

No. 63016-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERICK DESHUM JORDAN,

Appellant.

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

The Honorable Dean Lum

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of Jordan's Fourteenth Amendment right to due process, the trial court erred in failing to refer him for a competency evaluation.

2. The inclusion of Jordan's prior out-of-state conviction in his offender score under the Sentencing Reform Act of 1981 (SRA) violated due process.

3. The trial court denied Jordan his Sixth Amendment right to a defense when it declined to instruct the jury on justifiable homicide and on the lesser included offenses of manslaughter in the first and second degree.

4. Multiple instances of prosecutorial misconduct denied Jordan his due process right to a fair trial.

5. Jordan's convictions for murder in the second degree while armed with a firearm and unlawful possession of a firearm violated the Fifth Amendment's prohibition against double jeopardy.

6. Cumulative error denied Jordan his due process right to a fair trial.

B. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Principles of due process require that where a trial court has a reason to doubt a person's competency to stand trial, the court must refer the accused for an examination and hold a hearing as mandated by RCW

10.77.060. Although defense counsel told the court that he had concerns about Jordan's competency and the court's own colloquy with Jordan revealed that Jordan had difficulty understanding the nature of the proceedings, the court did not comply with the procedures set forth in RCW 10.77.060. Was Jordan denied due process? (Assignment of Error 1)

2. Principles of due process prohibit the use of a foreign conviction to elevate an accused's sentence in Washington where the elements of the foreign offense are different or broader than the comparable Washington offense, or where in Washington the accused could have raised defenses that would not be available under the foreign statute. Jordan's offender score was elevated by a Texas conviction for voluntary manslaughter to which Jordan had raised a claim of self-defense. "Voluntary manslaughter" in Texas is broader than any potentially comparable offense in Washington, and the law of self-defense in Texas at the time that Jordan was convicted (1) imposed a more stringent burden of production than is required in Washington, (2) did not require jury instructions unambiguously explain that the State bore the burden of disproving the defense, (3) permitted the use of deadly force only to combat deadly force or an attempt to use deadly force, and (4) imposed a duty to retreat upon the defendant. Did the use of this offense

to increase Jordan's punishment violate due process? (Assignment of Error 2)

3. Consistent with the Sixth Amendment right to present a defense, an accused person is entitled to jury instructions that enable him to argue his theory of the case even where the theory may be frivolous or where defense counsel lacks a good faith basis to believe the argument is supported by the facts. Prior to trial, Jordan submitted to an interview with the prosecution in which he stated he did not act in self-defense. Where these statements were not sworn, the evidence otherwise supported the issuance of self-defense instructions, and issuing the instructions would have held the State to its burden of proving the essential elements of the charge, did the trial court err in ruling defense counsel was "ethically bound" by the interview and Jordan was not entitled to the instructions? (Assignment of Error 3)

4. Did prosecutorial misconduct deny Jordan the fair trial he was guaranteed by the Fourteenth Amendment? (Assignment of Error 4)

5. Did Jordan's convictions for murder in the second degree predicated on the use of a firearm with a firearm enhancement and unlawful possession of a firearm in the first degree violate the Fifth Amendment's prohibition against double jeopardy? (Assignment of Error 5)

6. Did cumulative error deny Jordan the fundamentally fair trial he was guaranteed by the Fourteenth Amendment? (Assignment of Error 6)

C. STATEMENT OF THE CASE

1. The charged incident. Neighbors of the Ethio bar on Jefferson Street in Seattle were disturbed by a loud argument in the street late one July night in 2007 and called the police. 4RP 10-16, 30-34; 6RP 5-8; 13RP 675-76.¹ Patrick Ryan, who lived in a condominium on 12th Avenue and Jefferson Street, saw 10 to 12 people pushing each other back and forth and throwing punches. 4RP 13, 30. He heard two shots fired, and from his window then observed a man in a black shirt and shorts with his hand outstretched shoot another man, who dropped to the ground. 4RP 18-19. Another neighbor, Amir Rafi, similarly described seeing two men confronting a third man and also witnessed the shooting of the third man.

¹ The verbatim report of proceedings consists of 15 volumes, which are referenced herein as follows:

5/29/08	-	1RP
5/30/08	-	2RP
6/4/08	-	3RP
6/5/08	-	4RP
6/9/08	-	5RP
6/10/08	-	6RP
6/16/08	-	7RP
6/17/08	-	8RP
6/18/08	-	9RP
6/19/08	-	10RP
6/23/08	-	11RP
6/24/08	-	12RP
6/25/08	-	13RP
6/26/08	-	14RP
1/16/08	-	15RP

13RP 676. Officers Steve Lambert and Courtney Harris, who responded to the 911 disturbance call, arrived at the scene in time to witness the shooting as well. 6RP 37-38, 76-78, 81.

After the shooting, the crowd scattered, and the shooter and another man wearing light-colored clothes fled north on 12th Avenue. 4RP 21, 45. Following an intensive police search and containment operation, two young men, appellant Erick Jordan and his co-defendant, Marcus Dorsey, were arrested. 8RP 15; 9RP 44-48, 115. Ballistics testing connected bullet fragments recovered from victim Maurice Jackson's body to a .38 caliber revolver found in Jordan's pants pocket. 7RP 88; 10RP 170; 11RP 332-38.

Based on these events, Jordan was charged by amended information with one count of murder in the second degree with a firearm enhancement and one count of unlawful possession of a firearm in the first degree. CP 11-13.

2. Jordan's incompetency to stand trial. Prior to trial, Jordan's attorney told the court that he had concerns regarding Jordan's competency to stand trial. 1RP 4. He stated that Jordan had been attacked in the King County Jail and had been placed on a suicide watch. *Id.* He said that it had been difficult to communicate with Jordan and that he could not tell whether Jordan could understand him, explaining, "[Jordan]

would go from being very uncommunicative to focused on things outside of the issues that we had to deal with at trial.” Id. He asked the court to engage in a colloquy with Jordan to verify that he was competent to stand trial. 1RP 5.

