assistance is established when a defendant shows that counsel's performance was deficient and that the deficient

[12] *State v. Pam*, 98 Wn. 2e 748, 659 P.2d 454, (1983).
[13] *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

performance prejudiced the defense.[14] The first prong of the *Strickland* test requires "a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v. Thomas*.[15] The second prong of *Strickland* requires the defendant to show only a "reasonable probability" that counsel's deficient performance prejudiced the outcome of the case.[16] The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." A reasonable probability is one sufficient to undermine the confidence in the outcome of the case.[17]

In the present case, counsel proposed a jury instruction that relieved the state of it's burden of proof. There is no tactical advantage to having the jury receive the instruction without the proper definition for "great bodily harm."

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[14] *Strickland*, 466 U.S. at 687
[15] *State v. Thomas*, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987)
[16] *Strickland*, 466 U.S. at 693
[17] *Id* at 694.

The present case is virtually identical to the case of *State v. Rodriguez*.[18] As outlined above the circumstances are in effect the same. In *Rodriguez* the Court of Appeals Div. III stated:

"If we can conceive of some reason why Mr. Rodriguez's lawyer would propose these instructions as a tactic or strategy to advance Mr. Rodriguez's position at trial, then we would conclude that the lawyer's performance was not deficient...But we can conceive of none here. The net effect was to decrease the State's burden to disprove self-defense."[19]

It is clear from the record as well as recent case law that it the instructions given were deficient and did not make the appropriate legal standard manifestly apparent to the jury. As both *State v. Walden* and *State v. Rodriguez* had been decided prior to defendant's trial[20] in October of 2004, counsel should have been aware of the relevant case law and requested the proper instruction and definition.

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[18] *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201, (2004). (Citing State v. Studd, 137 Wn. 2d 533, 538, 973 P.2d 1049 (1999).
[19] Id at 187.
[20] *State v. Walden* was decided in 1997 and *State v. Rodriguez* was decided in April of 2004.

In the present case as in *Rodriguez*, the error cannot be said to be harmless, as the Court of Appeals stated "here these particular defense instructions struck at the heart of Mr. Rodriguez's defense."[21] The same is true of the present case.

The overwhelming evidence showed that the fight was instigated and pursued by the "victim" Mr. Mickens. Mr. Mickens himself stated:

> "I started the fight. I created the fight myself and it was my fault. I called him every name in the book, I told everybody that...I'm the one that went out there and started a fist fight with Ken Kyllo. I admit that." VRP 231

Mr. Mickens stated that prior to the fight he had been calling the defendant an informant for the task force, a rat and a sex offender. VRP 194. He also repeatedly stated that the defendant wasn't looking for a fight, VRP 194. Mickens stated that at some point prior to the fight " I came to the conclusion that I figured that, you know what, he doesn't want to fight." VRP 195.

Mr. Mickens described the actual fight in his own words and stated:

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[21] *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201, (2004).

> "I wanted a fist fight and he wanted to hold me...and not fist fight I'm thinking. I'm not sure if that's what it was. I think he wanted to prevent it. " VRP 211

Mr. Mickens also testified that the defendant "screamed stop" prior to biting his ear. VRP 212.

Perhaps the most telling evidence of Mr. Mickens intent to harm the defendant comes from his final statement: "The best thing that ever happened to Kenny Kyllo in his life is he bit my ear off." VRP 261. It is pretty clear from that statement that Mr. Mickens was indeed trying to inflict severe pain and suffering on the defendant and that the only thing that stopped him from doing so was getting his ear bit.

An especially telling point on this issue of Mickens intent to harm Kyllo is the fact that Mr. Kyllo was in jail following a car wreck and was injured. Mr. Mickens knew that and testified to it. "He was injured. He was hurt from a car wreck," VRP 181. Obviously a person who had been injured in a car wreck would expect that to get into a fight would cause further pain and damage to the body.

Mickens testified that this was the reason Mr. Kyllo gave for not wanting to fight. VRP 181

The entire defense was based upon self defense. The improper instructions to the jury struck right at the heart of that defense. Instead of being able to argue that the defendant was in fear of severe pain and suffering, the defense was forced to prove that the defendant was in fear of substantial disfigurement, substantial loss or impairment of function or fracture of any bodily part. There is no tactical or strategic rationale for the requesting instructions that created a greater burden on the defense. Counsel's deficient performance in submitting an incomplete instruction without proper definition of the critical term was highly prejudicial.

