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SUPREME COURT NO. 100950-0

NO. 37411-4-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ALMARAL,

Petitioner.

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

The Honorable Scott R. Sparks, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Christopher Almaral, the appellant below, asks this Court to review his case.

B. COURT OF APPEALS DECISION

Almaral requests review of the Court of Appeals decision in State v. Almaral, COA No. 37411-4-III, filed April 21, 2022, and attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether prosecutorial misconduct during closing argument – where the prosecutor used a PowerPoint presentation to misstate the law – denied petitioner his constitutional right to a fair trial under U.S. Const. Amends. VI, XIV, and Wash. Const. art. I, § 22.

2. Whether prosecutorial misconduct during closing argument – where the prosecutor appealed to racial bias – denied petitioner his constitutional right to a fair trial under Const. Amends. VI, XIV, and Wash. Const. art. I, § 22.

3. Whether defense counsel's failure to object to a first aggressor instruction denied petitioner his right to the effective assistance of counsel and a fair trial under U.S. Const. Amends. VI, XIV, and Wash. Const. art. I, § 22

4. Whether the cumulative impact of these errors denied petitioner a fair trial.

5. Whether review is appropriate under RAP 13.4(b)(1) because the Court of Appeals' decision conflicts with several Supreme Court decisions.

D. STATEMENT OF THE CASE

1. Trial Proceedings

Christopher Almaral was at a casino with a coworker, Pedro Garcia, when a woman approached him and said he was good-looking and that it looked like he worked out. RP 815. She said that she wanted someone to party and drink with, so she, Mr. Almaral, and Mr. Garcia left the casino together. RP 815-16.

The woman's name was Stephanie Curtis. RP 307. After driving around for some time, Ms. Curtis, Mr. Almaral, and Mr. Garcia ended up at the home of one of Mr. Almaral's friends. RP 821. On the way there, while stopped for a restroom break, Ms. Curtis noticed a sawed-off shotgun in the back of Mr. Almaral's car and asked him to show her how it worked, which he did. RP 819. Once they got to the friend's home, Ms. Curtis and Mr. Almaral drank and Mr. Almaral used cocaine. RP 821.

Mr. Almaral's plan was for the group to stay the night at his friend's home. RP 824. But his friend was not comfortable with Ms. Curtis staying there, so Mr. Almaral left to drive her back home to Yakima (from Ellensburg). RP 824-825.

On the road, Mr. Almaral realized that he was too intoxicated to drive safely. RP 825, 827. He pulled over, told Ms. Curtis that she would have to get out and get

home by herself, and gave her a blanket and some cash.
RP 827.

Ms. Curtis was angry that Mr. Almaral planned to abandon her. RP 827. She tried to get back into the car but Mr. Almaral blocked her ability to do so. RP 827. She hit him a few times. RP 827. When Mr. Almaral opened the trunk to get a blanket for her, Ms. Curtis grabbed his sawed-off shotgun out of the trunk and Mr. Almaral heard a click. RP 828-29. Mr. Almaral tried to pull the gun out of her hands but was unable to do so. RP 829. Eventually, Ms. Curtis pointed the shotgun at Mr. Almaral. RP 829. He grabbed a handgun out of his pocket and shot Ms. Curtis twice. RP 830. Ms. Curtis died, and her body was found the following morning. RP 321-22.

The state charged Mr. Almaral with first-degree premeditated murder, possession of a short-barreled

shotgun, and simple drug possession (based on drugs found during his arrest).¹ CP 147-48.

After his arrest, Mr. Almaral had participated in a lengthy interview with the police. See RP 710-766. He told the police that he was worried throughout the night that Ms. Curtis was engaging in a “set up” to get him into a vulnerable position so members of a gang could attack him. RP 728. He explained to the police that he had shot Ms. Curtis in self-defense. RP 734-38. He said that Ms. Curtis had reached for his gun in his pants pocket twice before he shot her. RP 730, 734. He did not tell the police that Ms. Curtis had used the sawed-off shotgun. RP 710-66.

At trial, Mr. Almaral explained that his statement to the police had been different than his testimony because

¹ Mr. Almaral eventually pleaded guilty to the gun and drug charges. RP 150-59, 366. The state also charged him with possession of a stolen firearm, but the jury acquitted him of that charge. CP 147-48, 320.

he was on drugs at the time of the interview. RP 833-34. He also said that the police asked him lots of questions about gangs, so he thought that was what they wanted to hear about. RP 832. One of the officers confirmed that Mr. Almaral fell asleep periodically in the interview room and had to be shaken awake. RP 844.

The jury found Mr. Almaral guilty of first-degree murder. RP 951; CP 366.

2. Appeal

The Court of Appeals vacated Mr. Almaral's conviction for simple drug possession under State v. Blake, 197 Wn.2d 170, 481, P.3d 521 (2021), and vacated his conviction for possession of an unlawful firearm because the record did not reveal a knowing and intelligent guilty plea on that charge. Slip op., at 1, 20-24.

The Court, however, affirmed Mr. Almaral's murder conviction. It rejected arguments that the prosecution committed misconduct by using misleading PowerPoint

slides and by emphasizing Almaral's membership in the Norteño gang. Slip op., at 24-31. It also declined to find defense counsel ineffective for failing to object to a first aggressor instruction. Slip op., at 31-34. Finding no error, it also rejected Mr. Almaral's cumulative impact argument. Slip op., at 34.

E. ARGUMENT

REVIEW IS APPROPRIATE UNDER RAP 13.4(b)(1) BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS FROM THIS COURT.

1. Prosecutorial Misconduct: PowerPoint Slide On First Degree Murder

Prosecutorial misconduct can deprive the accused of a fair trial. In re Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22.

Even absent an objection below, reversal is required when a prosecutor's misconduct is "so flagrant and ill-intentioned that an instruction would not have

cured the prejudice.” Glasmann, 175 Wn.2d at 704. Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time. Id. at 707. Misconduct is also ill-intentioned when it was planned in advance. State v. Thorgerson, 172 Wn.2d 438, 452, 258 P.3d 43 (2011).

Images displayed during closing argument can enhance the prejudicial effect of a prosecutor’s improper arguments. Glasmann, 175 Wn.2d at 707-09. Such images “may sway a jury in ways that words cannot,” and the effect is difficult to overcome with an instruction. Id. at 707 (quoting State v. Gregory, 158 Wn.2d 759, 866-867, 147 P.3d 1201 (2006)).

Visual arguments “manipulate audiences by harnessing rapid unconscious or emotional reasoning processes and by exploiting the fact that we do not generally question the rapid conclusions we reach based on visually presented information.” Salas, 1 Wn. App. 2d

931, 946–47, 408 P.3d 383 (2018) (citing Glasmann, 175 Wn.2d at 708). A prosecutor commits misconduct by using visual media to “communicate to the jury a covert message that would be improper if spoken aloud.” Salas, 1 Wn. App. 2d at 945.

Throughout closing argument, the prosecutor at Mr. Almaral’s trial used PowerPoint slides that purported to display the court’s instructions to the jury. CP 278-315. But the prosecutor had, in fact, altered the court’s to-convict instructions before placing them onto those slides, thereby communicating to jurors that Almaral’s guilt was a foregone conclusion. CP 286-87, 293-94, 312-14.

The language of each to-convict instruction properly informed the jury that:

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 210.

The prosecutor's slides were identical to the court's to-convict instructions except that the above language had been omitted. CP 286. Instead, the prosecutor altered the court's instruction to inform the jury that each element had, actually, been "proven beyond a reasonable doubt your duty to return a verdict of guilty". CP 286.

Unlike the portions of the slide properly recounting the elements of the offense, the language that the prosecutor had altered was displayed to the jury in bold and in all-capital letters:

MURDER IN THE FIRST DEGREE - ELEMENTS

- **INSTRUCTION 12**

- That on January 7, 2018, the defendant acted with intent to cause the death of Stephanie Curtis;
- That the intent to cause death was premeditated;
- That Stephanie Curtis died as a result of the defendant's acts; and
- That any of these acts occurred in the State of Washington.
- **PROVEN BEYOND A REASONABLE DOUBT YOUR DUTY TO RETURN A VERDICT OF GUILTY**

CP 286.

The slide also displayed the words "INSTRUCTION 12" in bold and all-capital letters, affirmatively misinforming the jury that the language had been taken directly from the court's instructions. CP 286.

The prosecutor showed this slide to the jury at least three separate times during closing argument. CP 286, 293, 312.

The prosecutor's alteration of the court's instructions constituted prejudicial, flagrant, ill-intentioned misconduct.

This Court has twice held that a prosecutor commits flagrant misconduct by showing the jury admitted exhibits that have been altered to include comments on the guilt of the accused. See Glasmann, 175 Wn.2d at 705-06; Walker, 182 Wn.2d at 478-79.

The Glasmann court held that the prosecutor in that case committed flagrant and ill-intentioned misconduct by presenting the jury with photos of the accused that had been "altered by the addition of phrases calculated to influence the jury's assessment of Glasmann's guilt and veracity." Glasmann, 175 Wn.2d at 705. The prosecutor's alteration of the exhibits to add those phrases was the equivalent of presenting the jury with unadmitted evidence. Id. at 706.

In Mr. Almaral's case, rather than properly reminding the jury of the state's burden of proof, the instructions were changed to claim that Mr. Almaral's guilt had already been determined.

