No. 307646-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

STEVEN MICHAEL SWINFORD,
Defendant/Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
I. ISSUES	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT	18
A. STANDARDS OF REVIEW	18
B. THE STATE'S COMMENT WAS NOT ERRONEOUS GIVEN THE CONTEXT, WAS NOT FLAGRANT AND ILL INTENTIONED, WAS NOT INCURABLE, NOR PREJUDICIAL	21
C. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL, AND OTHER COMMENTS NOT BROUGHT BEFORE THE TRIAL COURT DO NOT CHANGE THE STANDARD, THE CONTEXT, THE ANALYSIS, OR THE RESULT. CUMULATIVE ERROR ANALYSIS DEMONSTRATES NO PREJUDICE	32

TABLE OF CONTENTS (con't)

Page

D. REMAND TO THE TRIAL COURT FOR AN OPPORTUNITY TO MAKE A FINDING PURSUANT TO RCW 9.94A.607(1) THAT SUBSTANCE ABUSE CONTRIBUTED TO THIS OFFENSE IS PROPER REMEDY GIVEN THE NOTABLE EVIDENCE OF ALCOHOL CONSUMPTION ---------- 36

IV. CONCLUSION ---------- 38

TABLE OF AUTHORITIES

Cases	Page
In re Pers. Restraint of Glasmann, ___ Wn.2d ___, 286 P.3d 673, 678 (2012) -----	21,34
State v. Davis, 175 Wn.2d 287, 332, ___ P.3d ___ (2012)----------	28,30
State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012)----------	18,19,26, 29,35
State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)----------	24
State v. Hatley, 41 Wn. App. 789, 799, 706 P.2d 1083 (1985)----------	22
State v. Janes, 121 Wn.2d 220, 239-40, 850 P.2d 495 (1993)----------	23
State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009)----------	38
State v. Perez-Valdez, 172 Wn.2d 808, 818, 265 P.3d 853 (2011)----------	20,35
State v. Powell, 139 Wn. App. 808, 162 P.3d 1180 (2007), *reversed on other grounds*, 166 Wn.2d 73 (2009)----------	37
State v. Powell, 166 Wn.2d 73, 206 P.3d 321 (2009)----------	37
State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)----------	21,35

TABLE OF AUTHORITIES (con't)

Cases	Page
State v. Thorgerson, 172 Wn.2d 438, 454, 258 P.3d 43 (2011)	34
State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)	23
State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011)	25,26,32
State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008)	27
State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)	21

Rules and Statutes	Page
RCW 9.94A.607(1)	36

I. ISSUES

A. STANDARDS OF REVIEW FOR ALLEGED PROSECUTORIAL MISCONDUCT AND DENIAL OF MOTION FOR A NEW TRIAL.

B. COMMENT MADE BY THE STATE WAS NOT ERRONEOUS GIVEN THE CONTEXT, NOT FLAGRANT AND ILL INTENTIONED, NOT INCURABLE, NOR PREJUDICIAL.

C. TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL, AND OTHER COMMENTS NOT BROUGHT BEFORE TRIAL COURT DO NOT CHANGE THE STANDARD, THE CONTEXT, THE ANALYSIS, THE OUTCOME. CUMULATIVE ERROR ANALYSIS DEMONSTRATES NO PREJUDICE.

D. REMAND TO CONSIDER MAKING FINDING PURSUANT TO RCW 9.94A.607(1) THAT SUBSTANCE ABUSE CONTRIBUTED TO THIS OFFENSE IS PROPER REMEDY GIVEN THE NOTABLE EVIDENCE OF ALCOHOL CONSUMPTION.

II. STATEMENT OF THE CASE

The defendant was tried before a jury in Chelan County Superior Court February 3 - 10, 2012, on a charge of Murder in the Second Degree. The jury returned a verdict of guilty and sentencing occurred on March 30, 2012.

At trial, the jury was instructed on the lesser included offenses of Manslaughter in the First Degree and Manslaughter in the Second Degree. Also, the jury was given an instruction on self defense. (CP 54-62).

The facts of the crime are that on January 28, 2011, the defendant, Steven Swinford, without provocation, shot his friend, Paul Raney, at close range in Swinford's home seven times, killing Raney.

Steven Flick testified that he had known both the victim and defendant for years. (2 RP 256). In early January 2011, Flick allowed Swinford to move into his home because Swinford was divorcing his wife. Another friend, Jesse Juarez, moved in at about the same time. (2 RP 258).

Before Swinford moved in, Steven Flick did not have any guns in his home. Swinford brought with him 3 or 4 pistols and a shotgun. (2 RP 259). Flick testified it was not unusual for the guns to be left lying around on the furniture and for the shotgun to be left leaning against a wall. (2 RP 259). Additionally, it was not unusual for someone to keep a handgun out of the way by wedging it in between the seat cushion and the inside of an upholstered chair arm. (2 RP 259).

On January 28, 2011, Flick testified he went to exercise with his sister from approximately 4:00 p.m. to 6:00 p.m. and then ate dinner with his family in Chelan. When he arrived back at the Manson house, there were no firearms around and his two roommates and their mutual friend, Paul Raney, who frequently overnighted at that home, were all gone. Mr. Flick sat down to watch TV and the other three returned to the home around 9:00 p.m. (2 RP 259).

When Swinford, Juarez, and Raney came into the home, Juarez went upstairs to his bedroom. The defendant Swinford initially went upstairs, but then returned back downstairs to the living room. Raney had stayed downstairs in the living room with Steven Flick. The defendant joined them. (2 RP 261).