Defense counsel further compounded the error by the fact that he misinformed the jury that Mr. Kyllo needed to be in fear of serious injury or death. During closing arguments, defense counsel in recounting the defendant's actions, stated "he did what he needed to do to save himself from serious injury or death." VRP 385

This statement could do nothing but re-affirm to the jury that this was the standard that had to be arrived at in order to justify self-defense. Had the proper definition been given, counsel could have properly argued that all Mr. Kyllo had to be in fear of was severe pain and suffering.

Additional Ground # 3

THE APPELLANT WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S REFUSAL TO ALLOW A JURY INSTRUCTION ON SPECIFIC INTENT.

At the close of trial, counsel requested a jury instruction to define specific intent. (Attached as appendix B, Defendant's Proposed Jury Instructions #6) Counsel cited *State v. Louther*[22] as the basis for this instruction. The trial Court refused to give an instruction on specific intent and instead gave jury instruction # 16, a general intent instruction which read:

> **A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.** WPIC 10.10

[22] *State v. Louther* 22 Wn. 2d 497, 156 P.2d 672 (1945)

Defense counsel formally objected to the Court's failure to allow the proposed specific intent instruction. VRP 351-352.

The proposed instruction was needed in order to clarify the required essential element of intent. The court's refusal to allow the instruction prevented the defense from properly presenting their defense theory.

In order to convict the defendant of 2nd degree assault, the state had to prove beyond a reasonable doubt that the defendant "intentionally assaulted another and thereby recklessly inflicts substantial bodily harm," RCW 9A.36.021(1)(a). The other possible definitions of 2nd degree assault do not apply here. Given the fact that the State's burden of proof was to show that the defendant *intentionally assaulted* Mr. Mickens, the specific intent instruction was needed.

Under the general intent instruction that was given instead, the jury could have reasoned that the State satisfied it's burden by showing that the defendant engaged in the fight, a point that the prosecutor made numerous references to. The specific intent

instruction proposed by the defense would have clarified the State's burden to show "that the defendant knowingly did an act which the law forbids, purposefully intending to violate the law." (proposed instruction #6)

Two Washington Supreme Court cases stand for the proposition that the State must prove specific intent in some 2nd degree assault cases.[23] RCW 9A.08.010 gives a statutory definition of culpability and defines 4 levels of culpability or mental states. The Supreme Court has held that when one of these mental states is an essential element of the charged crime, a defendant is entitled to an instruction incorporating the appropriate statutory definition.[24]

In the present case by giving a broader general intent instruction instead of the specific intent instruction that was requested, the trial court reduced the State's burden of proof. Under the broader definition the State merely had to prove that the defendant intentionally entered into a fight which resulted in a crime. In the

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[23] *State v. Byrd* 125 Wn. 2d 707, 887 P.2d 396 (1995), *State v. Eastmond* 129 Wn. 2d 497, 919 P. 2d 577 (1996)
[24] *State v. Allen,* 101 Wn. 2d 355, 678 P.2d 798 (1984).

proposed specific intent instruction the State would have properly been required to prove that the defendant intended to assault Mr. Mickens. Furthermore, the jury would have been instructed that the fact that the fight resulted in Mr. Mickens receiving an injury does not prove intent.

Testimony from the only independent eye witness, Kenny Stevens, provides clear evidence that the defendant stated numerous times that he did not want to fight, (VRP 148) that Mickens was the aggressor and was inflicting severe pain to the defendant with kicks and blows to the groin. (VRP 149).

Under the general intent instruction the State was able to argue that the defendant intentionally bit Mr. Mickens' ear and therefore his intentional action resulted in assault. This is not a proper instruction because the whole defense was based upon the theory that the defendant bit Mr. Mickens in order to get him to stop beating on him. Under the proposed instruction the State would have had to prove that Mr. Kyllo intentionally assaulted Mr. Mickens with the intent to recklessly inflict substantial bodily harm.

As is discussed above, the cumulative effect of the jury instructions read as a whole created a fundamentally unfair standard of proof. The essential element of intent to commit 2nd degree assault was not properly defined for the jury.