The prosecutorial misconduct in Glasmann and Walker required reversal even though the state had a strong argument for guilt in each case. Glasmann, 175 Wn.2d at 711; Walker, 182 Wn.2d at 479. This Court emphasized that – despite the state's strong evidence – the repetition of the slides containing the improper remarks and the fact that the slides were shown to the jury immediately before deliberation made the misconduct “presumptively prejudicial.” Walker, 182 Wn.2d at 479 (citing Glasmann, 175 Wn.2d at 711). The same is true in Mr. Almaral's case.

This Court also reversed in both Glasmann and Walker despite the lack of an objection to the misconduct at trial, finding the misconduct to be flagrant and ill-

intentioned because of the persuasive power of the state's improper visual display was so strong that "no instruction could erase the cumulative effect of the misconduct." Glasmann, 175 Wn.2d at 707-08; Walker, 182 Wn.2d at 479. Again, the same is true here.

The Glasmann court also relied on the fact that the prosecutor's improper arguments were repeated throughout closing. Glasmann, 175 Wn.2d at 707. The improper slide was displayed during closing argument during Mr. Almaral's trial at least three times. CP 286, 293, 312.

Glasmann was decided more than seven years before Mr. Almaral's trial. The improper arguments during Mr. Almaral's trial were flagrant and ill-intentioned because they directly violated case law and professional standards that were available to the prosecutor at the time of the improper conduct. Glasmann, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct during Mr. Almaral's trial by presenting slides to the jury containing jury instructions that had been altered to say that the jury had a duty to find guilt. Glasmann, 175 Wn.2d at 707-08; Walker, 182 Wn.2d at 479.

Although the Court of Appeals found that the alteration of the slide for first-degree murder at Mr. Almaral's trial did not rise to the level of misconduct in Glasmann, slip op., at 27, the parallels are evident. Because the Court of Appeals decision conflicts with Glasmann, review is appropriate under RAP 13.4(b)(1).

2. Prosecutorial Misconduct: PowerPoint Slide On Lesser-Included Offense

The prosecutor's closing PowerPoint presentation also contained a slide claiming that the jury could not properly consider the lesser-included offense of second-degree murder unless they had already agreed that the

state had failed to prove premeditation:

MURDER ONE v. MURDER TWO

- MURDER ONE IS CHARGED
- MURDER TWO IS CONSIDERED LESSER INCLUDED OFFENSE
- DIFFERENCE –
 - PREMEDITATION
 - INTENTIONAL KILLING
- **NOT CONSIDER MURDER TWO UNTIL DECIDE PREMEDITATION DOES NOT EXIST**

CP 282.

But the jury was not legally required to “decide premeditation does not exist” before considering the lesser-included offense. Rather, the jury was required to consider the lesser offense also if they could not agree on whether the state had proved premeditation. State v. Labanowski, 117 Wn.2d 405, 414, 816 P.2d 26 (1991). This rule has been in place for thirty years and was

reflected in the jury instructions in Mr. Almaral's case. See CP 211, 226.

Even so, the prosecutor chose to improperly inform Mr. Almaral's jury that the lesser-included offense could not be considered unless the jury affirmatively acquitted him of the greater offense. CP 282. The prosecutor committed misconduct by misstating the law to the jury. State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

Mr. Almaral suffered prejudice. Such a misstatement by a representative of the state "is a serious irregularity having the grave potential to mislead the jury. Allen, 182 Wn.2d 380 (citing State v. Davenport, 100 Wn.2d 757 763, 675 P.2d 1213 (1984)).

This type of misconduct is "particularly grievous" when the misstatement of the law touches on a critical issue in the case. Id. Because Mr. Almaral admitted to killing Ms. Curtis, the issue of premeditation was central to his trial. The jury could have been initially unable to

agree that the state had proved premeditation beyond a reasonable doubt but, believing that they were unable to consider the lesser charge without such an agreement, persuaded one or more hold-out jurors to change their mind(s) and convict of the greater charge. This Court recognized this risk in Labanowski, explaining the risk when given an “acquittal first” instruction like the one improperly described in the prosecutor’s slide:

If the jury is heavily for conviction on the greater offense, dissenters favoring the lesser may throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all, although the jury might have reached a sincere and unanimous agreement with respect to the lesser charge.

Labanowski, 117 Wn.2d at 421 (quoting United States v. Tsanas, 572 F.2d 340, 346 (2d Cir. 1978)).

For this reason, the fact that the jury found Mr. Almaral guilty of the greater offense does not undermine the prejudice from the prosecutor’s misstatement of the law. Analogously, appellate courts regularly reverse

convictions for improper failure to instruct the jury on a lesser-included offense even when the jury convicted for the greater offense. See e.g., State v. Parker, 102 Wn.2d 161, 166, 683 P.2d 189 (1984). This is because, absent a proper jury instruction on a lesser offense (or, in Mr. Almaral's case, absent a correct statement of the law regarding when that offense can be considered) a jury could find guilt for the greater offense simply because it believes that the only alternative is to find no guilt at all. Id.

The prosecutor's mischaracterization of the law also was the only part of the slide in bold font, making it more likely that the jury would focus on and internalize it, believing it to be the rule correctly applicable to their deliberations. CP 282.

The prosecutor's misconduct was also flagrant and ill-intentioned. The misstatement of the law was not

accidental, but was part of a display that had been prepared in advance. Thorgerson, 172 Wn.2d at 452.

The prosecutor mischaracterized the law for the jury regarding an issue that had been conclusively decided by the Supreme Court in Labanowski almost thirty years before Mr. Almaral's trial. The misstatement was also flagrant and ill-intentioned because the prosecutor long had access to the correct legal standard. Glasmann, 175 Wn.2d at 707. The prosecutor's misstatement of the law regarding when the jury could properly consider the lesser-included offense in Mr. Almaral's case requires reversal despite the lack of an objection below. Id.

Although the Court of Appeals concluded that the PowerPoint Slide did not improperly require affirmative and unanimous acquittal on first-degree murder before considering second-degree murder, slip op., at 28-29, the slide's language indicates otherwise. Because that language misstates the law regarding lesser-included

instructions, and conflicts with this Court's decision in Labanowski, review is appropriate under RAP 13.4(b)(1).

3. Prosecutorial Misconduct: Norteño References

Mr. Almaral admitted past involvement as a Norteño gang member. RP 808; see also slip op., at 9-10, 31.

The prosecutor engaged a strategy of referring to Mr. Almaral as a Norteño throughout closing. A primary theory of the prosecutor's closing argument was that Mr. Almaral was not credible because his testimony differed from what he had said during a police interview. Instead of simply arguing that point, however, the prosecutor labelled each version of the story as the one involving "a flamed up Norteno" and the other involving a "kinder, gentler Norteno." See RP (Settlement of Record) 2, 11, 18.

The prosecutor referred to the two versions of events in this way throughout closing:

In version one while talking with law enforcement we have a flamed up Norteno. He is irritated, he's upset. ... In version two we have a kinder, gentler, Norteno. We have a gentleman who intended no harm to Ms. Curtis. We have a Norteno who wasn't looking for trouble just trying to fly under the radar screen. A Norteno who was unable to drive his vehicle to get Ms. Curtis safely home.

RP (Settlement of Record) 2.

We have two versions an old version, the old Norteno flamed up Norteno. You see, you see, you look at this, the new version, the kinder, gentler version, which we see here.

RP (Settlement of Record) 11.

Does common sense and the facts presented in this case indicate that on January 6th or 7th Mr. Almaral was a flamed up Norteno looking for trouble, or that he was a new, kinder, gentle Norteno flying under the radar screen not desiring to harm anyone?

RP (Settlement of Record) 18.

A prosecutor commits misconduct by making arguments that are designed to inflame the jury's passion and prejudice. Glasmann, 175 Wn.2d at 704. A prosecutor also commits misconduct by making

arguments designed to undermine the presumption of innocence. Id. (quoting Commentary to the American Bar Association Standards for Criminal Justice std. 3–5.8(c) (2d ed. 1980)); State v. Evans, 163 Wn. App. 635, 643–44, 260 P.3d 934 (2011). This is because “[j]ustice can be secured only when a conviction is based on specific evidence in an individual case and not on rhetoric.” State v. Loughbom, 196 Wn.2d 64, 69–70, 470 P.3d 499 (2020).

The prosecutor’s theme of referring to Mr. Almaral as either a “flamed up” Norteño or a “kinder gentler” Norteño throughout closing was designed to appeal to the jury’s passion and prejudice. The argument encouraged the jury to focus on Mr. Almaral’s status as a former gang member instead of on the specific evidence in the case. The repeated references to Mr. Almaral as a Norteño was also improper because it appealed to implicit racism. See State v. Monday, 171 Wn.2d 667, 678–79, 257 P.3d 551

(2011); Walker, 182 Wn.2d at 488 (Gordon-McCloud, J., concurring); See also Marie Pryor et. al., Risky Situations: Sources of Racial Disparity in Police Behavior, 16 Ann. Rev. L. & Soc. Sci. 343, 347 (2020) (recognizing the racialized nature of gang evidence).