Mr. Raney and Mr. Swinford began a drinking game called "three man" which involved drinking cups of alcoholic beverages and rolling dice. Mr. Flick testified that it was normal for them to start filling cups and drinking alcohol, and that there was usually quite a bit of alcohol in the house and consumed. (2 RP 261).

Mr. Flick further testified that the victim and defendant drank from large 24 ounce cups and had them relatively full with stiff drinks. They were matching each other's drinks, joking and

eventually having a hard time talking. It was normal for Raney and Swinford to get drunk and stumble on their words. (2 RP 262).

However, Mr. Flick testified that Mr. Raney and Mr. Swinford were not fighting and that they were joking around just 3 to 5 minutes before the shooting occurred. (2 RP 263).

After the movie ended, Mr. Flick drank 1 or 2 beers and remained in the living area. (2 RP 264). At one point, the victim, Paul Raney, leaned forward in his chair to use the Xbox control in front of him on a coffee table to turn back on the Xbox after the defendant Swinford had turned the Xbox off at its base by the TV. (2 RP 264-265).

Flick further testified there was discussion between Raney and Swinford about listening to music via the iPod or the Xbox and letting the iPod charge or not. The discussion was not aggressive or out of the ordinary. (2 RP 265). Flick testified that both Raney and Swinford liked to be right, that they frequently had disagreements but that they were just conversational and talking. He indicated they were having a match as to who was going to be correct which occurred on a daily basis, and that they were always friends afterwards. (2 RP 265). Mr. Flick specifically testified that he never heard Paul Raney threaten Mr. Swinford. (2 RP 266).

Flick also testified that at one point he heard the victim, Mr. Raney, say to Mr. Swinford, "Stop being such a bad ass all the time" just before the shooting. At that point, Flick observed the victim sitting forward in the upholstered chair so he could reach the Xbox control in front of him on the coffee table. At that point, Flick turned to grab another beer, heard a cocking noise, then shooting directly following. It was very rapid and quick. (2 RP 266).

Flick saw that the victim was leaning back in the upholstered chair, his hands were directly up before him and starting to fall. The shooting occurred in seconds, and Flick testified he heard 7 or 8 shots. (2 RP 267).

Flick further testified that after he had heard Mr. Raney make the "bad ass comment," the defendant had muttered something under his breath that was barely audible. Two to three seconds after the victim had made the "bad ass comment" the shooting started. (2 RP 267).

No warning shot was fired by Swinford. (2 RP 267, ln. 25 to 2 RP 267, ln. 1). Swinford had been standing closer to the Xbox console at the TV. Swinford had used a gun that had been left lying on the coffee table. Swinford used both hands to hold his gun. (4 RP 545, 548, 569, 570). Flick testified clearly that the

victim's hands were up before him and had started to fall as he was being shot. Further, that the victim, Paul Raney, had nothing in his hands. (2 RP 268).

After the shots were fired, Flick feared the defendant might shoot him also. (2 RP 268). Flick saw the defendant stand in the doorway and wait for police. (2 RP 269). Flick testified he heard the defendant tell the 911 operator, "He had shot his friend and was going away for a long time." (2 RP 270).

Flick believed the defendant was intoxicated at the time. Flick testified he also called 911 and the dispatcher told him to move the victim, Paul Raney, to the floor to start CPR. Jesse Juarez, who had come downstairs, helped Mr. Flick. (2 RP 270). Juarez, trained in emergency medical care, could not find a pulse. He checked several times. Mr. Juarez and Mr. Flick never did CPR as they believed Mr. Raney had already passed. (2 RP 272).

Mr. Flick further testified that he had been seated within arm's reach of where Mr. Raney was seated and he never saw any weapon where Mr. Raney had been seated. Having a weapon in the living area of the home was a normal activity, but he had just not seen Raney with a gun. Flick further indicated he had not touched a gun. (2 RP 262). He testified further that he did not

move or disturb anything at the scene, other than moving Mr. Raney to the floor as instructed by 911 dispatch. (2 RP 275).

Upon cross-examination, Mr. Flick reiterated that just before he looked away to grab his beer, he had seen the victim reaching for the Xbox controller directly in front of the victim on the coffee table. (2 RP 280). The victim, Paul Raney, had not raised his voice and was just talking to the defendant Swinford. (2 RP 281). Flick could see the defendant and the victim easily as the debate ensued. Flick's back was turned to grab a beer after the bad ass statement, and then he heard the cocking noise. (2 RP 284). Flick testified he felt the concussions on his face from the gunshots. (2 RP 286). Flick testified that there was no gun with the victim, Paul Raney's body, when Flick moved it from the chair. (2 RP 290). Flick saw that as the victim was being shot, his hands were directly in front of the victim, but not above in the air. They were falling down. (2 RP 296; 305, ln. 20).

Flick further testified that the victim's statement to the defendant about being a bad ass was not a threat and not unusual conversation for the victim and the defendant. (2 RP 303).

Flick testified that when the defendant Swinford was seated on the couch, he was approximately 2 feet from Paul Raney seated in his chair. (2 RP 307).

Next to testify was Jesse Juarez. (2 RP 309). Mr. Juarez also testified that the defendant Swinford brought guns to the house when he moved in. (2 RP 312-313). Mr. Juarez also testified that earlier in the day on January 28, 2011, he had joined the victim and the defendant target shooting. (2 RP 312). He testified that all of them were getting along during that time. They also went to Mr. Raney's mother's house in Chelan after target shooting. (2 RP 312).