Instructions that relieve the State of it burden to prove one of the elements of the charged crime are a violation of due process and the Sixth Amendment.[25] It is reversible error to refuse to give a requested instruction when it's absence prevents the defendant from presenting his or her theory of the case.[26] The instructions as given do not provide the jury with sufficient understanding of the issues involved and applicable standards pertaining to this case. An instruction is appropriate if it informs the jury of the applicable law, is not misleading, and allows the defendant to argue his theory of the case.[27]

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[25] *U.S. v. Gaudin* 115 S. Ct. 2310 (1995).
[26] State v. Kidd, 57 Wn. App. 95, 99, 786 P.2d 847 (1990).
[27] *State v. Tili*, 139 Wn. 2d 107, 126, 985 P.2d 365 (1999), *State v. Brightman*, 112 Wn. App. 260, 264, 48 P.3d 363. (2002)

A trial court's decision on what instructions to give are reviewed de novo.[28] A conviction cannot rest on an ambiguous and equivocal jury instruction.[29]

In the present case the lack of a specific intent instruction reduced the State's burden of proof and allowed the jury to convict with proving an essential element of the charged crime. The error cannot be said to be harmless.

Additional Ground #4

THE APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY HIS ATTORNEY'S ASSERTION DURING CLOSING ARGUMENTS THAT IF THE STATE SHOWED THAT KYLLO THREW THE FIRST PUNCH THEN HIS RIGHT TO SELF-DEFENSE WAS NEGATED.

During closing arguments defense counsel stated: "The State has hung it's hat and must convince you that my client threw the first punch; that he was the aggressor, and if they can convince you of that, then his right to self-defense goes away." VRP 380

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[28] *State v. Walker*, 136 Wn. 2d 767, 772, 966 P.2d 883 (1998)
[29] *U.S. v. Washington*, 819 F.2d 221 (9th Cir. 1987)

As discussed above an attorney's performance is deficient when it falls below an objective level of reasonableness and prejudices the defendant.[30]

In the present case, the offending statement was not only a material misstatement of the law, but it struck at the core of the defense case. Washington case law does not support a position that the person who throws the first blow is automatically the aggressor. The Court of Appeals has determined in *State v. Heath*, that the simple question of who struck the first blow is not determinative of who provoked the fight.[31]

The statement by defense counsel dramatically changed the burden of proof for the State and made it possible for the State to make the whole case a question of whether or not Mr. Kyllo threw an "air punch" when Mickens was attacking him verbally and getting "toe-to-toe" with him and threatening him. This is clearly not the standard as Washington law supports the principle that words and actions that precipitate a fight can be the provoking factor. In the case

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[30] *Strickland v. Washington*, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).
[31] *State v. Heath* 35 Wn. App. 269, 666 P.2d 922 (1983)

at hand, there is volumes of evidence to support the fact that Mickens was the aggressor and that he provoked and instigated the fight. If fact, the question of whether or not Mickens was calling Kyllo horrible names, swearing at him, challenging him to a fight and threatening him are uncontested by the State. The misstatement of the law by defense counsel allowed the State to set all of that aside and "hang it's hat" on the single question of whether or not the defendant swung first. The State made great use of this misstatement and elaborated on it during the final phases of closing argument. (Discussed below in Additional Ground #5point (E))

There can be no tactical or strategic reason for counsel to make a statement that misinforms the jury on the applicable law and destroys his client's claim of self-defense. The appellant was greatly prejudiced by counsel's statement and counsel's performance fell below an objective standard of reasonableness.

Additional Ground # 5

THE APPELLANT WAS DENIED DUE PROCESS OF LAW BY NUMEROUS INCIDENTWS OF PROSECUTORIAL MISCONDUCT.

During closing arguments, the prosecutor misrepresented critical facts, misquoted key testimony, interjected her personal opinion on medical matters, misstated the law in a highly prejudicial manner and participated in a card trick to inflame the passions of the jury. Although the defense objected on numerous occasions, the only instruction given by the trial court was "the jury is responsible in determining the evidence." VRP 359

The Washington Courts will review remarks that are deemed flagrant and ill intentioned that result in prejudice that could not have been neutralized by an admonition to the jury, even if no objection is made at trial.[32] Closing arguments are the defendant's "last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt."[33]

A. The prosecutor misrepresented critical facts.

The State focused a great deal of attention in closing to try and establish that it was the defendant who threw the first punch. During