In her concurrence in Walker, Justice Gordon-McCloud emphasized the role that implicit, unconscious racial bias can play during jury deliberations. Walker, 182 Wn.2d at 488-91 (Gordon-McCloud, J., concurring). In that case, the prosecutor superimposed a quote from the accused (who was black) using the n-word over a photo of him and his family. Id. at 488. While the prosecutor did not make any explicit appeals to racial bias, Justice Gordon-McCloud noted that:

The National Center for State Courts counsels that implicit bias is pervasive and operates without our awareness: 'Unlike explicit bias (which reflects the attitudes or beliefs that one endorses at a conscious level), implicit bias is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g.,

implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.’

Id. at 491 (quoting Nat’l Ctr. for State Courts, Helping Courts Address Implicit Bias: Frequently Asked Questions).

Based on this understanding, Justice Gordon-McCloud found that the prosecutor’s emphasis on the n-word during closing improperly highlighted the race of the accused in an inflammatory manner, regardless of whether the prosecutor intended that effect. Id. The majority in Walker agreed with Justice Gordon-McCloud and adopted her reasoning regarding the prosecutor’s improper appeal to racial bias into the majority opinion. Walker, 182 Wn.2d at 478, n. 4; See also Monday, 171 Wn.2d at 678-79.

The same is true of the prosecutor’s overemphasis on Mr. Almaral’s status as a “Norteño.” The repeated use of that word highlighted Mr. Almaral’s Latino race for the

jury and undermined the presumption of innocence by appealing to the racist notion that a member of that Latino-associated group was more likely to be guilty of a violent crime.

The prosecutor employed a pre-planned theme of intentionally highlighting the word “Norteño” for the jury. Notably, the prosecutor (who did not use any other Spanish words during trial) chose to repeat the word “Norteño,” rather than to refer to the more specific gang of which Mr. Almaral had been a part, which had the less inflammatory name of “NSV.” See RP 808. This strategy had no proper purpose other than to appeal to implicit racial bias. The prosecutor’s argument was improper.

There is a significant likelihood that the prosecutor’s misconduct affected the outcome of Mr. Almaral’s case. Glasmann, 175 Wn.2d at 704. Washington courts have acknowledged the “inflammatory nature” of gang evidence and the risk it creates of the jury convicting

based on an improper propensity inference. See e.g., State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009) (noting “the inflammatory nature of gang evidence generally”); State v. Scott, 151 Wn. App. 520, 529, 213 P.3d 71 (2009) (noting that gang evidence can cause a jury to conclude that the accused is a “bad person”); See also State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (2008) (gang evidence portrayed the accused as a “bad guy[]”);

While Mr. Almaral admitted to killing Ms. Curtis, he testified that he had done so in self-defense. The state also presented very little evidence of premeditation. The evidence of guilt was not overwhelming. Mr. Almaral was prejudiced by the prosecutor’s improper appeal to passion, prejudice, and racism.

The prosecutor’s misconduct was also flagrant and ill-intentioned. Arguments with an “inflammatory effect on the jury” are generally not curable by an instruction. State

v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012);
See also State v. Belgarde, 110 Wn.2d 504, 507–08, 755
P.2d 174 (1988).

Improper arguments are also flagrant and ill-intentioned when they are part of “a thematic narrative” designed to appeal to some consideration other than the evidence in the case. Loughbom, 196 Wn.2d at 70; See also Thorgerson, 172 Wn.2d 452.

Finally, improper prosecutorial appeals to racial bias are “so fundamentally opposed to our founding principles, values, and fabric of our justice system that it should not need to be explained.” Monday, 171 Wn.2d at 680. Such appeals violate the Sixth Amendment and art. I, § 22’s guarantees of the right to a fair trial. Id. In such a case, reversal is required unless the state can demonstrate harmlessness beyond a reasonable doubt, regardless of whether there was an objection below. Id. The state cannot meet that burden here.

The Court of Appeals erred when it found no misconduct on this subject. Slip op., at 30-31. Review is appropriate under RAP 13.4(b)(1) because the Court of Appeals decision conflicts with Glasmann, Walker and Monday.

4. Ineffective Assistance: First Aggressor

Mr. Almaral's defense theory was that he had killed Ms. Curtis in self-defense after she pointed a gun at him. RP 827-30. The state's counter-theory was simply that the evidence did not support the self-defense claim. See RP (Settlement of Record) generally. The state did not present any evidence suggesting that Mr. Almaral had created a need for Ms. Curtis to raise the gun to him. See RP generally.

Even so, the court gave a "first aggressor" instruction to the jury, informing them that:

No person may, by an intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-

defense and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP 216.

Mr. Almaral's defense attorney did not object to the first aggressor instruction, even though it was not warranted under the facts of the case. That failure constituted ineffective assistance of counsel.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV, art. I, § 22; State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. Id. Performance is deficient if it falls below an objective standard of reasonableness. Id. The accused is prejudiced by counsel's deficient performance if there is a reasonable

probability that counsel's mistakes affected the outcome of the proceedings. Id.

Defense counsel waives objection to an improper first aggressor instruction by failing to object at trial. State v. Grott, 195 Wn.2d 256, 267, 458 P.3d 750 (2020). Mr. Almaral's defense attorney had no tactical reason for waiving objection to the first aggressor instruction, which was not warranted by the facts of the case and which seriously undermined the theory of self-defense.

Jury instructions must make the law of self-defense "manifestly clear to the average juror." State v. Espinosa, 8 Wn. App. 2d 353, 361, 438 P.3d 582 (2019). This Court has admonished that trial courts must "use care" when determining whether a first aggressor instruction is appropriate in a given case because it "impacts a defendant's claim of self-defense." Grott, 195 Wn.2d at 266.

A first aggressor instruction is only appropriate when the accused person provoked a fight, thereby causing the alleged victim the need to use force. Id. In such a case, because the alleged victim is essentially acting in self-defense, the accused cannot then claim to have been acting in self-defense as well. Id.

Words alone are insufficient to constitute a provoking act under the first aggressor doctrine. State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948 (2011). This is because an alleged victim confronted with only words would not be entitled to use force in self-defense, him/herself. Id.; Espinosa, 8 Wn. App. 2d at 361; State v. Riley, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). The charged assault also cannot form the basis for the alleged first act of aggression. Bea, 162 Wn. App. at 577.

Other than the charged shooting, the only conduct by Mr. Almaral that could conceivably constitute a first act of aggression would be his choice to leave Ms. Curtis

alone on the road with a blanket and cash. RP 827. But that act does not rise to the level of warranting a first aggressor instruction because it would not have given Ms. Curtis the right to use force against Mr. Almaral in self-defense. Id.; Espinoza, 8 Wn. App. 2d at 361; Riley, 137 Wn.2d at 911.

In short, either the jury believed Mr. Almaral's testimony that Ms. Curtis had pointed a gun at him first (requiring acquittal) or they believed the state's theory that Mr. Almaral had shot her unprovoked. Neither version of events promotes a first aggressor instruction. Even under the state's theory, the first act of aggression by Mr. Almaral would have been the charged offense.

Mr. Almaral's defense attorney provided ineffective assistance of counsel by failing to object to that improper instruction. Jones, 183 Wn.2d at 339; Grott, 195 Wn.2d at 267.

Moreover, Mr. Almaral was prejudiced. As noted above, a first aggressor instruction undermines a self-defense claim. Grott, 195 Wn.2d at 266. Mr. Almaral's entire defense theory revolved around his self-defense claim because he had admitted killing Ms. Curtis. The improper first aggressor instruction, however, told the jury that self-defense was not available to Mr. Almaral if he had engaged in any act "reasonably likely to provoke a belligerent response." CP 216.

The jury could have found Mr. Almaral credible and believed his testimony that Ms. Curtis had pointed a gun at him first. But, given the improper instruction, the jury could still have believed that self-defense was not available to him because his plan to strand her on the road was "reasonably likely to provoke a belligerent response." The first aggressor instruction encouraged the jury to discount Mr. Almaral's self-defense claim even though the first aggressor doctrine did not actually apply

to his case. There is a reasonable probability that counsel's failure to object to that instruction affected the outcome of the trial. Jones, 183 Wn.2d at 339.

The Court of Appeals conceded it could find "no cases about being left in a cold environment," yet still found the first aggressor instruction appropriate because "Almaral's conduct could have reasonably provoked a panicked Curtis to justifiably reach for the gun." Slip op., at 34. Because this decision conflicts with what can be considered a sufficient provoking act under Grott, review is appropriate under RAP 13.4(b)(1).

F. CONCLUSION

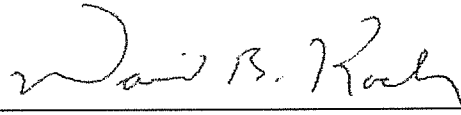
Almaral respectfully asks this Court to grant his petition and reverse the Court of Appeals.

I certify that this petition contains 4,965 words excluding those portions exempt under RAP 18.17.

DATED this 23rd day of May, 2022.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC

A handwritten signature in cursive script, appearing to read "David B. Koch".

DAVID B. KOCH, WSBA No. 23789
Attorneys for Petitioner

APPENDIX

FILED
APRIL 21, 2022
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

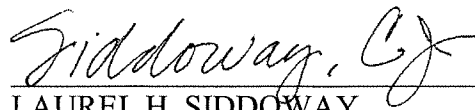
STATE OF WASHINGTON,)	
)	No. 37411-4-III
Respondent,)	
)	
v.)	
)	ORDER WITHDRAWING
CHRISTOPHER ALMARAL,)	OPINION
)	
Appellant.)	