Upon returning to their home in Manson, Juarez brought the shotgun back into the house and leaned it up against a wall. Mr. Juarez testified that the other guns were brought into the house by the other men. There were two 9 mm, a .40 caliber FNP, and a .45 caliber 1911. (2 RP 312).

Mr. Juarez indicated he went upstairs to his bedroom to Skype his girlfriend. (2 RP 314). Subsequently, he fell asleep. In the middle of the night, Mr. Juarez was awaken by the sound of gunshots. (2 RP 314). He next heard a call come in over his volunteer firefighter pager about gunshot wounds to the chest.

(2 RP 314). He decided to go downstairs and ran into the defendant Swinford on the stairway. Juarez testified he asked the defendant Swinford what happened, and the defendant replied he didn't know and that he had shot Paul and was going to jail. (2 RP 315). Juarez testified further that he asked Swinford why and that Swinford responded that he didn't know. Juarez also testified that the defendant said he had gotten mad at Paul and that Paul had gotten mad at Swinford, but Swinford did not explain why the shooting happened. (2 RP 315). Mr. Juarez also testified that, consistent with Mr. Flick's testimony, he saw no point in giving CPR to Mr. Raney who he believed had already passed by the time he saw him. (2 RP 316).

Juarez testified that he asked the defendant, Steven Swinford, several times why did he shoot Mr. Raney. The defendant only responded that he was angry and shot Paul and that he was going to jail. At one point, Juarez stated that Swinford told him, "I'm sorry, I don't know why, I can't tell you." (2 RP 318).

Juarez testified that Mr. Swinford never said anything about Mr. Raney pointing a gun at him. (2 RP 319). Juarez also testified that he had been better friends with the defendant, Steven

Swinford, than he had been with the victim, Paul Raney. (2 RP 322).

Wayne Harris, Chelan County Coroner, bagged the victim's hands at the scene and also placed the victim in a body bag. He transported the victim to the morgue in Wenatchee. (2 RP 328). Mr. Harris noticed wounds to the victim's chest and lower abdomen. (2 RP 328). He testified that the blood on the victim's hands was dry by the time he arrived at the scene at about 7:00 a.m. (2 RP 344).

Forensic pathologist, Dr. Gina Fino, performed the autopsy. (2 RP 338-340). Dr. Fino testified that photo number 22 showed the victim's right palm with blood spatter, which was blood applied with force. (2 RP 343). Two droplets were below the index finger on the palm and there was more on the palm below the 5th or little finger and a few on the 3rd and 4th fingers. (2 RP 344). The next photo, number 23, also of the right palm, showed more blood spatter droplets. (2 RP 344). Photo number 24, of the left hand, depicted two bullet wounds which generally matched the bullet wounds on the victim's chest. (2 RP 345-346). Dr. Fino testified that it made sense that the two left hand wounds lined up with the two chest wounds on the victim. (2 RP 346). The left hand

wounds were through-and-through wounds. (2 RP 347). Photo number 25 showed a picture of three gunshot wounds that also exited the victim's body. (2 RP 348). That bullet in particular entered the victim's right arm four inches below the right elbow, traveled upward into the right upper arm (meaning the elbow was bent and the lower arm was up against the upper arm when it was shot), and exited two and three-quarter inches above the right elbow. It then hit the chest of the victim, further indicating that the arm was very close to the victim's body at the time the victim was shot. (2 RP 348-351).

The victim's right upper arm was likely against his chest when the right arm gunshot wound occurred. (2 RP 352). The trajectory of this bullet is consistent with the right hand being up. (2 RP 352). It is also consistent with the right palm, which had blood spatter on it (2 RP 351), facing the body as it was being shot. (2 RP 353).

Dr. Fino testified specifically about eight wounds to the victim. The first was a bullet wound that went through the heart and the spinal cord and was considered a fatal wound. It entered on the left side of the victim's chest. After someone would have received such a wound, muscular control would be lost. (2 RP

353). The second gunshot wound discussed was also to the upper left chest of the victim and exited the back. (2 RP 354). The third gunshot wound discussed entered the right chest and then entered the pelvis tissue. That bullet was recovered inside the victim. (2 RP 344). The fourth gunshot wound discussed was to the right lower chest and it exited the body. (2 RP 355). The fifth gunshot wound discussed was to the victim's right pelvis and it was a perforating wound, meaning in and out. It was a wound consistent with being seated in a chair. (2 RP 356). The sixth gunshot wound discussed was to the left side of the pelvis, and could have ricocheted off of a belt. (2 RP 356). The seventh gunshot caused the right arm wounds previously discussed. (2 RP 357). The last gunshot wounds discussed were the two through-and-through wounds to the victim's left hand which generally matched up with the victim's two left chest wounds. (2 RP 357).

Dr. Fino also testified that the blood spatter on the right palm of the victim was consistent with the palm facing toward the body at the time it was being shot and consistent with the victim not having anything in that hand at that time. (2 RP 358). She testified further that although there was no way to tell in what order the gunshot wounds entered the victim's body, that the gunshot wound to the

left side of the chest that went through the victim's heart and spinal cord would have prevented the victim from having muscle control. (2 RP 373). Essentially, a common sense reading of the autopsy report indicates it was absurd to believe that the victim had a gun in his hands at any time before or during the shooting.