Jordan’s responses during the colloquy were rambling and disjointed. When the court asked him if he understood the charges against him, Jordan responded, “Whatever they say I’m charged with, I’m charged with.” 1RP 7. The court then reminded Jordan of that it was important to cooperate with his attorney, to which Jordan responded:

No. I’m talking about the fact that it is like being befriended to the case, being befriended and especially gang ground, like be nice to you, gain information out of you. And I’m thinking to myself, like, I’m not a member of a gang. What if they get to my son, who is 13? He might want to get into a gang, and that hurt me when I heard that.

That’s the type – there is already enough stuff going on. Don’t use anything to try to incriminate me. And that’s the thing that bothers me the most. I feel bad about this. You are all just a small fragment of what is going on. This is nothing, you feel me.

That’s the Court up above, and I ain’t going to try to get away with nothing I done. This is not the whole case.

1RP 7-8.

Despite Jordan’s strange answers to the court’s questions, the court ruled,

Based on the colloquy, the court doesn’t have concerns about competency. I understand the defendant is

going through a tough time. And he is charged with very, very serious events. And there are issues that he has to deal with, in terms of what his son has to perceive. And obviously, all of us have to deal with some larger religious and social issues, that are larger than us.

And I think that's what the defendant's referring to. And I sense a feeling of frustration. And I find this is not a competency issue, but perhaps understandable frustration in the situation. And that's not to minimize it, or not to say that – make any value comment on it. It is just what it is. But it is not competency.

1RP 8-9.

At a CrR 3.5 hearing held immediately after this colloquy, Jordan told the court that he did not understand the proceedings. 1RP 9. The court then asked him, “Mr. Jordan, do you understand this?” Jordan responded, “I’m here, and I’m just going along.” 1RP 10.

3. Trial and sentencing. Jordan proceeded to a jury trial. The trial court denied Jordan’s requests for jury instructions on justifiable homicide and the lesser included offenses of manslaughter in the first and second degree. 13RP 709. Jordan was convicted of both counts as charged. CP 14-16.

At sentencing, the court concluded that Jordan’s 1992 Texas juvenile conviction for voluntary manslaughter was comparable to the crime of murder in the second degree, and, based on Jordan’s other Washington felony history, determined his offender score on the murder conviction was eight and on the unlawful possession of firearm conviction

six. 15RP 20-21; CP 153. The court sentenced Jordan to serve 417 months on the murder conviction, including five years for the firearm enhancement, and 75 months on the unlawful possession of a firearm conviction. CP 155. Jordan appeals. CP 167-77.

D. ARGUMENT

1. THE TRIAL COURT DENIED JORDAN HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WHEN IT FAILED TO ORDER A COMPETENCY EVALUATION.

a. Principles of due process prohibit the criminal trial of an incompetent person. An accused person in a criminal case has the fundamental right not to be tried while incompetent to stand trial. Drope v. Missouri, 420 U.S. 160, 171-72, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); State v. Heddrick, 166 Wn.2d 898, 903-04, 215 P.3d 201 (2009); U.S. Const. amend. XIV. ““Incompetency” means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.” RCW 10.77.010(14).

Washington’s competency statute provides greater protection against being tried while incompetent than the federal constitution. In re Personal Restraint of Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). In Washington, whenever there is a reason to doubt an accused person’s

competency, “the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant. RCW 10.77.060 (emphasis added). “The ‘[p]rocedures of the competency statute . . . are mandatory and not merely directory.’” Heddrick, 166 Wn.2d at 904 (quoting Fleming, 142 Wn.2d at 863).

“A lawyer's opinion as to his client's competency and ability to assist in his own defense is a factor which should be considered and to which the court must give considerable weight.” State v. Crenshaw, 27 Wn. App. 326, 331, 617 P.2d 1041 (1980); accord State v. Harris, 122 Wn. App. 498, 505, 94 P.3d 379 (2004). An “expressed doubt” regarding competency by defense counsel, as “one with the closest contact with the defendant” is “unquestionably a factor which should be considered.” State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 678 (1978) (citation omitted).

b. By determining on its own that Jordan was competent to stand trial without complying with the mandatory provisions of RCW 10.77.060, notwithstanding defense counsel's representations to the contrary, the trial court violated Jordan's right to due process. In 1973, the Legislature substantially limited the discretionary authority of trial courts

to make their own determinations of defendants' competency. State v. Wicklund, 96 Wn.2d 798, 801, 638 P.2d 1232 (1982) (discussing enactment of Chap. 10.77 RCW, Laws of 1973, 1st Exec. Sess., ch. 117, p. 795)). The intent and effect behind this legislation was to standardize the procedures to be used in making competency determinations. Wicklund, 96 Wn.2d at 801.

The determination of whether a competency examination should be ordered still rests generally within the discretion of the trial judge. Fleming, 142 Wn.2d at 863. But, "once there is a reason to doubt a defendant's competency, the court must follow the statute to determine his or her competency to stand trial." Id. at 863 (quoting City of Seattle v. Gordon, 39 Wn. App. 439, 441, 693 P.2d 741 (1985)). The failure to follow these procedures is a denial of due process. Heddrick, 166 Wn.2d at 904.

In Heddrick, the Court emphasized that the statutory procedures contained in RCW 10.77.060 can be waived only in very limited circumstances. 166 Wn.2d at 906-07. Specifically, for example, a defense attorney may waive completion of the statutory competency procedures by asking the court to find the defendant competent or by stipulating to competency. Id. (discussing Israel). In Israel, the prosecutor moved for a competency evaluation, but the trial court instead proceeded to question

the defendant and to permit the prosecutor to question her. Israel, 19 Wn. App. at 775-76. After this perfunctory examination, defense counsel asked the court to find Israel competent. Id. The court in Israel held that the defense attorney's request sufficed to waive completion of the statutory competency procedures.

Similar to Israel, the Supreme Court held that Heddrick's defense attorney effected a waiver when she withdrew a challenge to competency. 166 Wn.2d at 908. By contrast, in State v. Marshall, 144 Wn.2d 266, 27 P.3d 192 (2001), the defendant entered a guilty plea to aggravated first degree murder against his lawyer's advice. 144 Wn.2d at 269. After the State indicated it intended to seek the death penalty, Marshall's lawyer alerted the court to competency concerns that may have affected the validity of the plea. 144 Wn.2d at 270-73. Despite this evidence, the court did not comply with the procedures contained in RCW 10.77.060 and instead found on its own that Marshall was competent when he pleaded guilty. Id. at 273. The Supreme Court held the trial court either had to permit Marshall to withdraw the plea or convene a formal competency hearing pursuant to RCW 10.77.060. Id. at 278-79.