THE COURT on its own motion finds that the opinion filed April 14, 2022, should be withdrawn:

THEREFORE, IT IS ORDERED, the opinion filed April 14, 2022, is hereby withdrawn and a new opinion will be filed this day.

PANEL: Judges Fearing, Siddoway, Lawrence-Berrey

FOR THE COURT:



LAUREL H. SIDDOWAY
Chief Judge

FILED
APRIL 21, 2022
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON,)	
)	No. 37411-4-III
Respondent,)	
)	
v.)	
)	UNPUBLISHED OPINION
CHRISTOPHER ALMARAL,)	
)	
Appellant.)	

FEARING, J. — Christopher Almaral appeals his convictions for possession of a controlled substance, possession of unlawful firearm, and first degree murder. He also challenges his community custody conditions. Pursuant to *State v. Blake*, we vacate his conviction for possession of a controlled substance. We vacate his guilty plea for possession of unlawful firearm because the record does not show that Almaral intelligently pled guilty to the crime. We affirm his conviction for first degree murder. We remand for resentencing, during which the superior court should further delineate some of the community custody conditions.

FACTS

We draw the facts primarily from trial testimony, including a jail interview of Appellant Christopher Almaral played to the jury. The prosecution arises from the death of Stephanie Curtis during the early morning of January 7, 2018. Christopher Almaral concedes he shot Curtis, but claims self-defense.

Christopher Almaral joined the North Side Varrio (NSV) street gang when twelve years old. NSV is an affiliate of the nationwide Norteño gang. “Norteño” translates to “northerner.” The Sureños are a rival nationwide gang. “Sureño” translates to “southerner.” Norteños wear the color red and Sureños the color blue.

The story of the prosecution begins on the night of January 6, 2018, in Yakima County. On that evening, Christopher Almaral and his friend Pedro Garcia de la Cruz patronized a casino in Toppenish. Almaral wore all red, the colors of the NSV gang. Due to Almaral’s attire, Garcia de la Cruz initially isolated from him because of worry of a gang-related altercation. After this initial sequestering, the two played near one another on slot machines.

Stephanie Curtis was in the wrong place at the wrong time. Inside the casino, Curtis approached Pedro Garcia de la Cruz and Christopher Almaral. She had not known them before. Curtis left the casino with Almaral and Garcia de la Cruz. Almaral drove, Garcia de la Cruz sat in the front passenger seat, and Curtis rested in the middle of the rear seat. The trio drove to a residence in Mill Pond, outside of Ellensburg, to party at the

home of two of Almaral's friends. On the way, the group stopped at a Toppenish gas station to purchase beer. The three also stopped twice in Yakima respectively to procure condoms and a bottle of wine. Later, the triad stopped on the side of the road for Stephanie Curtis to relieve herself. During this stop, Almaral plucked a handgun from his jacket and shot it into the air, before redepositing it into his jacket. The group stopped one more time so that the men could also relieve themselves.

Christopher Almaral testified that, during the final rest stop before arriving at Mill Pond and after he used restroom facilities, he saw Stephanie Curtis standing and shivering outside. Almaral spoke of a blanket in his vehicle's trunk. When Almaral accessed the trunk, Curtis spied a short-barreled shotgun within the trunk. A curious Curtis questioned Almaral about the firearm. Almaral explained that the object was a shotgun, and he demonstrated how it functioned. Thereafter, Garcia de la Cruz returned from the restroom, at which time Almaral and Curtis reentered the car, while leaving the blanket and shotgun in the trunk.

On reaching the party site in Mill Pond, Christopher Almaral, Stephanie Curtis, and Pedro Garcia de la Cruz entered the residential trailer. Almaral intook cocaine, and Curtis drank alcohol. Almaral planned to spend the night at his friends' Mill Pond residence and take Curtis to her Yakima home the following day. Almaral's friends, however, did not feel comfortable with Curtis spending the night in the trailer. They informed Almaral that he alone could stay the night.

During the party, Pedro Garcia de la Cruz and Stephanie Curtis left to purchase tacos from a Jack in the Box restaurant. Based on the restaurant security footage, the two frequented the restaurant at 3:08 a.m. While in the Taco Bell drive-through, to the surprise of Garcia de la Cruz, Curtis kissed him. Not long after the duad returned, the partygoers indulged themselves in tacos, and Garcia de la Cruz stepped outside to smoke a cigarette. While Garcia de la Cruz remained outside, Christopher Almaral and Curtis drove from the trailer. When Garcia de la Cruz returned to the residence, one reveler informed him that Almaral mentioned, ““They’ll be back.’” Report of Proceedings (RP) (Dec. 6, 2019) at 634.

Pedro Garcia de la Cruz, realizing he had left his keys in Christopher Almaral’s vehicle, texted Almaral, at 3:29 a.m., to return to the trailer. At 3:33 a.m., Almaral replied via text, ““I’m just about ready to come back[.]”” RP (Dec. 6, 2019) at 647. Soon after, Almaral informed Garcia de la Cruz that he ““just wanted to talk to her [Curtis] about something.’”” RP (Dec. 6, 2019) at 647. Almaral sent Garcia de la Cruz an additional message stating ““Just let me do this thing and I’ll go.’”” RP (Dec. 6, 2019) at 647. From this message, Garcia de la Cruz interpreted that Almaral desired sex with Curtis.

During trial, Christopher Almaral testified that he killed Stephanie Curtis in self-defense. According to Almaral, en route to Yakima along the old route on Canyon Road, he concluded that he could not drive, presumably due to his use of alcohol and cocaine.

Thus, Almaral stopped the car, awoke Stephanie Curtis, and explained to Curtis that he could not drive to Yakima. While the two stood outside the car, Almaral told Curtis that she needed to return home alone. Almaral offered to give Curtis cash and his blanket. According to Almaral, once Curtis realized she would be left alone in the middle of the cold night, an angry Curtis attempted to reenter Almaral's vehicle. Almaral blocked her from entering the car. Curtis attempted to push him away and hit him twice in the chest.

Christopher Almaral further testified at trial that Stephanie Curtis approached close enough to him to grab his handgun from his jacket pocket. He stepped back and held his hands in front of her to prevent her from nearing him. Almaral then walked to the back of his car to retrieve his blanket for Curtis. As he reached into the trunk for the blanket, Curtis rushed him and pushed him two feet from the car. Almaral heard a click and turned toward his vehicle to witness Curtis wielding the shotgun she had retrieved from the car's trunk.

According to Christopher Almaral's trial testimony, he slowly approached Stephanie Curtis with his left arm stretched. He placed his hand on the top of the gun and pointed it away. As Almaral attempted to disarm Curtis, she pulled away from him. Almaral apologized by commenting he felt guilty for leaving her alone in the cold, but that he could not finish the drive. Curtis drew nearer Almaral, put her forehead to his chest, gazed at his face, and kissed him. Suddenly Curtis kicked Almaral's crotch with her left knee. Almaral pushed Curtis. Curtis aimed at Almaral with the shotgun.

Almaral quickly drew his handgun and twice discharged the weapon.

Christopher Almaral testified that he approached Stephanie Curtis' body and tapped her foot with his. When Curtis did not respond, he recovered the shotgun and placed it in his car's trunk. Almaral returned to his friends' trailer to retrieve Pedro Garcia de la Cruz and take him home.

Christopher Almaral returned to Mill Pond without Stephanie Curtis. Almaral explained to Pedro Garcia de la Cruz that he had already left Curtis at her home. Almaral drove Garcia de la Cruz home without further mention of Curtis.

Between 7:00 and 7:30 a.m. on a snowy, freezing January 7, 2018, Jon Tollman observed a "flash of color" on the side of the road as he drove to work. RP (Dec. 4, 2019) at 321. Tollman stopped to look. Tollman found the body of Stephanie Curtis. Tollman called law enforcement.

At 7:44 a.m., Kittitas County Sheriff's Office Corporal James Woody arrived at the location of Stephanie Curtis' body. Corporal Woody surmised that Curtis did not die due to natural causes. Law enforcement identified Curtis by a Toppenish hospital bracelet she wore on her right wrist. The bracelet, dated January 5, 2018, listed her name and birthdate. Sheriff deputies confirmed Curtis' identity by her driver's license photograph viewed on a patrol car's computer.

Law enforcement transported Stephanie Curtis' remains for X-rays. The resulting radiographs revealed two bullets resting within Curtis' body, one in her head and the other in her torso.

On January 9, 2018, Stanley Adams, M.D. performed an autopsy on Stephanie Curtis' corpse. Dr. Adams concluded that a gunshot wound to her head killed her. Adams further opined that a first gunshot wound to Curtis' chest would have led to her death within a few minutes if the second bullet had not intervened.

Dr. Stanley Adams determined that the two bullets entered Stephanie Curtis at a sharp, downward angle. The bullet to the chest entered at a height of 54.5 inches from Curtis' left heel and exited from the back of her torso 46 inches from her left heel. Dr. Adams opined that the shot to Curtis' chest occurred from two inches to three feet away and that the shot to her head occurred within two feet away.

Law enforcement had yet to identify anyone who participated in the death of Stephanie Curtis. In Curtis' left jacket pocket, law enforcement located a Wapato Dollar Tree receipt dated January 6, 2018, and timestamped at 8:43 p.m. The Wapato Police Department obtained video surveillance footage from the Dollar Tree. The footage confirmed that Curtis visited the store with an individual later identified as Valentine Romero Ramirez.