It is also consistent with the autopsy to infer that the right hand of the victim, which contained the blood spatter, was cupped at the time the spatter was being deposited, because the most interior part of the palm had no spatter. (2 RP 374). The blood spatter had a very directional quality to it and Dr. Fino was confident that it was blood deposited by force. (2 RP 375).

Detective Paul Rohrbach of the Chelan County Sheriff's Office testified that when he was examining the crime scene, he recovered the gun from the chair in which the victim was sitting. (2 RP 385). It was tucked into the chair fairly deep and only the rear sights and portion of the rear slide and trigger mechanism were visible. It had been difficult for Detective Rohrbach to see the gun and he didn't notice it until he was almost directly above or over the seat cushion of the chair itself. (2 RP 385).

Next to testify was Mitchell Nessan of the Washington State Patrol Crime Lab. (3 RP 466). He has formal training in bullet

trajectory, blood spatter and stain analysis, and general crime scene processing. (3 RP 466). Mr. Nessan analyzed the .40 caliber FNP pistol that had been recovered from the chair where the victim, Paul Raney, had been sitting. (3 RP 468). Also, he analyzed chair fabric taken from the same chair. (3 RP 468). He observed blood stains on the weapon around the rear sights and around the hammer area. (3 RP 469). Blood stains were also located within the grooves of the serrated portion of the hammer. (3 RP 474). Essentially, that was the back of the hammer. (3 RP 475). Mr. Nessan found no blood on the trigger or barrel portions of the gun. (3 RP 480). He found blood only on the back portion or the area around the rear sights and around the hammer and firing pin areas. (3 RP 480-481). This is consistent with the gun having been tucked into the chair between the seat cushion and the inside of the arm of the chair during an event which had created blood spatter. (3 RP 481). Nessan testified that the analysis of the victim's chair fabric was consistent with the victim leaning to the right as he was shot. (3 RP 482). Further, Nessan testified the bullet wounds on the victim's left hand were consistent with the left chest wounds, meaning the left hand was against the victim Paul Raney's chest as he was getting shot. (3 RP 483).

Next to testify was Glen Davis, a forensic scientist with the Washington State Patrol Crime Lab. (3 RP 511). He analyzed firearms from the crime scene. He examined a Springfield 1911 pistol which was the gun used to kill Mr. Raney by Mr. Swinford. (3 RP 514). It is a single-action firearm because when you pull the trigger, it does one thing—it releases the hammer. (3 RP 515). It has a number of safeties, including a thumb safety on the side and a grip safety which must be depressed by the shooter's hand in order for the weapon to shoot. (3 RP 515). Mr. Davis testified that if a live cartridge were in the chamber and the slide was pulled back, it would eject an unfired cartridge. Then when the slide went forward, it would strip the next cartridge in the box magazine and load it into the chamber. (3 RP 517). The gun would fire as quickly as the shooter could pull the trigger. (3 RP 517). The cartridge cases of the spent rounds were compared to the gun as well as the unspent round that was found at the scene. Mr. Davis determined that they were all of the same brand and that the spent cartridges had been fired from the .45 caliber 1911 pistol. (3 RP 519-520).

Mr. Davis also analyzed the FNP .40 caliber pistol that Detective Rohrbach recovered from the victim's chair. (3 RP 520). That gun is distinct from the 1911 pistol. The FNP is a double

single action and it does not automatically cock the hammer when the trigger is pulled after the first shot. When the trigger is pulled, it releases the hammer, but it does not cock the gun for the next time. (3 RP 521). It has a de-cock safety where the hammer drops but isn't lying against the firing pin. It is a safety measure in case the gun is dropped on the hammer, it won't fire. (3 RP 522). The FNP .40 caliber was in the de-cock position when Detective Grant cleared that gun at the scene. (3 RP 457).

The defendant, Steven Swinford, testified that when he and the victim, Paul Raney, were engaged in a conversation about turning off and on the iPod versus the Xbox, he got up and moved to the Xbox console at the entertainment center, then turned and saw Mr. Raney going for the gun in the side of the chair. Mr. Swinford testified further that instead of doing anything else, he moved to the table to grab the 1911 pistol. (4 RP 548). Mr. Swinford testified that his eyes were closed when he shot the victim. (4 RP 548, ln. 25). Mr. Swinford acknowledged that he told the 911 operator that he "murdered" Mr. Raney, and that he had "overreacted" when he shot his friend. (4 RP 549, ln. 16-17; 556, ln. 19-25). Mr. Swinford also testified that he told Jesse Juarez that he had just shot Paul. (4 RP 550, ln. 11-13). Swinford admitted

that he did not see the victim, Paul Raney, raise the gun and he admitted that immediately afterward he wondered well, maybe, it had all been a joke and the victim had been playing. (4 RP 557, ln. 1-5). Further, the defendant admitted that he looked away from the victim. (4 RP 557, ln. 23-25). The State asked, "You reached and got the weapon and you never saw him raise the gun toward you, did you?" Defendant: "No." State: "Yet, you turned and fired on him, didn't you?" Defendant: "Yes, I did." State: "And, when you fired on him, you hit him every time you shot, didn't you?" Defendant: "I wasn't looking, but yes." (4 RP 558). Also, Mr. Swinford admitted that he held the gun with two hands when he shot Paul Raney. (4 RP 569, ln. 25; 570, ln. 1-9).