This case is like Marshall. At the pretrial hearing where he brought his concerns regarding Jordan's competency to the court's attention, Jordan's attorney explained that Jordan's mental state had

deteriorated to the point where Jordan could not communicate effectively with him and he was concerned that Jordan did not understand the proceedings. 1RP 4. He told the court that Jordan had been placed on suicide watch. Id.

Although defense counsel did not request a competency evaluation, he also did not ask the court to forgo that process or otherwise waive the statutory procedures. Based on his representations to the court and the colloquy counsel did request, there was reason to doubt Jordan's competency. RCW 10.77.060. The court was therefore obligated to follow the statutory procedures to ensure Jordan was competent to stand trial. Marshall, 144 Wn.2d at 278 (“Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.”) (quoting RCW 10.77.060) (court's emphasis)).

c. The constitutional error requires reversal. “Failure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process.” Marshall, 144

Wn.2d at 279. The trial court's inexplicable failure to comply with the statutory procedures contained in RCW 10.77.060 denied Jordan his Fourteenth Amendment right to due process. The convictions should be reversed. On remand, the court should be directed to hold the mandatory competency hearing. Id.

2. JORDAN'S PRIOR TEXAS CONVICTION FOR VOLUNTARY MANSLAUGHTER SHOULD HAVE BEEN EXCLUDED FROM HIS SRA OFFENDER SCORE BECAUSE THAT CRIME IS NOT COMPARABLE TO A FELONY IN WASHINGTON.

a. The inclusion of out-of-state offenses in the SRA offender score violates due process unless the foreign convictions are legally and factually comparable to crimes in Washington. Where the State alleges a defendant's criminal history contains out-of-state felony convictions, under the SRA, the State bears the burden of proving the existence and comparability of those convictions. RCW 9.94A.525;² State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

To determine whether a foreign conviction is comparable to a Washington offense, the court engages in a two-step analysis. First, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d

² That section provides in relevant part, "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525.

at 479 (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)).

If the elements of the foreign conviction are comparable to the elements of a Washington offense on their face, the foreign offense counts toward the offender score as if it were the comparable Washington offense. In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

If the elements of the prior offense are not comparable, or are broader than the pertinent crime in Washington, then the court may look to the facts admitted by the defendant or proved by indictment or trial to determine if the prior offenses are comparable. Id. at 256-57.

However, there are two important caveats to this general rule.

First, if the elements are different or broader than the pertinent Washington statute, the crime may not be used to increase an offender score without offending principles of due process. Lavery, 154 Wn.2d at 257; In re Personal Restraint of Crawford, 150 Wn. App. 787, 794, 209 P.3d 507 (2009); State v. Ortega, 120 Wn. App. 165, 168, 84 P.3d 935 (2004). This is because in order to establish that a prior out-of-state conviction is comparable to a crime in Washington, the court must look to facts beyond the “fact” of the conviction itself. See, e.g., Shepard v. United States, 544 U.S. 13, 125 S.Ct. 1254, 1262, 161 L.Ed.2d 205 (2005) (clarifying that the “prior conviction exception” does not include facts

“about” a prior conviction if those facts are “too far removed from the conclusive significance of a prior judicial record”).

As the Lavery Court explained,

Where the foreign statute is broader than Washington’s, [an examination of the underlying facts] may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense.

Lavery, 154 Wn.2d at 257 (citing Ortega, 120 Wn. App. at 168).

The second caveat concerns the availability of defenses under Washington law that may not have been available under the foreign statute. For example, in Lavery, the defendant had been convicted of federal bank robbery, and this offense was used to impose a sentence of life without the possibility of parole under the Persistent Offender Accountability Act (POAA). Federal bank robbery is a general intent crime, but under Washington law, specific intent to steal is an essential element of the crime of second degree robbery. Lavery, 149 Wn.2d at 255-56 (citations omitted). Thus there are several defenses available under Washington law that could not be raised in a federal bank robbery prosecution, such as intoxication, diminished capacity, duress, insanity, and claim of right. Id. at 256. It is for this reason that any effort to establish factual comparability in such a circumstance will violate due process, as the defendant may have raised a defense were he charged

under Washington law that he could not have raised in the foreign jurisdiction. Id. at 258 (“As in Ortega, Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under the robbery statute but were unavailable in the federal prosecution.”).

b. The inclusion of a 1992 foreign conviction for voluntary manslaughter in Jordan’s SRA offender score, where that crime was neither factually nor legally comparable to a felony in Washington, violated due process. At sentencing, the State sought to include a 1992 juvenile conviction for voluntary manslaughter in Jordan’s offender score. The State presented copies of the pertinent Texas criminal statute and other documents from the prior proceeding to establish the existence and comparability of the prior foreign offense. CP 27-144. The court concluded this crime was comparable to the crime of second-degree murder in Washington, and relied upon it to add two points to Jordan’s offender score for the current murder conviction, and one point to the offender score for the unlawful possession of a firearm conviction. 15RP 20-21; CP 153.

The crime of voluntary manslaughter was not legally comparable to any Washington felony, however, and there are defenses available under Washington law to a charge of intentional murder that were not

available under Texas law when Jordan's prior offense was committed.

For these reasons, the inclusion of the offense in Jordan's SRA offender score violated due process.

i. The Texas crime was not legally comparable to a felony in Washington. According to the pertinent Texas statute in effect at the time that Jordan's crime was committed, "voluntary manslaughter" is defined as:

A person commits an offense if he causes the death of an individual under circumstances that would constitute murder under Section 19.02 of this code, except that he caused the death under the immediate influence of sudden passion arising from adequate cause.

Tex. Penal Code § 19.04 (1992).

Tex. Penal Code § 19.02 (1992), titled "Murder," provides:

- (a) A person commits an offense if he:
- (1) intentionally or knowingly causes the death of an individual;
 - (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
 - (3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

Tex. Penal Code § 19.02 (1992).