On January 10, 2018, Wapato police contacted and interviewed Valentine Romero Ramirez, who informed detectives that he dropped Stephanie Curtis at the Toppenish

casino between 10:00 p.m. and midnight on the evening of January 6, 2018. Surveillance footage from the casino captured Curtis meeting Christopher Almaral and Pedro Garcia de la Cruz, although neither the casino nor law enforcement knew the two men's identity. The footage showed the trio leaving the casino in a 2016 red Mercedes-Benz. The footage did not display the vehicle's license plate.

On January 11, 2018, Kittitas County Sheriff's Office Detective Jerry Shuart saw a vehicle that matched the description of the Mercedes-Benz from the casino surveillance footage. Detective Shuart noticed the license plate number for the vehicle and identified the car's owner as Christopher Almaral's father, Dennis Almaral. Dennis registered the vehicle at a Benton City address. The Benton County Sheriff's Office told Kittitas County detectives that Dennis and Christopher Almaral resided in Benton City. Detectives compared Christopher's driver's license photo and photos from his Facebook account to the Toppenish casino security footage, after which they concluded that Christopher had driven the red Mercedes on the night of January 6, 2018.

After obtaining a search warrant, law enforcement searched Christopher Almaral's Ellensburg residence, where he lived with his mother and brother. Police seized, from the home, a modified, short-barreled shotgun and red pants matching those seen on the casino surveillance footage. During a search of Almaral's red Mercedes-Benz, detectives seized a red bandana and red jacket Almaral wore at the casino and a handgun later identified to have caused Curtis' death. The handgun had been stolen.

Christopher Almaral testified that, after ending Stephanie Curtis' life, he sought self-medication through drugs. He got high on drugs every day until law enforcement interviewed him on January 16, 2018.

On January 16, 2018, law enforcement detained Christopher Almaral and interviewed him. Detectives with the Kittitas County Sheriff's Office suspected that Stephanie Curtis' murder may have been gang-related. Accordingly, the detectives sought the assistance of Yakima Police Department Detective David Cortez, an expert in street gang culture. Detective Cortez attended the Kittitas County Sheriff's Office's interview of Christopher Almaral. At trial, the court declared Detective Cortez to be an expert in street gang culture. Cortez' trial testimony shed luminous light on gang culture, clothing, and language.

During the jail interview, Christopher Almaral acknowledged that he socialized with Stephanie Curtis at the Toppenish casino on January 6, 2018. Detective David Cortez asked Almaral whether he was a Norteño or whether he was involved with any street gangs that go by NSV.

Christopher Almaral responded to Detective David Cortez' questioning by identifying himself as a "Varrío." According to Detective Cortez, "varrio" like "barrio," in Spanish, means "neighborhood." RP at 702. Later in the interview, Almaral identified himself as a Norteño. Almaral explained that, when he met Curtis, he felt suspicious of

her. He ruminated that Curtis was “scrap” and may have wished to lead him to calamity. “Scrap” is a derogatory term used by Norteños for Sureños. RP (Dec. 10, 2019) at 705.

During the custodial interview, Christopher Almaral commented about being “flamed up” while at the casino, meaning that he bore only red clothes and accessories. Br. of Resp’t at 19. Stephanie Curtis wore a blue jacket, a fact that worried Almaral that she worked for the Sureños. As a result of his suspicions, Almaral scrutinized his environs while at the casino. During the interview, Almaral added that Curtis approached him and stated she wanted to get drunk. An otherwise suspicious Almaral departed from the casino with Curtis and Pedro Garcia de la Cruz.

During the jail interview, Detective David Cortez asked Christopher Almaral what led to Stephanie Curtis’ death. Almaral responded that Curtis disclosed that she was raised in foster homes and had no family in the Yakima Valley. Curtis’ comment unnerved Almaral and caused him again to suspect a ruse. According to Almaral, after Curtis made this comment, she repeatedly requested Almaral’s phone, which made Almaral more wary. At one point, Almaral told her:

[Y]ou need to calm down. This shit ain’t right. If it’s a set up . . . fuck then, I don’t know. . . . I don’t know what to say, you fucked up.

Exhibit 125.

During the interview, Christopher Almaral commented that “honestly . . . I pretty much made myself out there,” by going into the casino “[a]ll [flamed] up.” RP (Dec. 10,

2019) at 732. Stephanie Curtis interrogated him throughout the night. She asked Almaral why he wore all red. He responded that red was his favorite color. While in the car, Curtis also asked Almaral why he had a red bandana on his car's review mirror.

Curtis remarked:

Oh well now it all makes sense, . . . [y]ou're a gangster, huh[?]

RP (Dec. 10, 2019) at 748.

Christopher Almaral told detectives that he left his friend, Pedro Garcia de la Cruz, in Mill Pond and informed him that he intended to leave with Stephanie Curtis to speak to her alone. Almaral wanted to determine why Curtis kept asking to access his phone. On the trip to Yakima, Almaral stopped his car and conversed with Curtis outside. Almaral intended to leave Curtis by the side of the road, but did not intend to hurt her. Curtis then stepped closer to Almaral and began hugging him. Curtis reached for his handgun. In response, Almaral shoved Curtis.

Christopher Almaral continued his narrative during the custodial questioning. Almaral and Stephanie Curtis argued while standing near the back of Almaral's car. Curtis attempted to reenter Almaral's vehicle, but he blocked her access. Almaral ask her about why she befriended him at the casino. Curtis did not answer, went to hug Almaral again, told him that she felt cold, and stated she wanted to return inside the car. While she hugged him, Curtis reached for his firearm a second time. Almaral drew his weapon

and shot Curtis twice with the barrel of his gun two to two and a half feet from her. He did not view Curtis lying on the ground, but returned to his car.

Christopher Almaral disclosed during the detective interview that, after shooting Stephanie Curtis, he retired to his Ellensburg home, where he drank alcohol and finished an eight ball, an eighth of an ounce of cocaine. Almaral told detectives he questioned his behavior.

PROCEDURE

The State of Washington charged Christopher Almaral, by second amended information, with one count each of (1) murder in the first degree of Stephanie Curtis, (2) possession of a stolen firearm, the handgun (3) possession of a controlled substance, cocaine, and (4) possession of an unlawful firearm, a short-barreled shotgun or rifle. The State further alleged that Almaral murdered Curtis with a firearm.

Christopher Almaral pled guilty to the possession of a controlled substance and possession of an unlawful firearm charges. In his statement on his plea of guilt, in his own words, Almaral wrote the factual basis for his guilt on the two charges:

In Kittitas County on January 16, 2018 I possessed cocaine and a short barrelled [sic] shotgun, which is an unlawful firearm.

CP at 159. During the plea hearing, the superior court asked Christopher Almaral whether he had reviewed his guilty plea statement with his attorney, to which Almaral responded affirmatively. Almaral informed the court that he had no questions about the

document. The court inquired how short a shotgun needed to be to qualify as a short-barreled shotgun. The prosecutor answered, and defense counsel agreed, that the gun needed to be shorter than 26 inches in length. The court then asked Almaral whether his shotgun measured less than 26 inches in length. Almaral responded, “[y]es, sir.” RP (Dec. 3, 2019) at 69.

During trial, the State questioned Christopher Almaral about his custodial statement, in which he told detectives that he felt that Stephanie Curtis sought to trap him. Almaral responded that, at the time of returning Curtis to Yakima, he was coming down from a high. He could not remember what transpired during the early morning of January 7, 2018. He further commented that, because the interviewing detectives asked about gangs, he believed the officers only wished to question him about gang involvement and not a murder. He agreed understatedly, with the State’s attorney, that his custodial statement differed from his trial testimony.

During trial, Christopher Almaral acknowledged that, at the time of the shooting, he was 6 feet 1 inch tall and weighed 260 to 270 pounds, while Stephanie Curtis stood 5 feet 6 inches tall and weighed 140 pounds. Almaral also testified that, despite not remembering the events of early morning January 7, Curtis never actually grabbed for his handgun, contrary to what he told detectives during the interview, and that she never pulled the trigger of the shotgun. Almaral admitted that Curtis never threatened to kill him.

The superior court delivered numerous standard jury instructions for the crimes charged. Jury instruction 12, the first degree murder instruction, read:

To convict the defendant of the crime of murder in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about January 7, 2018, the defendant acted with intent to cause the death of Stephanie Curtis;
- (2) That the intent to cause the death was premeditated;
- (3) That Stephanie Curtis died as a result of the defendant's acts; and
- (4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 210. The trial court provided the jury with instructions on the charge of the lesser included offense of second degree murder with a firearm. The court further instructed the jury, in jury instruction 13, how to address two levels of a crime:

The defendant is charged in count 1 with Murder in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Murder in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

CP at 211.

The superior court delivered Christopher Almaral’s requested self-defense instructions. Additionally, the court provided a first aggressor instruction. The first aggressor instruction provided:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant’s acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP at 216. Almaral did not object to the inclusion of the first aggressor instruction. Neither counsel mentioned the latter instruction during closing arguments.

At the outset of the State’s closing argument, the prosecutor told the jury: “[t]he State has the burden of proof. Hold us to that.” RP (Dec. 11, 2019) at 3. During its closing argument, the State attacked Christopher Almaral’s credibility and highlighted that he provided two versions of events leading to Stephanie Curtis’ death. Throughout closing, the prosecutor repeatedly referred to Almaral as a Norteño:

At the start of this case, I suggested that in some ways this case would be easy. . . . What I did not anticipate at that time is that as you sat here deliberating about this case you would be sitting with two different versions of events from Mr. Almaral.