[32] *State v. Smith* 144 Wn. 2d 665, 30 P.3d 1245 (2001)
[33] *State v. Perez-Cervantes* 141 Wn. 2d 468, 6 P.3d 1160 (2000) citing *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)

her recitation of Mickens' testimony in closing argument she stated that Mickens turned away and "when he turns back around Kyllo was swinging, doesn't land a punch, gets nothing but air. But he's swinging." VRP 358. This is not an accurate portrayal of what Mickens testified to. He originally stated that he turned and made a comment into the day room and "that's when the fight started." VRP 196. Then he stated that he got up toe- to- toe with Mr. Kyllo and confronted him. VRP 198. Mickens was then asked when he turned back around where the defendant was in comparison to him and he stated he was "about a distance from me to the corner right there." He then stated, "He came at me and threw some punches and I threw some punches at him." VRP 202 Mickens then stated that none of the punches touched him. VRP 203.

The prejudice can be seen clearly later in closing when the prosecutor stated: "Mr. Mickens said: 'I was egging him on verbally, but Mr. Kyllo threw the first punch', and that is consistent through all Mr. Mickens statements. It's been consistent the entire time that Mr. Kyllo did actually get in some punches here and there." This editorial

license with the sequence of events is critical because the State placed it's whole case on the fact that if Kyllo threw the first punch, his self-defense instruction was null and void as discussed in point (E) below.

B. The prosecutor misquoted key witness testimony.

The prosecutor stated during closing arguments that the defendant never mentioned self-defense in his statements to Pat Connors. "Didn't say he acted in self-defense." VRP 362. This statement is untrue. On direct examination by the same prosecutor Mr. Connors was asked if Mr. Kyllo made any comments about defending himself and Mr. Connors responded that the report shows that Mr. Kyllo told him that if he interviewed the people in the jail he would see that Kyllo didn't start the fight and was defending himself. VRP 280.

Later in closing the prosecutor summarized the conversation prior to the fight from Mickens' testimony and stated that Mr. Kyllo that was instigating the fight. "Mr. Kyllo said: 'No you come here and let's fight.'" VRP 357 She then repeated the statement at VRP 358. Not only is this not what Mr. Mickens testified to but it is completely

contrary to all the evidence that shows Mr. Kyllo stated several times that he did not want to fight. Mr. Mickens testified to the events proceeding the fight and clearly stated that Mr. Kyllo "didn't look for a fight," VRP 194. Mr. Mickens did say that the two of them went back and forth saying "you come in here" "you go out there" VRP 195 but nowhere in the record is any mention of Kyllo stating "let's fight."

Mr. Stevens stated that Mr. Kyllo stated numerous times that he did not want to fight. VRP 148

The prosecutor's misrepresentation of the statements preceding the fight went right to the heart of the defense that Mickens was the aggressor and the defendant was trying to avoid a fight.

In discussing Mr. Stevens' testimony the prosecutor stated that Mr. Stevens testified that he never saw the ear being bitten. "And what's interesting is Mr. Stevens, who supposedly was in this great viewpoint, never ever saw the defendant bite Mr. Mickens' ear, claims to have not seen that: 'Oh, I saw the whole thing. I saw Mr. Kyllo was completely innocent and he didn't want to fight, and he didn't

throw a single punch, but I couldn't see this man biting off another man's ear. I don't know what happened. The fight just ended and his ear was hanging off." VRP 361. This whole line of quotes is complete fantasy. On direct examination the prosecutor asked Steven's "Your claiming now that you did see the defendant bite Mr. Mickens' ear?" "Yes." VRP 151

C. The prosecutor interjected her personal opinion on matters requiring expertise.

During closing the prosecutor gave her personal opinion on the injuries sustained by Mr. Kyllo. The State suggested that the bite marks were self- inflicted despite the fact that they did not call any qualified medical expert to give there opinion. Instead the prosecutor interjected her own opinion into the case. "If you're going to bite yourself, that's a hard thing to do if you're really trying to cause injury. It makes sense that the skin isn't going to be broken. It's very difficult, I think, psychologically to cause injury to yourself. It was not a vicious bite that would put the defendant in fear of his life. It was not from Mr. Mickens. *It's very obviously from Mr. Kyllo.*" VRP

370 (emphasis added). She then goes on to give her medical opinion regarding the defendant's bruises. VRP 371.