The petition filed in the Texas Juvenile Court and brought by a grand jury alleged:

On or about July 26, 1992 in Limestone County, Texas, Erick Deshun [sic] Jordan did then and there intentionally and knowingly cause the death of an individual, to wit: Juan Gillespie by shooting him with a deadly weapon; to wit: a pistol, against the peace and dignity of the state of Texas.

CP 44-46.

On its face, the Texas statute is substantially broader than any potentially comparable Washington statute, because it permits conviction if a person “intentionally or knowingly causes the death of an individual.” Tex. Penal Code § 19.02. By contrast, Washington’s murder in the second degree statute requires the State to prove an intentional killing. RCW 9A.32.050(1)(a). Washington’s manslaughter in the first degree statute likewise requires the State to prove a different mens rea than what the State must prove under Texas law. RCW 9A.32.060 provides: “A person is guilty of manslaughter in the first degree when . . . he recklessly causes the death of another person.” RCW 9A.32.060(1)(a).

Under Washington law, intent is defined as follows:

A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.

RCW 9A.08.010(a).

In Washington, a person acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(b).

A person is reckless or acts recklessly when:

he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

RCW 9A.08.010(c).

Although the Texas statutory provision defining “intent” is substantially similar to Washington’s RCW 9A.08.010(a), the provision defining “knowledge” allows knowing behavior to be established by a broader range of conduct than is permissible in Washington:

A person acts intentionally or with intent with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Tex. Penal Code § 6.03 (1992).

Although the first prong of Texas' definition of "knowledge" resembles Washington's definition, the second definition, which focuses on the result of the criminal acts, more closely resembles Washington's definition of recklessness. Compare Tex. Penal Code § 6.03 (1992) with RCW 9A.08.010(c).

The State may counter that because Jordan was indicted for "intentionally and knowingly" causing Juan Gillespie's death, these statutory differences do not matter. Any such claim is defeated by an examination of the facts the jury actually found based upon the instructions they were given.

ii. Contrary to Washington law, Texas imposes a burden on the defendant to produce evidence of self-defense and requires a lesser corresponding burden from the State. Jordan raised a self-defense/defense of another claim to the Texas charge. CP 53-55. In Washington, once the issue of self-defense is raised, the absence of self-defense becomes an essential element of the offense which the State must

prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 621-23, 683 P.2d 1069 (1984); accord State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996) (abrogated on other grounds by State v. O’Hara, 167 Wn.2d 91, 101-02, 217 P.3d 756 (2009)); State v. Woods, 138 Wn. App. 191, 198, 156 P.3d 309 (2007).

Jordan raised a defense of others claim to the Texas charge, and the jury in the Texas proceeding was instructed as follows:

You are instructed that under our law a person is justified in using force or deadly force against another to protect a third person if, under the circumstances as he reasonably believes them to be, such person would be justified in using force or deadly force to protect himself against the unlawful force or deadly force of another which he reasonably believes to be threatening the third person he seeks to protect, and he reasonably believes that his intervention is immediately necessary to protect the third person.

CP 53.

With respect to the legal requirements of self-defense, the Texas court explained:

A person is justified in using force to protect himself against another when and to the degree necessary he reasonably believes the force is immediately necessary to protect himself against the other’s use or attempted use of unlawful force. A person is justified in using deadly force against another if he would be justified in using force against the other in the first place, as above set out, and when and to the degree he believes the deadly force is immediately necessary to protect himself against the

other's use or attempted use of unlawful deadly force and if a person in his situation would not have retreated.

CP 53.

With respect to Jordan's right to act on appearances, the court instructed the jury:

When a person is attacked with unlawful deadly force, or he reasonably believes he is under attack or attempted attack with unlawful deadly force, and there is created in the mind of such person a reasonable expectation or fear of death or serious bodily injury, then the law excuses or justifies such person in resorting to deadly force by any means at his command to the degree that he reasonably believes immediately necessary, viewed from his standpoint at the time, to protect himself from such attack or attempted attack, as a person has a right to defend his life and person from apparent danger as fully and to the same extent as he would had the danger been real, provided that he acted upon a reasonable apprehension of danger, as it appeared to him from his standpoint at the time, and that he reasonably believed such deadly force was immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force.

So it is, in the case of a person acting against another in defense of a third person, it is not necessary that there be actual danger to such third person, as a person acting in his defense would have the right to defend him from apparent danger as fully and to the same extent as he would have were the danger real, provided he acted upon a reasonable apprehension of danger to such third person, as it appeared to him from his standpoint at the time, and that he reasonably believed such deadly force by his intervention on behalf of such third person was immediately necessary to protect such person from another's use or attempted use of unlawful deadly force, and provided it reasonably appeared to such persons acting, as seen from his viewpoint alone, that a reasonable person in the situation being

defended would not have retreated to avoid using deadly force in his own defense.

CP 54.

The sole instruction that the court provided concerning the burden of proof with respect to self defense stated:

Now, if you find from the evidence beyond a reasonable doubt that the juvenile respondent, Erick Deshun [sic] Jordan, did kill Juan Gillespie by shooting him with a firearm: to-wit: a pistol, as alleged, but you further find from the evidence, or you have a reasonable doubt thereof, that, viewed from the standpoint of the juvenile respondent at the time, from the words or conduct, or both, of Juan Gillespie, it reasonably appeared to the juvenile respondent that his life or the life or person of Michael Williams was in danger and there was created in juvenile respondent's mind a reasonable expectation or fear of his or Michael Williams's death or serious bodily injury from the use of unlawful deadly force at the hands of Juan Gillespie and that juvenile respondent reasonably believed that under the circumstances then existing, a reasonable person in his or Michael Williams's situation would not have retreated before using deadly force in his own defense, and that the juvenile respondent, acting under such apprehension and reasonably believing that the use of deadly force, by his intervention, or on his part was immediately necessary to protect himself or Michael Williams against Juan Gillespie's use or attempted use of unlawful deadly force, and that he, therefore, shot Juan Gillespie, then you will find that the juvenile respondent did not engage in delinquent conduct; or, if you have a reasonable doubt as to whether or not the juvenile respondent was acting in defense of himself or Michael Williams on said occasion under such foregoing circumstances, then you should give the juvenile respondent the benefit of that doubt and acquit him by answering the questions hereinafter set forth "We do not."

CP 54-55.