Further, Mr. Swinford admitted that it was normal for he and Mr. Raney to bicker with each other. "Yes, friends bicker." (4 RP 560, ln. 11; 567, ln. 12-13). He admitted further that it was normal for them to leave guns lying around and it was normal for guns to be in the cushions of the seats. (4 RP 560, ln. 18-19). Additionally, Mr. Swinford admitted that he was the one teaching Mr. Raney how to use guns and specifically taught him to decock the gun and leave it in the condition in which it had been found in a de-cocked position. (4 RP 561). Further, the defendant admitted that when

he contacted 911 after the murder, he said that there's no excuse and that he would go to jail for a long time. (4 RP 565). Additionally, the defendant admitted on cross-examination that he was in the military for only about 120 days. (4 RP 566, ln. 9-13).

III. ARGUMENT

A. STANDARDS OF REVIEW.

1. Standard of Review of Allegation of Prosecutorial Misconduct.

When evaluating an allegation of prosecutorial misconduct, a court must first determine whether the statement was erroneous. If deemed erroneous, then the court applies one of two standards of review. If defense counsel objected at trial, an erroneous statement must be shown to have resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). If defense counsel did not object, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. Id.

The record confirms, and defendant's brief herein acknowledges, that no objection was interposed at trial regarding the State's comment in closing argument alleged to be erroneous. (4 RP 599; Appellant's Brief at 9). Thus, the defendant must first demonstrate, given the evidence and context when uttered, was the prosecutor's statement erroneous? Second, if erroneous, was it flagrant and ill intentioned? Third, if flagrant and ill intentioned, was it incurable? Fourth, if incurable, did prejudice result? The State respectfully submits the answer to each question is, "no."

This standard of review is based on a defendant's duty to object to a prosecutor's allegedly improper argument in order to give the trial court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks. Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process. If a party is not required to object, a party could simply lie back, not allowing the trial court to avoid potential prejudice, gamble on the verdict, and then seek a new trial on appeal. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed

misconduct as a life preserver on a motion for new trial or on appeal. (Citations omitted.) Emery, supra, at 761-62.

2. Standard of Review for Denial of Motion for a New Trial.

A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried. Emery, supra, at 765. A trial court's denial of a mistrial is reviewed for abuse of discretion, and abuse is only found when no reasonable judge would have reached the same conclusion. Id. When determining the effect of an irregularity, if found to have occurred, the reviewing court examines its seriousness, whether it involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it. Id.

These factors are considered with deference to the trial court. State v. Perez-Valdez, 172 Wn.2d 808, 818, 265 P.3d 853 (2011). A trial court's decision to deny a new trial is reversed only upon abuse of discretion: "This case is an excellent example of the reason for and the validity of the oft repeated observation that the trial judge who has seen and heard the witnesses is in a better position to evaluate and adjudge than can we from a cold, printed

record." State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967). Discretion is abused when the judge's decision is manifestly unreasonable or based upon untenable grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

B. THE STATE'S COMMENT WAS NOT ERRONEOUS GIVEN THE CONTEXT, WAS NOT FLAGRANT AND ILL INTENTIONED, WAS NOT INCURABLE, NOR PREJUDICIAL.

1. Challenged Comment Was Not Erroneous Given the Context.

Statements allegedly constituting prosecutorial misconduct must be analyzed in the context in which they were made. In re Pers. Restraint of Glasmann, ___ Wn.2d ___, 286 P.3d 673, 678 (2012). Defendant primarily claims the State's comment, "Certainly, he owes a duty of care to his best friend inside this house," from the State's closing argument constituted prosecutorial misconduct because, appellant seems to claim, it shifted the burden of proof to the defendant. (4 RP 599, ln 14-15).

However, defendant makes no mention of the context in which the comment was made. It came at a point when the State had finished mentioning the lesser included offenses discussed in

the instructions and then discussed the self-defense instruction, No. 17. (CP 62). A fuller quote is:

> But Instruction Number 17 is in his defense, it says, it's a defense to the murder or manslaughter if the homicide was justifiable. And you need to determine this. The State has the burden to prove it wasn't justifiable. But there's three different parts to that and the third part, it says, the slayer employed such force and means as a reasonably prudent person would use under the same or similar circumstances – or conditions as they reasonably appeared to the slayer, taking into consideration all facts and circumstances as they appeared to him at the time of and prior to the incident. Certainly, he owes a duty of care to his best friend inside this house. And when he pulls the trigger, he ignores that. The State only has to disprove one of those three.

(4 RP 599, ln 4-16).

The duty of care comment referred to the objective aspect of self-defense. But it was not in disregard of or in contradiction to the subjective aspects of that or any other instruction.

The only form of self-defense recognized in this state requires that the actor's belief that resort to self-defense is necessary be reasonable. State v. Hatley, 41 Wn. App. 789, 799, 706 P.2d 1083 (1985). The imminent threat of great bodily harm does not actually have to be present, so long as a reasonable

person in the defendant's situation could have believed that such threat was present. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

The importance of the objective portion of the inquiry cannot be underestimated. Absent the reference point of a reasonably prudent person, a defendant's subjective beliefs would always justify a homicide. The objective part of the standard keeps self-defense firmly rooted in the narrow concept of necessity. Id. at 772-3; State v. Janes, 121 Wn.2d 220, 239-40, 850 P.2d 495 (1993). Considering both the subjective and objective aspects of the defense, it is not improper for the State to argue, given the evidence, that the defendant could not reasonably believe deadly force was necessary.