It is improper for a prosecutor to express opinions that require expert knowledge.[34] By going beyond the record, the prosecutor becomes an unsworn witness, engages in extraneous and irrelevant argument, diverts the jury from it's proper function, and seriously threatens the defendant's right to a fair trial.[35]

In the present case it was improper for the prosecutor to give the jury her opinion of the evidence. She did not call an expert witness to give an opinion as to whether the injuries were self-inflicted and it was inappropriate for her to give her own opinion.

D. The prosecutor made comments intended to inflame the passions of the jury

Just prior beginning her rebuttal portion of the closing argument the prosecutor walked up to the jury box and shuffled a deck of cards and told the jury "that is the sound of your ear being ripped off your

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[34] [34] *The Georgetown Law Journal Annual Review of Criminal Procedure.* 2003, PG 558

[35] *Prosecutorial Misconduct*, 2nd Edition, Bennett L. Gersham, (2005), citing U.S. v. Hoskins, 446 F.2d. 564, (9th Cir. 1971).

head." VRP 386. She then went on to tell the jury several times that she wanted them to remember that sound when they go back in deliberations.

A prosecutor is forbidden to use arguments calculated to inflame the fears, passions, and prejudices of the jury.[36] The theatrics employed by the prosecutor go beyond the pale. Court's have frowned upon argument that "offends the dignity and decorum of the proceedings,"[37] or possesses a "unique capacity to remain in the minds of the jurors and influence their deliberations."[38] Clearly the prosecutor's card trick was intended to do just that.

E. The prosecutor misinformed the jury on the applicable law.

Central to the State's case was the assertion that if the State could prove that the Kyllo threw the first punch then self-defense. During closing the prosecutor made a material misstatement of the law to the jury: "It's true that if I prove to you beyond a reasonable doubt that Ken Kyllo took that first swing, threw that first punch, self-

[36] *Prosecutorial Misconduct*, 2nd Edition, Bennett L. Gersham, (2005) citing ABA Standards for Criminal Justice §3-5.8(c) (3d. Ed. 1993).
[37] *Viereck v. U.S.*, 318 U.S. 236, 63 S. Ct. 561, 87 L.Ed. 734 (1943)
[38] *Prosecutorial Misconduct*, 2nd Edition, Bennett L. Gersham, (2005) at page 260.

defense is out." VRP 390. Not only is this statement contrary to Washington state case law, it is fatally prejudicial to the defense. The simple question of who struck the first blow is not determinative of who provoked the fight.[39] Even under the State's theory of the events, at worst Mr. Kyllo threw a punch that did not hit Mickens. To tell the jury that if that event happened, Mr. Kyllo's claim of self defense "is out" is a material misstatement of the law.

It is the rule in this state, that statements by the prosecution or defense to the jury upon the law must be confined to the law as set forth in the instructions to the court.[40] The 10th Circuit Court of Appeals has said, "A misstatement of law that affirmatively negates a constitutional right or principle is often, in our view, a more serious infringement than mere omission of a requested instruction."[41]

Prosecutorial misconduct which denies a defendant a fair trial violates the defendant's Constitutional due process rights.[42] "It is well

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[39] *State v. Heath* 35 Wn. App. 269, 666 P.2d 922 (1983)
[40] *State v. Estill* 80 Wn. 2d 196, 492 P.2d 1037 (1972)
[41] *Mahorney v. Wallman* 917 F.2d 469, 473 (10th Cir. 1990) Citing *Donnelly v. DeChristoforo* 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974).
[42] Washington Practice Criminal Procedure Volume 13 §4406 page 257

settled that presentation of false evidence violates due process."[43] In the present case the prosecutor's misrepresentation of the evidence coupled with her material misstatement of the law deprived the defendant of his Constitutionally guaranteed right to a fair trial.

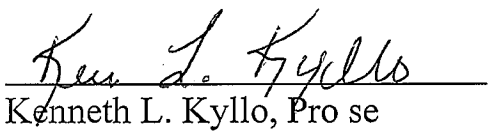
Conclusion

As previously stated this appellant would ask this Court to consider the cumulative effect of all the errors that deprived this appellant of due process as guaranteed under the 5th and 14th Amendments to the United States Constitution.

The cumulative effect of all the errors in the present case deprived this appellant of a fair trial. This appellant would respectfully ask this court to reverse the conviction against him.

Dated this 13th day of February, 2006.

Respectfully submitted,



Kenneth L. Kyllo, Pro se

[43] Phillips v. Woodford 267 F.3d. 966 (9th Cir. 2001) at page 984.