Under Washington law, these instructions would be severely deficient in several respects. The most glaring defects concern the instructions on the burden of proof. In Texas, before a defendant is entitled to have the jury instructed on self-defense, he bears the burden of producing some evidence supporting the defense. Zuliani v. State, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). Although the State then bears the burden to disprove the raised defense, “[t]he burden of persuasion is not one that requires the production of evidence. Rather it requires only that the State prove its case beyond a reasonable doubt.” Id. (citations omitted); see also Tex. Penal Code § 2.03 (“If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted.”). But “[w]hen a jury finds the defendant guilty, there is an implicit finding against the defensive theory.” Zuliani, 97 S.W.3d at 594.

Thus, Texas law differs substantially from Washington’s requirements regarding the burden of proof in self-defense cases in two respects. First, Texas affirmatively requires the defendant to produce evidence before he will be entitled to have the jury instructed on self-defense. Saxton v. State, 804 S.W.2d 910, 913-14 (Tex. 1991).

The issue . . . is whether, if the testimony is believed, a case of self-defense has been made. If such testimony or other evidence viewed in a favorable light does not establish a case of self-defense, an instruction is not required.

Dyson v. State, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984).

By contrast, in Washington, while a defendant raising a self-defense claim bears what has been termed a burden of production, State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993), this is a lower threshold than what is required under Texas law. “Although it is essential that some evidence be admitted in the case as to self-defense, there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of jurors on that issue.” Id. (quoting State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)). Moreover, this evidence need not be produced by the defendant. Rather, “there need only be some evidence admitted in the case from whatever source which tends to prove a killing was done in self-defense.” McCullum, 98 Wn.2d at 488 (emphasis added).

In addition to placing a lower threshold burden on a defendant who raises a self-defense claim, Washington imposes a more rigorous duty on the part of trial courts to ensure that the State is held to its burden of proof in response to a self-defense claim. Washington requires that “[t]he jury should be informed in some unambiguous way that the State must prove

[the] absence of self-defense beyond a reasonable doubt.” Acosta, 101 Wn.2d at 621. The Court in Acosta emphasized, “The defendant is entitled to a correct statement of the law, and should not be forced ‘to argue to the jury that the State [bears] the burden of proving [the] absence of self-defense.’” Id. at 621-22 (emphasis in original, citation omitted).

In Texas, although the State bears the same burden, there is no requirement that the jury be unambiguously so instructed in order for a conviction to be upheld. All that is required is that the State prove its case. Zuliani, 97 S.W.3d at 594.

iii. The circumstances where Texas permits an individual to use deadly force in self-defense are narrower than in Washington. Jordan’s Texas jury was instructed that his use of deadly force was lawful only if he (1) was, or reasonably believed himself to be, under attack with unlawful deadly force, and (2) reasonably expected death or serious bodily injury to result from his assailant’s use of unlawful deadly force. CP 54-55. Washington imposes no predicate requirement that a person believe he is under attack with unlawful deadly force, but rather permits the use of deadly force to be a complete defense if he believes that he or someone else is about to suffer death or great personal injury. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997); State v. Ferguson, 131 Wn. App. 855, 859, 129 P.3d 856 (2006); RCW

9A.16.050.³ Compare, e.g., Trammell v. State, 287 S.W.3d 336, 341 (Tex. App. 2009) (to be entitled to self-defense instruction where deadly force has been used, defendant must present evidence demonstrating that his use of such force was immediately necessary to protect him or third person from the victim’s use or attempted use of deadly force); see also Tex. Penal Code § 9.32 (1992).

iv. Contrary to Washington law, at the time of Jordan’s conviction Texas imposed a duty to retreat on a person claiming self-defense. It is well-settled in Washington that when a person is assaulted in a place where he or she has a right to be, he has no duty to retreat, but may defend himself with force even though flight might also be a reasonable alternative to force. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); see also e.g. State v. Meyer, 96 Wn. 257, 264, 164 P. 926 (1917) (upholding the common law right of an accused to “stand his ground and repel force with force, even to taking the life of his assailant if necessary or in good reason apparently necessary for the preservation of his own life or to protect himself from great bodily harm”).

³ RCW 9A.16.050(1) provides that homicide is justifiable: In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished

But in Texas, when Jordan was tried for his offense, in order for him to obtain an acquittal based on a claim of self-defense, the jury had to find that deadly force was immediately necessary for protection and that a reasonable person in Jordan's place would not have retreated. Tex. Penal Code § 9.32 (1992);⁴ see also, e.g., Riddle v. State, 888 S.W.2d 1, 7 (Tex. Crim. App. 1994). The jury instructions in Jordan's Texas trial made the duty to retreat explicit. CP 53. Had Jordan been tried for the same offense in Washington, however, the jury would not have had to decide whether retreat was a reasonable alternative to the use of force before determining whether the force itself was justifiable.

v. The inclusion of the foreign conviction in Jordan's offender score violated due process. All of these differences between the Texas Penal Code and Washington law make it plain that the use of the voluntary manslaughter conviction to elevate Jordan's SRA offender score violated due process. Cf. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). In Texas, Jordan's conviction is presumptively valid, as the jury was instructed in accordance with the law in effect in Texas at the time the offense was committed. But, had Jordan been tried in Washington, the many significant defects in the instructions

⁴ Texas later amended the statute setting forth the requirements of self-defense to delete the duty to retreat in specified circumstances. 2007 Tex. Sess. Law Serv. Ch. 1 (S.B. 378).

given the jury would have hobbled Jordan's self-defense claim. Indeed, in Washington, the egregious misstatements of relevant law and dilution of the State's burden may well have resulted in reversal of his conviction on appeal or a successful collateral attack. Most importantly, because of the substantial differences between the Texas Penal Code and Washington law, Jordan may well have been convicted for conduct for which he could not have been convicted in Washington.

c. The remedy is remand for resentencing without the foreign conviction. It should be axiomatic that because Jordan could not defend himself in Texas as he would have been entitled to do in Washington, the foreign conviction cannot be counted in his offender score. Lavery, 149 Wn.2d at 258. Moreover, even if it somehow were possible for the conviction to be included in Jordan's offender score without violating due process, the State did not present sufficient facts to overcome the substantial impediments to inclusion of the conviction. Specifically, the State did not show that the jury found either that retreat was not an option, that Jordan had presented a sufficient quantum of evidence to claim self-defense, or that his victim, Gillespie, had threatened him or his companion with deadly force. And because Jordan specifically objected to the existence and comparability of his prior conviction, the State must be held to the existing record. Mendoza, 165 Wn.2d at 930;

State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002). The existing record is inadequate. This Court should reverse and remand for resentencing without the Texas offense.