On appeal, defendant claims only one comment from the State's closing was error, but at trial, defense counsel did not object. Defendant makes no claim of impropriety regarding rebuttal. The State's closing and rebuttal comprise about 319 lines in the official transcript. (4 RP 592-602, 611-614).

Defendant's appeal brief cites the trial court's finding No. 7 in its Order Denying a New Trial as error. The State interprets the trial court's findings No.'s 6 and 7 as blending the steps in the

analysis of alleged prosecutorial misconduct. The trial court essentially ruled the State's comment, when analyzed in context, is not incorrect, but even if it were, it was not flagrant or ill intentioned, and not substantially likely to have affected the verdict. (CP 120-124; 5 RP 12, 13, 17). The State is generally afforded wide latitude in making arguments to the jury, and prosecutors are allowed to draw reasonable inferences from the evidence. State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). The State is entitled to comment upon the quality and quantity of evidence the defense presents. Id. Such argument does not necessarily suggest that the burden of proof rests with the defense. Id. Here, the State's comment did not contradict the instruction that the jury view conditions as they reasonably "appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him." Nor did it contradict the instruction stating the slayer "employed such force and means as a reasonably prudent person." Nothing in the prosecutor's comment shifts the focus of the jury from viewing the scene in any other manner than as the slayer viewed it.

2. Challenged Comment Was Not Flagrant and Ill Intentioned, Was Not Incurable, Nor Was it Prejudicial.

In State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011), an argument regarding reasonable doubt which asked jurors to find a specific reason for doubt such that they could "fill in the blank," was deemed erroneous because it shifted the burden of proof to the defense. Also found erroneous was telling the jury that its role was to declare the truth because the jury's job is not to solve a case, rather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt. The appellate court also found that a comparison of the reasonable doubt standard to "a common standard that you apply every day" trivialized the gravity of the State's burden and the jury's role in assessing the case against the defendant. Further, the prosecutor was found to have misstated the law and to have committed misconduct by telling the jury that the defense of others standard would be met if the jury would have taken the same action in defense of another. However, the reasonableness standard is not whether the jury would have done it, too. Id. at 732-35. The court reversed Walker's convictions because it found the

cumulative effect of numerous erroneous statements throughout the State's closing and rebuttal prejudicial. Id. at 739.

Unlike Walker, 164 Wn. App. 724, in this matter, there was not a repetition of the duty of care comment in the State's closing; it was stated only once in closing and not mentioned in rebuttal. Further as previously quoted, it was stated during a verbatim reading of the court's jury instruction regarding self defense, where the State also said, "But Instruction Number 17 is in his defense, it says, it's a defense to the murder or manslaughter if the homicide was justifiable. And you need to determine this. The State has the burden to prove it wasn't justifiable." And the State also said, "taking into consideration all facts and circumstances as they appeared to him at the time of and prior to the incident." (4 RP 599). Even if the State's comment in closing was deemed error, there is no comparison to the nature and extent of error which occurred in Walker, 164 Wn. App. 724, where multiple types of misstatements occurred repeatedly and were emphasized with the use of a power point presentation. Id. at 738. Here the State did not tell the jury it must fill in the blank for a reasonable doubt, did not trivialize the gravity of the jury's job, did not tell the jury it must solve the case, nor did the state tell the jury it should examine the

defendant's actions in terms of what they would do. Rather, here the State reminded the jury that the State had the burden to disprove self defense and that the jury must view circumstances as they appeared to the defendant.

Given all the factors surrounding the State's comment, it clearly was not flagrant or ill intentioned. Further, any inaccuracy would have easily been cured by an instruction to the jury.

In State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012), prosecutorial misconduct was found to have occurred where the State used the "fill in the blank" argument and also the "declare the truth" argument. However, in Emery, supra, the Supreme Court held that these misstatements could have been cured by a proper instruction, if either defendant had objected. The trial court could have properly explained the jury's role and reiterated that the State bears the burden of proof and the defendant bears no burden. Such an instruction would have eliminated any possible confusion and cured any potential prejudice stemming from the prosecutor's improper remarks. Id. at 764. In State v. Warren, 165 Wn.2d 17, 195 P.3d 940 (2008), similar misstatements by the prosecutor were cured even though the trial court's instruction was imperfect. Id. at 25.

In State v. Davis, 175 Wn.2d 287, 332, ___ P.3d ___ (2012), the defendant claimed the prosecutor's comments prohibited the jury from considering mercy and that violated his Eighth and Fourteenth Amendment rights to have the jury consider all relevant mitigating circumstances. No objection was made to the trial court. Upon review, the Supreme Court reiterated that if the defense does not object at trial, "[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request." Id., citing State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). The Court went on to state that the particular comments were not flagrant or ill intentioned: "To the contrary, the prosecutor's argument revealed an intent to comply with the law by emphasizing that the jury should base its decision not on emotion, but on the evidence and reason. Even assuming the prosecutor went too far, a jury instruction clarifying the definition of compassion could have cured any error." Id. at 334.

In light of Emery, supra, and Davis, supra, Swinford cannot demonstrate the comment by the State in closing could not have been cured by an instruction from the court. In Emery, supra, the court acknowledged that the defendants demonstrated the

prosecutor's statements were improper, but could not show they were incurable or prejudicial. Emery, supra, at 765.