. . . .

You can call these versions one and versions two. In version one while talking with law enforcement we have a *flamed up Norteno*. He is irritated, he’s upset. He’s being bugged. He’s being mad-dogged. He is being set up. He is suspicious for hours until he finally acts upon that driving Ms. Curtis into the [Yakima River] canyon where she was killed.

In version two we have a *kinder, gentler, Norteno*. We have a gentlemen who intended no harm to Ms. Curtis. We have a *Norteno* who

wasn't looking for trouble just trying to fly under the radar screen. A *Norteno* who was unable to drive his vehicle to get Ms. Curtis safely home.

RP (Dec. 11, 2019) at 1-2 (emphasis added).

In this case, I would suggest that there's an attempt to have an oratory [sic] illusion because we now have two versions that really are not lining up. We have two versions a [sic] old version, *the old Norteno flamed up Norteno*. You see, you see, you look at this, the new version, *the kinder, gentler version*, which we see here. Can you decipher where the truth lies?

RP (Dec. 11, 2019) at 11 (emphasis added).

Does common sense and the facts presented in this case indicate that on January 6th or 7th Mr. Almaral was a *flamed up Norteno* looking for trouble, or that he was a *new, kinder, gentle Norteno* flying under the radar screen not desiring to harm anyone?

He was a kinder, gentler Norteno going into territory, such as the casino.

RP (December 11, 2019) at 18 (emphasis added). Christopher Almaral did not object to the State's attorney's remarks.

During its argument, the prosecution displayed a PowerPoint presentation to the jury. The presentation included a slide relating to jury instruction 12, the instruction enumerating the elements of murder in the first degree. CP 286, 293, 312. The slide read, in relevant part:

INSTRUCTION 12

- That on January 7, 2018, the defendant acted with intent to cause the death of Stephanie Curtis;
 - That the intent to cause death was premeditated;
 - That Stephanie Curtis died as a result of the defendant's acts; and
 - That any of these acts occurred in the State of Washington.
- PROVEN BEYOND A REASONABLE DOUBT YOUR DUTY

TO RETURN A VERDICT OF GUILTY

CP at 286, 293, 312 (boldface omitted). We label this slide as “the first degree murder slide.” Note that the prosecution headlined the slide as referencing jury instruction 12. Nevertheless, the State omitted the two paragraphs at the end of instruction 12 and added language beyond the content of the jury instruction: “PROVEN BEYOND A REASONABLE DOUBT YOUR DUTY TO RETURN A VERDICT OF GUILTY.” Christopher Almaral did not object to the showing of this slide.

The first time the prosecutor showed the first degree murder slide, he stated:

The last part there of that instruction—If you find that the state has proven those elements beyond a reasonable doubt it will be your duty to return a verdict of guilty.

RP (Dec. 11, 2019) at 5 (emphasis added). On the second occasion the slide appeared, the State’s attorney commented:

So, [the slide] looks different right now. That’s because I want you to notice that I have highlighted in red . . . what I believe without saying anything further, you can already say that has been proven beyond a reasonable doubt.

And the defendant acted with intent to cause the death of Stephanie Curtis. She died as a result of the defendant’s acts, that the acts occurred in the state of Washington.

As to Murder 1, *all that is left is whether the intent was premeditated.*

RP (Dec. 11, 2019) at 8 (emphasis added). When showing the slide for the last time, the prosecutor discussed premeditation and the absence of self-defense:

So, murder in the first degree. January 7; Intent to cause the death of

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Stephanie Curtis; That intent was premeditated; She died as a result of those acts; The acts occurred in the State of Washington. *The screen is now full.*

RP (Dec. 11, 2019) at 28 (emphasis added).

The prosecutor's PowerPoint presentation included a slide relating to the lesser included offense of murder in the second degree:

Murder One v. Murder Two
- Murder one is charged
- Murder two is considered lesser included offense
- Difference -
 - Premeditation
 - Intentional Killing
- NOT CONSIDER MURDER TWO UNTIL DECIDE
PREMEDITATION DOES NOT EXIST

CP at 282 (boldface omitted). We label this slide as "the second degree murder" slide.

Christopher Almaral also did not object to this slide. While presenting this second slide to the jury, the prosecutor intoned:

Let's talk about murder in the second degree. Without considering anything else, every element has been matched up. The date, that the acts were done with intent, that she died as a result of those acts, and those acts occurred in the State of Washington. With nothing further if you were to get to murder in the second degree. Check, check, check.

RP (Dec. 11, 2019) at 8.

The jury found Christopher Almaral guilty of first degree murder and that he committed the crime with a firearm. The jury found Almaral not guilty of possession of a stolen firearm.

In addition to sentencing Christopher Almaral to a lengthy term in prison, the superior court imposed 36 months' community custody for the first degree murder charge and 12 months' community custody for the possession of a controlled substance charge.

The relevant conditions of the imposed community custody include the following:

7. Do not associate with persons involved in the purchase, possession, consumption, manufacture, or sale of illegal drugs.
-
14. Do not possess any gang or gang related paraphernalia.
15. Do not use any gang names or monikers.
16. Do not engage in gang activities in any form, including but not limited to wearing of colors; flashing/showing signs; associating with gang members, prospects, and associates; attending meetings; or "doing work.["]
17. Do not associate with persons involved in gang activities.
18. Do not enter or remain in any establishment, home, business, or other location that is owned, operated, or used by the gang.

CP at 378.

LAW AND ANALYSIS

On appeal, Christopher Almaral assigns numerous errors to the superior court proceedings. First, he argues that he did not knowingly, voluntarily, and intelligently plead guilty to possession of unlawful firearm. Second, Almaral contends that the State's attorney committed prosecutorial misconduct when showing the jury misleading PowerPoint slides and when emphasizing Almaral's membership in the Norteño gang. Third, he maintains that his trial counsel performed ineffectively when failing to object to a first aggressor jury instruction. Fourth, he challenges the validity of his conviction for

possession of a controlled substance. Fifth, he seeks to void some of his community custody conditions. We address these assignments of error in such order.

Possession of Unlawful Firearm Plea

Christopher Almaral asserts that the factual basis for his guilty plea to the possession of an unlawful firearm charge is insufficient to demonstrate that he entered the plea knowingly, voluntarily, and intelligently. He argues that the record does not mention his mental state at the time of the alleged offense or any mens rea element. We agree.

Due process requires that a guilty plea be voluntary, knowing, and intelligent. *State v. R.L.D.*, 132 Wn. App. 699, 705, 133 P.3d 505 (2006). A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements. *State v. R.L.D.*, 132 Wn. App. at 705.

RCW 9.41.190 governs unlawful firearms. The statute declares, in relevant part:

(1) Except as otherwise provided in this section, it is unlawful for any person to:

(a) Manufacture, *own*, buy, sell, loan, furnish, transport, or *have in possession or under control*, any . . . short barreled shotgun, or short-barreled rifle.

(Emphasis added.) RCW 9.41.010(29) defines a “short-barreled rifle” as:

a rifle having one or more barrels less than sixteen inches in length and any weapon made from a rifle by any means of modification if such modified weapon has an overall length of *less than twenty-six inches*.

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(Emphasis added.) RCW 9.41.010(30) also defines a “short-barreled shotgun” as a shotgun measuring less than twenty-six inches in overall length.

RCW 9.41.190 does not expressly identify a means rea requirement. The Washington Supreme Court has chosen not to read the statute as permitting strict liability for possession. *State v. Williams*, 158 Wn.2d 904, 915-16, 148 P.3d 993 (2006). Because a citizen possesses a constitutional right to bear arms under both the United States and Washington State Constitutions, the Supreme Court also does not want to impose criminal liability unless the possessor knew of the characteristics of the gun rendering possession unlawful. *State v. Williams*, 158 Wn.2d 904, 913 (2006). Therefore, the State must prove that the accused have: (1) knowledge that he or she possesses a short-barreled shotgun or rifle, and (2) knowledge of the weapon’s characteristics that renders possession of the weapon unlawful. *State v. Williams*, 158 Wn.2d 904, 909 (2006). The State carries its burden if it proves that the accused should have known of the unlawful characteristics of the firearm. *State v. Williams*, 158 Wn.2d 904, 915-16 (2006). In *Williams*, the court added that the State may not encounter difficulty establishing constructive knowledge when the accused possessed the firearm over an extended period of time.

The State charged Christopher Almaral with possession of an unlawful firearm. The charging language for the count stated that “CHRISTOPHER ALMARAL . . . on or

about January 16, 2018, did *knowingly* . . . have in possession or under control, any . . . short-barreled shotgun.” CP at 57 (emphasis added).

Before the plea agreement with Christopher Almaral, the State filed proposed jury instructions. One instruction read that the State charged Almaral with the crime of possession of an unlawful firearm, a charge which “alleges that in the State of Washington, on or about January 16, 2018 the defendant did *knowingly* have in his possession or under his control, a short-barreled shotgun.” CP at 63 (emphasis added). Another instruction read that “A person commits the crime of possession of a short-barreled firearm when he *knowingly* owns or has in his possession or control any short-barreled firearm.” CP at 126 (emphasis added). A third instruction, the to-convict instruction for the unlawful possession charge, identified, as an element, “That on or about January 16, 2018, the defendant *knowingly* owned a short-barreled firearm or knowingly had a short-barreled firearm in his possession or control.” CP at 128 (emphasis added). Neither the information, nor the proposed jury instructions, expressly read that Almaral knew or should have known of the characteristics of the firearm.