3. THE TRIAL COURT DENIED JORDAN HIS SIXTH AMENDMENT RIGHT TO A DEFENSE WHEN IT REFUSED TO ISSUE JURY INSTRUCTIONS ON JUSTIFIABLE HOMICIDE AND MANSLAUGHTER.

a. The court denied Jordan's request for jury instructions on justifiable homicide and manslaughter in the first and second degree.

Jordan requested the jury be instructed on self-defense and the lesser included offenses of manslaughter in the first and second degree, but the trial court refused to issue these instructions. 13RP 709. The court's reason for refusing the instructions was based on events that occurred prior to trial.

In an effort to resolve the case, Jordan had consented to be interviewed by the prosecutor and lead detective. Supp. CP __ (Sub No. 51A, State's Trial Brief at 8). Apparently during this interview, Jordan denied that he was acting in self-defense when he shot Jackson, and stated that he felt very remorseful about his actions. 10RP 233; 13RP 662. There is no indication that Jordan's statements at this interview were made under oath. Supp. CP __ (Sub No. 51A, State's Trial Brief at 8).

The prosecutor and Jordan's attorney agreed that Jordan's statements could be used to impeach him in the event that he testified to something different from what he said from the interview. Id. There is no indication that the prosecutor sought, at the time of the interview, to limit the defenses available to Jordan. Jordan did not testify at trial, and none of the statements were admitted.

When Jordan requested instructions on justifiable homicide, the prosecutor alleged that issuing such instructions in light of Jordan's pretrial statements would be improper. She characterized such a defense as "a material misrepresentation of what the facts may be" in light of the defense proffer at the pretrial interview. 13RP 662.

The court opined that defense counsel was "ethically bound" by Jordan's statements in the pretrial interview, and intimated that the Rules of Professional Conduct should prohibit him (and any appellate lawyer for Jordan) from arguing the propriety of self-defense. 13RP 677-78. The court also concluded that the instruction was not warranted based on the facts, and for the same reason declined Jordan's proposed lesser-included-offense instructions on manslaughter in the first and second degree. 13RP 709.

b. There was no ethical or evidentiary impediment to issuing the instructions, and their denial prevented Jordan from presenting

his defense to the jury. An accused person has a due process right to have the jury accurately instructed on his theory of defense, provided the instruction is supported by substantial evidence and accurately states the law. U.S. Const. amends. V, VI, XIV; California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. State v. Agers, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

The trial court's principal reason for declining instructions on justifiable homicide was the court's discomfiture with the fact that Jordan had given an unsworn statement to the prosecution in which he said he did not act in self-defense. The court viewed Jordan's request for self-defense instructions in this circumstance to be unethical. The implication from the trial court's comments is that it was improper for zealous counsel to advance a theory to the jury where he had a basis to believe that the theory was not grounded in fact. In the context of criminal cases, however, defense counsel's constitutional responsibility to effectively advocate for his client provides an added layer of nuance to the analysis.

Most commentators, regardless of their general views on adversary ethics and partisanship, acknowledge that criminal defense presents a special case for vigorous advocacy. One leading critic of the adversary system has called criminal defense the area where "the case for

undiluted partisanship is most compelling.” In particular, because of the unique threats to life, liberty, and reputation that a criminal trial presents, the criminal defense attorney has a license to be more adversarial than other attorneys, especially the opposing prosecutor. Furthermore, the justifications for adversary procedure—as preserver of liberty, defense against state power, and neutral arbiter of fairness, if not the truth—are most potent in this area.

Rosemary Nidry, Restraining Adversarial Excess in Closing Argument, 96 Colum, L. Rev. 1299, 1304 (1996).

Washington’s Rules of Professional Conduct expressly sanction the advancement of frivolous claims by criminal defense attorneys where in other circumstances, such arguments may be improper. RPC 3.1, titled, “Meritorious Claims and Contentions,” states:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 3.1 (emphasis added).

The comment to the rule explains:

The lawyer’s obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Comment, RPC 3.1.

Unlike an affirmative defense, when a claim of self-defense is raised, the absence of self-defense becomes an element that the State must prove beyond a reasonable doubt. LeFaber, 128 Wn.2d at 903.

Furthermore, as noted, in Washington, the threshold for a defendant to receive instructions on self-defense is very low. A defendant need not testify in order to receive an instruction on self-defense, but rather can rely on evidence from any source. McCullum, 98 Wn.2d at 488. Moreover, before issuing self-defense instructions, the court need not find there is sufficient evidence to establish a reasonable doubt on the question.

Defense counsel in this case theorized that a claim of self-defense could lie upon the fact that Patrick Ryan heard shots fired before he witnessed Jordan shoot Jackson. 4RP 18-19. Defense counsel also theorized that in the heat and chaos of the situation, Jordan may have fired his gun to defend himself without intending to shoot Jackson. Defense counsel elicited evidence that while being transported by Officer Pendergrass, Jordan stated, "I tapped at him, he tapped at me, [the] police came, I had to run." 9RP 68. The evidence assuredly was sufficient to meet the minimal threshold for the issuance of self-defense instructions.

With respect to the trial court's qualms about issuing the instructions given the substance of Jordan's pretrial interview with the

prosecutor, defense counsel's ethical obligations were complicated by the fact that Jordan's statements were unsworn. An individual seeking to obtain a favorable plea bargain may conceivably make untruthful statements if he believes such statements would be to his benefit. Unless statements are made under oath, no judge or attorney can be wholly confident in their veracity.