The jury was properly instructed in this case. The jury instructions clearly relayed that the State bore the burden of proof and that the defendant was presumed innocent. (CP 49). Also that it is "the duty of the jury to accept the law from the court regardless of what you personally believe the law is or ought to be." (CP 44). This same instruction also informed the jury that it was "not to consider the filing of the information or its contents as proof of the matters charged," and that in terms of attorneys' remarks, it must, "disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court." Further, Instruction 17 stated, "The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty." (CP 62). Also, the prosecutor stated this in closing. (4 RP 599, ln. 6-7). Also, the trial court read the instructions to the jury. (4 RP 592, ln. 15). At the beginning of the proceedings, the trial court informed the jury that the State has the burden of proving the defendant's guilt at all times and that at no time does the

defendant have any burden of proving his innocence to you, (1 RP 9) and also, that the jury must accept the instructions of the court. (1 RP 23).

Additionally, given the overwhelming evidence of the defendant's guilt in this case, no prejudice could be said to result from the State's comment, even if deemed misconduct. To be prejudicial, a substantial likelihood must exist that the misconduct affected the jury's verdict. Judging whether there was a prejudicial effect must be done by viewing the improper comments in the context of the whole proceeding, not in isolation. Davis, supra, at 54-55.

Here, the defendant admitted more than once during cross examination that he looked away and did not see the victim, Paul Raney, raise a gun, but instead shot the victim seven times in a close pattern to the chest and abdomen while holding his gun with both hands. He described the gun's action as carrying up as he fired. He acknowledged that he had taught Paul Raney to de-cock the gun the victim had wedged in the chair in which the victim sat. He admitted that he and the victim were engaged in normal, friendly bickering moments before the shooting and that it was not unusual. He admitted that he'd overreacted. (4 RP 555-573).

Further, the gun the defendant used to kill the Paul Raney had a thumb safety on the side and a grip safety which has to be depressed by the shooter's hand in order to shoot. (3 RP 515, ln. 20-21).

There was evidence the defendant took time to cock the gun he had picked up from the coffee table and took time to mumble something barely audible before he emptied his gun into the victim. (2 RP 266, ln. 21; 267, ln. 19-21). There was evidence the victim Paul Raney's hands were up against his torso in a defensive position as he was shot and that he had nothing in them. (2 RP 267, ln. 3-5; 268, ln. 4-7; 2 RP 345, ln. 19 to 347, ln. 4; 2 RP 349-353, ln. 5). And evidence the victim was leaning to the right such that he couldn't have been reaching for a gun. (3 RP 482).

The evidence in this case overwhelmingly supports the conclusion that the defendant shot Paul Raney without any provocation, and continued shooting until his gun was empty. Any statement by the prosecution claimed by the defendant to be error could not have had a substantial likelihood of affecting the jury's verdict given such evidence. It was not a close case as suggested in defendant's brief. (Appellant's Brief at 16.) The phrasing used in defendant's brief that, "the prosecutor asked Swinford if he used

care when he shot at Raney before seeing him raise his gun," is not supported in the transcript. (4 RP 557, ln. 14 to 558, ln. 17). Rather, Swinford testified there that he did not see Raney raise a gun and admitted reaching for his gun and firing while looking away. Id.

C. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A NEW TRIAL, AND OTHER COMMENTS NOT BROUGHT BEFORE THE TRIAL COURT DO NOT CHANGE THE STANDARD, THE CONTEXT, THE ANALYSIS, OR THE RESULT. CUMULATIVE ERROR ANALYSIS DEMONSTRATES NO PREJUDICE.

1. A Review of the Trial Court's Order Denying Defendant's Motion for a New Trial Demonstrates the Trial Court's Analysis Was Correct and Additional Comments Claimed in This Appeal Do Not Change the Result.

The trial court relied on State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011), as establishing the analysis to determine questions of prosecutorial misconduct. (CP 118). Although the trial court articulated its ruling regarding the duty of care comment from the State's closing in a manner that blended the criteria, the court analyzed it in context and concluded no basis for overturning the jury's verdict existed.

On appeal, defendant also claims two questions from the State's cross examination of the defendant show an attempt to alter the definition of self defense, because the State asked if the defendant used care, and whether he owed his friend a duty of care. However, no objections were interposed. (4 RP 558, 572). It is important to view those questions in the context of the entire exchange taking place between the prosecutor and the defendant. At those points in the State's questioning, Swinford was testifying that he looked away when he shot the victim and that he didn't see the victim raise a gun. (4 RP 557-560, 570-573). Swinford acknowledged he shot the victim seven times in a close pattern while not looking. Id. At a minimum, that seems implausible to accomplish. Question: "You never looked." Answer: "Exactly." (4 RP 572, ln. 12-13). More pertinent, defendant's admission that he did not see the victim lift a gun but shot anyway doesn't sound like a reasonable reaction. No one but the defendant articulated what he perceived, which was that the victim did not have a gun. Nothing the prosecutor said contradicted the jury instruction to consider circumstances as the defendant perceived them. The defendant himself was able to demonstrate that his reaction was unreasonable.

Also, even if erroneous, any confusion caused by the particular questions could have easily been remedied with an objection and request for a curative instruction. Error, if any, could not be deemed to even approach the level of impropriety occurring in the Emery, supra, and Davis, supra, cases, and certainly not the nature of errors present in the In re Personal Restraint of Glasmann, ___ Wn.2d ___, 286 P.3d 673 (2012). There the prosecutor repetitively used unadmitted evidence and personal opinion during closing argument in a graphic display that the court found so flagrant that no instruction or series of instructions could erase their combined prejudicial effect. Id. at 679.