The factual basis for Christopher Almaral’s plea of guilty to the possession of unlawful firearm charge tersely declared: “In Kittitas County on January 16, 2018[,] I possessed . . . a short barreled [sic] shotgun, which is an unlawful firearm.” CP at 159. The trial court asked Almaral at the plea hearing whether the length of the shotgun he possessed extended less than twenty-six inches, and Almaral answered, “Yes, sir.” RP

(Dec. 3, 2019) at 69. Nevertheless, the court did not ask Almaral and Almaral did not volunteer that he knew the length of the barrel on January 16, 2018.

A person who owns or possesses a firearm, but knows not the characteristics rendering the gun unlawful, presumably would assess its unlawful characteristic before pleading guilty to unlawful possession. For example, if a person had not previously measured the length of a shotgun's barrel, he would likely measure it and determine that it was shorter than twenty-six inches before agreeing to plead guilty. Nevertheless, his knowledge of the unlawful length of the shotgun at the time of the plea does not mean he possessed this knowledge on the charging date.

The record does not reflect that Christopher Almaral knew or should have known at the time of possession of the unlawful length of the shotgun. If Almaral had such knowledge the State should have ensured that the factual statement in the guilty plea expressed that knowledge. Without such confirmation, we cannot conclude that Christopher Almaral knowingly and intelligently pled guilty.

Possession of a Controlled Substance Conviction

Christopher Almaral argues that his conviction for possession of a controlled substance must be vacated, pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). The State agrees. So do we.

In *State v. Blake*, the Washington Supreme Court held that the state's strict liability drug possession statute, former RCW 69.50.4013(1), violated due process under both the state and federal constitutions. The court found the statute void.

Before trial, Christopher Almaral pled guilty to possession of a controlled substance, cocaine, in violation of former RCW 69.50.4013. We remand for vacation of Almaral's conviction for possession of a controlled substance and for resentencing based on a lower offender score.

First Degree Murder Conviction

Slide Show

Christopher Almaral assigns numerous error in an attempt to reverse his murder conviction. Almaral first argues that the prosecutor committed misconduct during closing arguments by presenting to the jury two PowerPoint slides containing improper arguments. Almaral maintains that, in the first degree murder slide, the State manipulated jury instruction 12 by writing that the State had established Almaral's guilt. According to Almaral, the State also discouraged addressing second degree murder when, in the second degree murder slide, the State directed the jury to reject the first degree murder charge before addressing the lesser included crime. Almaral emphasizes the all caps and bolded language on the slides misinformed the jury that Almaral's guilt was a foregone conclusion and that the jury had a duty to find Almaral guilty of first degree

murder. Almaral characterizes the PowerPoint slides as flagrant and ill-intentioned misconduct.

The State responds that its PowerPoint slides contained accurate and appropriate argument when considered alongside the prosecutor's spoken argument when showing the slides. The State highlights that the jury was instructed to apply the law contained within the jury instructions and that counsels' comments did not constitute law.

To prove prosecutorial misconduct, a defendant must show that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006). The accused deserves reversal of a conviction when misconduct creates a substantial likelihood of affecting the jury's verdict. *State v. Weber*, 159 Wn.2d 252, 270 (2006). When analyzing misconduct and prejudice, an appellate court reviews a prosecutor's actions in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). "Highly prejudicial images may sway a jury in ways that words cannot." *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (plurality opinion).

Christopher Almaral did not object at trial to the showing of either of the slides challenged on appeal. When a defendant fails to object at trial to the prosecutor's alleged misconduct, the defendant must also demonstrate that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice. *In re Personal*

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Restraint of Glasmann, 175 Wn.2d 696, 704 (2012). The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.

State v. Swan, 114 Wn.2d 613, 635, 790 P.2d 610 (1990).

First Degree Murder Slide

We isolate the two for purposes of review. The first degree murder slide, captioned jury instruction 12, listed elements of first degree murder and then added: “PROVEN BEYOND A REASONABLE DOUBT YOUR DUTY TO RETURN A VERDICT OF GUILTY.” CP at 286, 293, 312 (boldface omitted).

Some readers of the PowerPoint slide, when reading the slide in isolation, might conclude that jury instruction 12 instructed the jury that the State had proven beyond a reasonable doubt the crime of first degree murder. The slide should have separated the closing comments from the caption of instruction 12. Nevertheless, when we review the slide in the context of the entire case, we do not consider it misleading.

The jury also had available jury instruction 12 and could readily tell that the “proven” language was not found therein. When addressing the final part of the slide, the prosecutor told the jury, “*If you find that the state has proven those elements beyond a reasonable doubt it will be your duty to return a verdict of guilty.*” RP (Dec. 11, 2019) at 5 (emphasis added). The second time the slide appeared in the State’s presentation, the prosecutor explained that the only element at issue regarding first degree murder was

premeditation. The third and final time the prosecutor presented the above slide occurred after his argument on premeditation and the absence of self-defense: “The screen is now full.” RP (Dec. 11, 2019) at 28. The prosecutor meant that all elements were now highlighted on screen, because the State had carried its burden as to each. The State’s attorney never told the jury that the slide constituted the language in the true jury instruction.

Christopher Almaral posits *In re Personal Restraint of Glasmann*, 175 Wn.2d 696 (2012) as controlling. In *Glasmann*, our high court held the State committed flagrant and ill intentioned misconduct by presenting the jury with altered exhibits. The State presented the jury with Edward Glasmann’s booking photograph altered by the inclusion of “phrases calculated to influence the jury’s assessment of Glasmann’s guilt and veracity.” *In re Personal Restraint of Glasmann*, 175 Wn.2d at 705. The State presented at least five slides of Glasmann’s picture with different captions, including “DO YOU BELIEVE HIM?” “WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?” and “GUILTY.” *In re Personal Restraint of Glasmann*, 175 Wn.2d at 701-02, 706 (2012).

We deem the prosecution’s slides in Christopher Almaral’s prosecution pale when compared to the altered exhibits and photographs in the Edward Glasmann prosecution. The State’s attorney’s presented no images in the slides in Almaral’s case. We hold that the State committed no misconduct, let alone flagrant and ill intentioned misconduct.

The Second Degree Murder Slide

The second degree murder slide directed the jury in bold print not to consider the second degree murder charge until deciding whether premeditation existed. The slide did not directly instruct the jury to decide whether or not Christopher Almaral committed first degree murder, before deciding if he committed second degree murder. Nevertheless, Almaral argues the slide strongly implied that the jury should not address the lesser included offense at the same time as discussing the higher offense. Almaral further contends that this slide thereby misstated the law.

A prosecuting attorney commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). The Washington Supreme Court declared with regard to a lesser included instruction:

When a jury is instructed on lesser included or lesser degrees of charged crimes, it should also be instructed that *it is to first consider the crime charged and if after full and careful consideration of the evidence it cannot agree on a verdict as to that crime, it may then proceed to arrive at a verdict on a lesser crime.*

State v. Labanowski, 117 Wn.2d 405, 414, 816 P.2d 26 (1991).

Christopher Almaral faults the PowerPoint slide for requiring the jury to affirmatively and unanimously acquit him of first degree murder before deciding whether to convict of second degree murder, rather than simply allowing the jury to consider the lesser included offense after they fail to agree on the higher crime. We do not read the slide as Almaral reads it. The slide tells the jury to focus on premeditation first, which

should have been the focus when addressing first degree murder and second degree murder. The State's suggestion to the jury that it should address premeditation first posed a logical method of addressing the charges. The State did not suggest that this language was found in any jury instruction or that the trial court instructed the jury to follow this approach.

Jury instruction 13 informed the jury how to deliberate when resolving which, if any, level of a crime the accused committed. The PowerPoint slide did not conflict with the instruction.

Norteño Reference

Christopher Almaral contends that the prosecutor committed misconduct by appealing to the jury's passion when repeatedly referring to him as a Norteño throughout the State's closing argument. Almaral contends that the State's repeated references to him being a Norteño appealed to the jury's implicit racial bias. By framing him as a Norteño, the State highlighted his Latino race for the jury and undermined his presumption of innocence by suggesting that a member of a Latino-associated group is more likely to be guilty of a violent crime. The State responds that the prosecutor did not err by referring to Christopher Almaral as a Norteño, because reasonable inferences from the evidence demonstrated that, on the day Almaral killed Stephanie Curtis, he was a member of the NSV street gang.

A prosecutor should not make arguments designed to inflame the jury's passions or prejudices. *In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 704 (2012). While a prosecutor is granted wide latitude to draw reasonable inferences from the evidence, he or she must seek convictions based only on probative evidence and sound reason. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011); *State v. Cateneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74 (1991).

During its closing argument, prosecutor referred to Almaral as a Norteño nine times. Three times, the State's attorney called Almaral a "flamed up Norteño" and four times a "kinder" or "gentler" Norteño.