Importantly, RPC 3.1 stresses that the provisions of the rule notwithstanding, defense counsel in a criminal case may "defend the proceeding so as to require that every element of the case be established." RPC 3.1; Winship, 397 U.S. at 364-65. Under RPC 3.1, defense counsel was obligated to compel the State to disprove self-defense, consistent with his duty under the Sixth Amendment to provide Jordan with the effective assistance of counsel.

c. Jordan is entitled to a new trial at which the jury will receive the requested instructions. In certain circumstances, limitations on the Sixth Amendment right to present a defense can never be harmless. Cf. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (finding restrictions on Sixth Amendment right to confrontation not susceptible of harmless error analysis).

Even if a harmless error analysis could apply, a constitutional error is presumed prejudicial and the State bears the burden of proving beyond a

reasonable doubt that the jury would have reached the same result absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The error here was prejudicial. Assume, for example, that the jury, confronted with the uncontroverted evidence that two shots were fired before Ryan looked out of his window, believed that either Jackson or one of his associates could have fired those shots (or that Jordan mistakenly believed this was so), and that Jordan responded with excessive force. This hypothetical illustrates the circumstance of “imperfect self defense,” in which case instructions on both self-defense and Jordan’s proposed lesser included offenses would have been warranted. State v. Schaffer, 135 Wn.2d 355, 357-58, 957 P.2d 214 (1998) (Where a person is prosecuted for premeditated or intentional murder and the evidence supports the inference that he acted recklessly or negligently in defending himself, the court must instruct the jury on the lesser included offense of manslaughter); State v. Jones, 95 Wn.2d 616, 623, 628 P.2d 472 (1981) (same).

Given counsel’s special obligations in a criminal case – a duty that is recognized by the Rules of Professional Conduct – the trial court erred in concluding Jordan was somehow barred from requiring the State to prove the absence of self-defense at trial because of his unsworn

statements at the pretrial interview. Further, the evidence supported the issuance of instructions on self-defense, and, commensurately, on the lesser included offenses of manslaughter in the first and second degrees. This Court should conclude the failure to issue the instructions denied Jordan his Sixth Amendment right to a defense, and reverse the convictions.

4. PROSECUTORIAL MISCONDUCT DENIED
JORDAN HIS DUE PROCESS RIGHT TO A FAIR
TRIAL.

a. The prosecutor committed misconduct by urging the jurors to draw a negative inference from Jordan's exercise of his right to counsel, soliciting improper opinion testimony from prosecution witnesses, and by appealing to the jury's passions and prejudices. While in custody, Jordan made some oblique statements to law enforcement. On cross-examination of Seattle Police Officer Laura Pendergrass, defense counsel elicited testimony that Jordan never expressly stated he understood his rights, and that he did acknowledge the shooting followed an argument. 9RP 63-64. On redirect, the prosecutor cast aspersions on defense counsel, stating defense counsel was "trying to imply" that Jordan's shifting story had confused the witness. 9RP 67. The prosecutor then asked the witness to comment directly on Jordan's veracity, asking,

“Is it fair to say that sometimes when people aren’t telling the truth their stories change?” 9RP 68.

Defense counsel’s objection to this question was sustained. Id. Undeterred, the prosecutor asked the witness, “Have you ever been around someone who is not telling the truth and the story kind of keeps changing from time to time, ‘Yeah, that is what I mean. That’s the story?’” Id. The witness responded, “frequently.” Id.

In closing argument, the prosecutor reiterated this theme, telling the jurors that Jordan was “not telling the truth” when he talked to law enforcement because he was “guilty.” 14RP 736. The prosecutor concluded her summation with an impassioned plea to the jurors to vindicate the rights of Maurice Jackson:

[T]he hardest thing about prosecuting a homicide or murder case is we all never get to meet the victim. For that I am sorry. We didn’t get to know a lot about him. But the one thing I hope that you recall during your deliberations is that he does matter. He matters the same that any of us matter. And he matters not only for what happened to him, but what matters about this case is for what is happening out in these neighborhoods, out on city streets. People pulling out guns in public. You know why they do that? Because they are relying on the code of silence. You don’t pull your gun out in public and shoot and kill somebody in a crowd, unless you think that nobody will tell on you. But the good news is that people are starting to tell. And we are thankful for that.

14RP 811-12.

b. Principles of due process forbid prosecutors from engaging in misconduct to obtain convictions. Prosecutors, as quasi-judicial officers, have the duty to seek verdicts free from prejudice and based on reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). This is consistent with the prosecutor’s obligation to ensure an accused person receives a fair and impartial trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L.Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amends. V; XIV; Const. art. I, § 3.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

i. Standard of review. The defense bears the burden of proving a “substantial likelihood” that prosecutorial misconduct affected the jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699

(1984). A claim of prosecutorial misconduct in closing argument is waived if defense counsel did not object and curative instructions would have obviated the prejudice from the remarks. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 154 (1988). However, “[a]ppellate review is not precluded if the prosecutorial misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.” Id. (emphasis in original). This Court has also found prosecutorial misconduct to be flagrant and ill-intentioned where prior decisional law has made the impropriety of the remarks clear. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 18 (1997). Finally, where misconduct invades a fundamental constitutional right, it may be manifest constitutional error that is properly before the Court on review notwithstanding the absence of an objection. Id. at 216; State v. Warren, 165 Wn.2d 17, 27 n. 3, 195 P.3d 940 (2008).

ii. The misconduct in this case denied Jordan his due process right to a fair trial and warrants reversal of the conviction. A prosecutor violates the Sixth Amendment right to counsel if she personally attacks defense counsel, impugns defense counsel’s integrity or character, or disparages the role of defense attorneys in general. State v. Fisher, 165 Wn.2d 727, 771, 202 P.3d 937 (2009) (Madsen, J., concurring); Warren,

165 Wn.2d at 29-30. Such arguments are improper because they “seek[] to draw the cloak of righteousness around the prosecutor in [her] personal status as government attorney and impugn[] the integrity of defense counsel.” State v. Gonzales, 111 Wn. App. 276, 283, 45 P.3d 205 (2002) (quoting United States v. Frascone, 747 F.2d 953, 957 (5th Cir. 1984)).

Likewise, it is improper for a prosecutor to personally comment on a witness’s credibility or to solicit such an opinion from a witness. See State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003) (finding “no meaningful difference” between permitting an officer to testify directly that he does not believe a witness and in allowing the State to elicit evidence that allows the jury to draw that inference).⁵

Finally, it is a fundamental premise of our system of justice that the State obtain convictions based on the strength of the evidence adduced at trial, and not on considerations external to the record or on arguments that inflame jury passions. Belgarde, 110 Wn.2d at 507; State v. Boehning, 127 Wn. App. 511, 522, 111 P.3d 899 (2005).