2. Cumulative Error Analysis Demonstrates No Prejudice.

Cumulative error may call for reversal, even if each error standing alone would be considered harmless. However, the doctrine does not apply where the defendant fails to establish how claimed instances of prosecutorial misconduct affected the outcome of the trial or how combined claimed instances affected the outcome of the trial. State v. Thorgerson, 172 Wn.2d 438, 454, 258 P.3d 43 (2011). Here, defendant fails to demonstrate how the claimed errors could have affected the jury's verdict in light of the

defendant's own testimony that he overreacted and shot not once, but seven times without looking. All of which was corroborated by the testimony of an eyewitness that there was no provocation, that the victim had no gun, and that his hands were up near his torso defensively; which was also corroborated by the forensic pathologist.

In this case, the prosecutor did not violate a motion in limine, did not inject personal opinion, did not vouch for the credibility of a witness, did not disparage defense counsel, did not tell the jury to fill in the blank with a reason, did not tell the jury to solve the case, and did not utilize unadmitted evidence in closing.

A mistrial should only be granted when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried. A reviewing court will only find abuse where no reasonable judge would have reached the same conclusion. Emery, supra, at 765. These factors are considered with deference to the trial court. State v. Perez-Valdez, 172 Wn.2d 808, 818, 265 P.3d 853 (2011). Discretion is abused when the judge's decision is manifestly unreasonable or based upon untenable grounds. Stenson, supra. No abuse of discretion occurred in this case.

D. REMAND TO THE TRIAL COURT FOR AN OPPORTUNITY TO MAKE A FINDING PURSUANT TO RCW 9.94A.607(1) THAT SUBSTANCE ABUSE CONTRIBUTED TO THIS OFFENSE IS PROPER REMEDY GIVEN THE NOTABLE EVIDENCE OF ALCOHOL CONSUMPTION.

Defendant assigns error to the trial court's imposition, as a condition of community custody, a requirement that defendant undergo a substance abuse evaluation and participate in recommended treatment. RCW 9.94A.607(1) states such a condition must be based upon a finding by the court. A review of the Judgment and Sentence indicates the trial court did not include a specific written finding that alcohol or substance abuse contributed to Swinford's offense. (CP 108). However, the court commented during sentencing that alcohol certainly did contribute to the offense:

> This is a household where the testimony established, really, with no dispute, that several young men were drinking, and had loaded guns, within easy reach. And that set of circumstances, quite frankly, was just an inexcusable recipe for this disaster. And, for those of us who, either, don't have guns, or don't drink ,or would never dream of leaving a loaded weapon lying around the house, or handling a loaded weapon, while pretty severely intoxicated, this was, quite frankly, a simply incomprehensible set of circumstances. That there are folks out there that are conducting themselves in this way.

(5 RP 37, In. 14-25).

There was plenty of testimony regarding drinking and intoxication during the evening leading up to the murder. (4 RP 544, In. 8-25; 545, In. 1; 564, In. 19-23; 566, In. 15-21; 2 RP 261, In. 21-25; 262, In. 1-25; 263 In. 1-8, 19-25; 264, In. 1-4; 270, In. 19-25; 278, In. 18-23; 301, In. 9-14). Although the trial court failed to indicate it on the Judgment and Sentence, substantial evidence exists in the record to support a finding that alcohol abuse contributed to the commission of this offense.

Appellant's brief discusses State v. Powell, 139 Wn. App. 808, 162 P.3d 1180 (2007), *reversed on other grounds*, 166 Wn.2d 73 (2009), where Division II of the Court of Appeals opined in anticipation of remand, that even though the trial court failed to check the box indicating Powell had a chemical dependency, the record amply supported its decision to order drug treatment as a condition of his sentence. Id. at 820. Division II reversed his conviction, but the Supreme Court reversed and affirmed the conviction without discussing imposition of drug treatment by the trial court. State v. Powell, 166 Wn.2d 73, 206 P.3d 321 (2009). The State acknowledges this court may not adopt the reasoning that a specific finding is not necessary when substantial evidence is

in the record to support it. The State submits that remand to the trial court to either make the requisite finding or strike the condition is the proper remedy in this case. A trial court's discretion to resentence on remand is limited by the scope of the appellate court's mandate. State v. Kilgore, 167 Wn.2d 28, 42, 216 P.3d 393 (2009).

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirm the defendant's conviction for Murder in the Second Degree for the killing of Paul Raney and remand the matter for resentencing on the limited issue of finding whether chemical dependency contributed to this offense.

DATED this 10th day of December, 2012.

Respectfully submitted,

Douglas J. Shae WSBA #17942
Chelan County Prosecuting Attorney

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

STATE OF WASHINGTON, Plaintiff/Respondent, vs. STEVEN M. SWINFORD, Defendant/Appellant.	No. 30764-6-III Superior Court No. 11-1-00039-8 DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 10th day of December, 2012, I electronically transmitted to:

Renee S. Townsley
Clerk/Administrator
Court of Appeals, Div. III
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AND deposited in the United States Mail properly stamped and addressed envelopes directed to:

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said electronic transmission and envelopes containing true and correct copies of Brief of Respondent.

Signed at Wenatchee, Washington, this 10th day of December, 2012.

Cindy Dietz
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Chelan County Prosecuting Attorney's Office

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