We find no decision that includes the prosecution's labeling the accused as either a Norteño or a Sureño. We find cases, wherein the State's attorney, during argument, often referred to the accused as a gang member. Courts do not find this reference to a gang to be misconduct unless the prosecution presented no evidence of gang activity. *Brown v. State*, 291 Ga. 887, 734 S.E.2d 41, 45 (2012). To the contrary, when evidence presented shows the accused to be a gang member or the crime to be gang related, the prosecution may mention such during summation. *Commonwealth v. Leach*, 73 Mass. App. Ct. 758, 901 N.E.2d 708, 717 (2009); *People v. Sims*, 265 Ill. App. 3d 352, 638 N.E.2d 223, 230 (1994). In *People v. Samuels*, 228 P.3d 229 (Colo. App. 2009), the reviewing court held that the prosecution committed no misconduct by repeatedly referring to the accused by his gang nickname, when witnesses used the nickname.

During his custodial interview played to the jury, Christopher Almaral admitted to being a member of the Norteño gang. He also described himself as “flamed up” the night of the murder because of his red dress. He justified his shooting of Stephanie Curtis in part because of his belief that she worked for the rival Sureño gang. Thus, his gang membership and the identity of his gang constituted evidence before the jury. The State’s attorney may have unbecomingly called Almaral a “kindler, gentler Norteño,” but the law does not preclude sarcasm. The State’s attorney did not commit misconduct by referencing Almaral as a Norteño.

Christopher Almaral also asserts that, at trial, the State never disputed that he was no longer involved with NSV and that he worked twelve-hour days at a legitimate job at the time of Stephanie Curtis’ death. Almaral maintains that the State, nevertheless, focused on his status as a former gang member to obtain a conviction, instead of highlighting the specific evidence presented in the case. We disagree with Almaral. In his custodial interview, Almaral declared himself a Norteño and never suggested that he had left the gang.

Ineffective Assistance of Counsel

Christopher Almaral asserts that defense counsel provided ineffective assistance by failing to object to the first aggressor jury instruction, because the facts did not warrant the instruction and the instruction only served to undermine his claim of self-defense. The State responds that the first aggressor instruction applied because Stephanie

Curtis could have believed that she fought for her survival before being killed, since Almaral intended to abandon her at night and in freezing temperatures. The State further contends that, even if evidence did not merit the instruction, its inclusion did not prejudice Almaral's defense because the prosecutor did not mention the instruction during argument.

To prevail on an ineffective assistance of counsel claim, the defendant must demonstrate (1) that defense counsel's representation was deficient, and (2) that the deficient representation prejudiced the defendant. *State v. Estes*, 193 Wn. App. 479, 488, 372 P.3d 163 (2016), *aff'd*, 188 Wn.2d 450, 395 P.3d 1045 (2017). Representation is deficient if, after considering all the circumstances, the performance falls below an objective standard of reasonableness. Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have differed. *State v. Estes*, 193 Wn. App. at 488; *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Criminal defendants may rebut the presumption of reasonable performance by demonstrating that no conceivable legitimate tactic explains counsel's performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

To determine whether defense counsel erred by failing to object to the first aggressor instruction, we first consider whether the instruction was error. A first aggressor may not claim self-defense. *State v. Grott*, 195 Wn.2d 256, 266, 458 P.3d 750

(2020). The right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). This rule arises from the the aggressor's victim defending herself against the aggressor and thus employing lawful force. *State v. Grott*, 195 Wn.2d 256, 266 (2020). The defendant's provoking act must be an intentional act that the jury could reasonably assume would provoke a belligerent response from the victim. *State v. Espinosa*, 8 Wn. App. 2d 353, 362, 438 P.3d 582 (2019). The provoking act does not need to be unlawful. *State v. Sullivan*, 196 Wn. App. 277, 290-91, 383 P.3d 574 (2016).

The question of whether a first aggressor instruction should be given is a highly fact-specific inquiry, such that broad, bright-line rules are rarely appropriate. *State v. Grott*, 195 Wn.2d 256, 267 (2020). When the court reviews whether the evidence sufficed to support giving a first aggressor instruction, the court must carefully consider the specific evidence presented at trial in the light most favorable to the requesting party. *State v. Grott*, 195 Wn.2d at 267.

Christopher Almaral contended that he shot Stephanie Curtis when she reached for the handgun in his coat pocket. Assuming Curtis did so, she reached for the gun only after knowing that Almaral intended to abandon her in freezing temperatures in the early morning along a sparse rural road. She also reached for the gun with the knowledge that Almaral possessed two guns and had fired one before. She did not necessarily reach for the gun to kill Almaral, but to insure her safe return home. Curtis could have expected to

die from freezing weather or for Almaral to shoot her as he left the scene. We find no cases about being left alone in a cold environment. Nevertheless, when we view the evidence in the light favorable to the State, Almaral's conduct could have reasonably provoked a panicked Curtis to justifiably reach for the gun.

Because the first aggressor instruction fit the facts, Christopher Almaral does not show that his trial counsel performed ineffectively. Almaral also demonstrates no prejudice.

Cumulative Error

Christopher Almaral contends that the cumulative effect of the prosecutor's and defense counsel's errors deprived him of a fair trial. The cumulative error doctrine "may warrant reversal, even if each error standing alone would otherwise be considered harmless. The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006) (citation omitted). Because we find no error, we discern no cumulative error.

Community Custody Conditions

Christopher Almaral challenges six community custody conditions imposed as part of his sentence, numbers 7 and 14 through 18, as unconstitutionally vague. He argues that each condition raises many unanswered questions, such that the conduct they proscribe is not sufficiently definite and the conditions are susceptible to arbitrary

enforcement. Almaral requests that this court remand for the trial court to strike the offending conditions from the judgment and sentence.

The State concedes that community custody conditions 14 through 18 are unconstitutionally vague and requests that this court remand for the trial court to modify the conditions to be more specific. The State does not address condition 7.

We do not necessarily discern that community custody conditions 14 to 18 suffer from undue vagueness. Nevertheless, in our discretion, we accept the State's concession. Even if not unduly vague, the five conditions could improve by clarification. We review only community custody condition 7.

The accused may raise a vagueness challenge to conditions of community custody for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 745, 193 P.3d 678 (2008). A community custody condition is unconstitutionally vague if it fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. *State v. Duncalf*, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013); *State v. Bahl*, 164 Wn.2d 739, 752-53 (2008). The community custody condition is unconstitutionally vague if either requirement is unsatisfied. *State v. Bahl*, 164 Wn.2d at 753. The party challenging a condition carries the burden of proving the law to be unconstitutional beyond a reasonable doubt. *City of Spokane v. Douglass*, 115 Wn.2d 171, 177, 795 P.2d 693 (1990).

This court proceeds cautiously when interpreting vague statute when the statute implicates the First Amendment to the United States Constitution's right to association. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 31, 992 P.2d 496 (2000). Community custody conditions may only limit a probationer's First Amendment right if the restriction is "reasonably necessary to accomplish the essential needs of the state and public order." *State v. Bahl*, 164 Wn.2d 739, 757 (2008) (quoting *Malone v. United States*, 502 F.2d 554, 556 (9th Cir. 1974)).

Christopher Almaral's community custody condition 7 declares:

7. Do not associate with persons involved in the purchase, possession, consumption, manufacture, or sale of illegal drugs.

CP at 378. When challenging this condition, Almaral poses the questions:

What does "associate" mean? Does it include, for example, interactions with coworkers[?] Does it include buying something from a clerk at a store?

Is Mr. Almaral prohibited from interacting with people who are involved with drugs even if he does not *know* of that involvement? How recent must the person's drug involvement be?

Br. of Appellant at 41.

While Christopher Almaral correctly characterizes the community custody condition 7 as lacking particularity, the condition need not be so specific.

[S]ome level of ambiguity will always remain in community custody conditions. However, "impossible standards of specificity are not required." And a convicted person is not entitled to complete certainty as to the exact point at which his actions would be classified as prohibited

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conduct. Instead, all that is required is that the proscribed conduct is sufficiently definite in the eyes of an ordinary person.

State v. Hai Minh Nguyen, 191 Wn.2d 671, 681, 425 P.3d 847 (2018) (citations omitted) (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 26,759 P.2d 366 (1988) (internal quotations omitted)).


An ordinary, reasonable person understands that community custody condition 7 only restricts Christopher Almaral from associating with people he knows participates in illegal drug activity. The restriction only applies to those involved in the present tense, not those who imbibed years earlier. One does not necessarily associate with a coworker by standing next to her while working. One associates with one involved in drug activity, when one knowingly socializes with such person.

CONCLUSION

We affirm Christopher Almaral's conviction for murder in the first degree. We vacate Almaral's conviction for possession of a controlled substance and vacate his plea of guilty on the possession of unlawful firearm charge. We remand for further proceedings on the possession of unlawful firearm charge and for resentencing. During resentencing, the court should renumber Almaral's offender score. The superior court should also provide definition to community custody conditions 14 through 18.

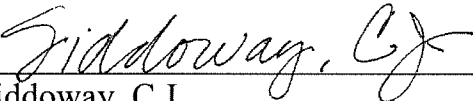
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A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

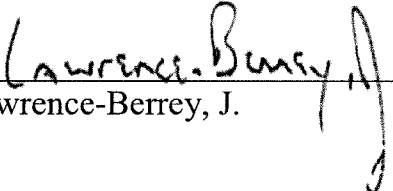


Fearing, J.

WE CONCUR:



Siddoway, C.J.



Lawrence-Berrey, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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