This prosecutor committed misconduct by disparaging the role of defense counsel, by asking a witness to comment on the credibility of another witness, and by seeking a conviction based on improper appeals to

⁵ The prosecutor’s comments here are particularly ironic given her insistence to the trial court that Jordan’s statements during the pretrial interview comprised the ‘real’ story.

the jury's passions and prejudices, rather than the evidence. Jordan's counsel objected to the opinion testimony; thus, this error is reviewed under the "substantial likelihood" standard. This Court should conclude the remaining misconduct was flagrant and ill-intentioned, and that the taint of the improper comments could not have been obviated by a curative instruction. These comments, too, warrant reversal.

5. JORDAN'S CONVICTIONS FOR SECOND-DEGREE MURDER PREDICATED ON THE USE OF A FIREARM AND UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, AND THE IMPOSITION OF A SENTENCE ENHANCEMENT BASED ON THE SAME FIREARM, VIOLATED DOUBLE JEOPARDY.⁶

The double jeopardy clause of the United States Constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. The Washington Constitution also provides that no individual shall "be twice put in jeopardy for the same offense." Const. art I, § 9. The double jeopardy prohibition protects against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). Certainly the

⁶ Similar issues are currently pending in the Washington Supreme Court in State v. Aguirre, No. 82226-3, and State v. Kelley, No. 82111-9 (both argued 10/29/09).

prosecution may charge and the jury may consider multiple charges arising from the same criminal conduct. However, the court may not enter multiple convictions, nor in turn impose multiple punishments, for the same criminal offense. State v. Freeman, 153 Wn.2d 765, 770-71, 108 P.3d 753 (2005).

While several antiquated Court of Appeals cases held that a “sentence enhancement” for an offense committed with a weapon does not violate double jeopardy even where the use of the weapon was an element of the crime,⁷ Apprendi v. New Jersey and Blakely v. Washington have reoriented our understanding of what constitutes an “element.”⁸ Because the United States Supreme Court has contemporaneously noted that there is “no principled reason to distinguish” what constitutes an offense for purposes of the Sixth Amendment and Fifth Amendment,⁹ these standards must alter the calculus of how the Court conceives of “sentencing facts” in the double jeopardy context, where the identical facts were already found by the jury in reaching its underlying verdict.

⁷ See State v. Pentland, 43 Wn.App. 808, 811-12, 719 P.2d 605 (1986); State v. Caldwell, 47 Wn.App. 317, 320, 734 P.2d 542 (1987); State v. Horton, 59 Wn.App. 412, 418, 798 P.2d 813 (1990).

⁸ Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

⁹ Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003).

The Court has made it clear that the relevant determination of what is an “element” does not turn on what label a particular fact has been given by the Legislature or its placement in the criminal or sentencing code. Instead, it is the effect the proof of that fact has on the maximum sentence to which the accused is exposed.¹⁰ Apprendi, 530 U.S. at 494.

With regard to double jeopardy, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to determine whether there are two offenses or only one is whether each provision requires proof of a fact the other does not. United States v. Dixon, 509 U.S. 688, 696-97, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932); State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

Here, the State prosecuted Jordan for murder in the second degree under two alternate theories: either (1) that Jordan committed intentional murder, RCW 9A.32.050(1)(a), or (2) that Jordan committed felony murder predicated on the crime of assault in the second degree. RCW

¹⁰ This was most succinctly stated by Justice Scalia:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating factor together constitute an aggravated crime. The aggravated fact is an element of the aggravated crime.

Ring v. Arizona, 536 U.S. 584, 605, 122 S.Ct. 2428, 153 L.Ed.2d 18 (2002) (emphasis added).

9A.32.050(1)(b). One of the definitions of assault in the second degree provided to the jury was an assault committed with a firearm. CP ___ (Jury Instructions 9-12).¹¹ The jury's verdict was silent regarding the means by which they concluded Jordan had committed the crime. CP 14.

The State also sought to increase Jordan's sentence by adding a firearm enhancement, pursuant to RCW 9.94A.533. CP 11. The jury found by special verdict that Jordan was armed with a firearm, which was the same weapon used in the commission of Count I. CP 16. Finally, the State charged Jordan with unlawful possession of a firearm in the first degree, and the jury convicted Jordan of this charge. CP 12, 15.

In essence, therefore, Jordan was punished thrice for the same offense, namely, his use of a firearm to cause the death of Maurice Jackson. This Court should conclude the multiple convictions violate double jeopardy, reverse and dismiss the conviction for unlawful possession of a firearm in the first degree, and strike the firearm enhancement from count I.

¹¹ The jury instructions were filed in co-defendant Marcus Dorsey's file. Although these instructions were designated for purposes of the instant appeal, the index to clerk's papers does not reflect CP cites for the instructions.

6. CUMULATIVE ERROR DENIED JORDAN HIS DUE
PROCESS RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; Williams v. Taylor, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (concluding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). Even if this Court decides that none of the trial errors set forth above individually necessitates reversal, this Court should conclude that under the cumulative error doctrine, reversal is required.

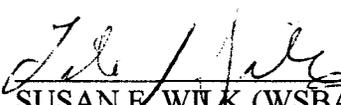
E. CONCLUSION

For the foregoing reasons, this Court should reverse Jordan's convictions. If, upon remand, there are reasons to doubt Jordan's competency, the trial court should be directed to comply with the mandatory procedures set forth in RCW 10.77.060. If Jordan is competent to proceed to trial, then the trial court should instruct the jury on self-defense and any lesser included offenses supported by the evidence.

In the alternative, this Court should reverse Jordan's sentence and direct that on remand, the firearm enhancement and unlawful possession of a firearm count be reversed and dismissed, and his prior Texas conviction for voluntary manslaughter be excluded from his offender score.

DATED this 29th day of December, 2009.

Respectfully submitted:

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 63016-4-I
v.)	
)	
ERICK JORDAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF DECEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF DECEMBER, 2009.

X _____ *Jord*

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