69841-9

NO. 69841-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JUSTICE,

Appellant.

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

The Honorable Barbra L. Linde, Judge

AMENDED BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. INTRODUCTION

Appellant Michael Justice is appealing his convictions for unlawfully possessing a firearm and first degree assault while armed with a firearm, based on a shootout between him and Edward Roy on July 14, 2012, in Seattle's Columbia City neighborhood. Neither man was hit or injured. Justice admitted he fired the first shot, but testified he acted in self defense; Roy previously threatened to kill him and lifted up his shirt to reveal the butt of a gun only moments before Justice fired that first shot. Although Roy fired several shots in Justice's direction, Justice and his wife escaped by driving away.

Justice admitted he mouthed off to Roy immediately preceding the shooting. Over defense counsel's objection, the court gave an aggressor instruction, which instructed the jury Justice was not entitled to act in self defense if he acted in a way that was likely to provoke a belligerent response. The court's instruction did not advise the jury that "words alone" are not sufficient provocation to defeat a self defense claim.

Justice will argue there was no basis for the court to give the aggressor instruction in the first place, and alternatively, that it was error to give it without also instructing the jury that words alone are

an insufficient basis to find someone is a first aggressor. To the extent counsel contributed to the error by failing to request the "words alone" language once his objection was overruled, Justice received ineffective assistance of counsel. Additionally, because the prosecutor misstated the law in closing argument regarding the aggressor instruction, Justice is entitled to a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in giving a first aggressor instruction to the jury.

2. The trial court erred in giving a first aggressor instruction that failed to advise the jury "words alone" are not sufficient to qualify one as a first aggressor.

3. To the extent counsel contributed to the error, Justice received ineffective assistance of counsel.

4. Prosecutorial misconduct in closing argument violated Justice's right to a fair trial.

5. The court's exclusion of exculpatory evidence deprived Justice of his right to present a defense.

6. The procedure by which the court took peremptory challenges violated Justice's right to a public trial.

7. The court acted outside its authority by including an Arizona conviction in Justice's offender score.

Issues Pertaining to Assignments of Error

1. The only purpose of an aggressor instruction is to remove a self-defense claim from the jury's consideration. By submitting the aggressor instruction to the jury where the instruction was not supported by the evidence, and by submitting an instruction that did not inform jurors "words alone" are an insufficient provocation to defeat a self defense claim, did the trial court deprive Justice of his right to present a defense and his right to have the prosecution prove the lack of self defense beyond a reasonable doubt?

2. Did Justice receive ineffective assistance of counsel where: (i) defense counsel – once his objection to the aggressor instruction was overruled – failed to request the court include language indicating "words alone" are not sufficient provocation to make someone a first aggressor; and (ii) there was evidence appellant mouthed off to Roy immediately preceding the shooting, upon which the jury could have relied to find Justice was a first aggressor?

3. In closing, the prosecutor argued Justice could not claim self defense because he created the need to act in self defense by firing his gun. This was the act that formed the basis for the alleged assault, however. It is well settled that the act of aggression justifying an aggressor instruction cannot be the assault itself. Did the prosecutor's misstatement of the law constitute prosecutorial misconduct depriving Justice of his right to a fair trial?

4. The defense sought to call DeShawn Miliken as a witness in its case-in-chief. The offer of proof indicated Miliken would testify that sometime after the shooting, he approached Roy and made some sort of plea on Justice's behalf. In response, Roy threatened, "Don't make me do you like I almost killed your boy."[1] Defense counsel argued the evidence was relevant because it tended to show Roy was the aggressor. Did the court's ruling excluding this exculpatory evidence violate Justice's right to present a defense?

5. During jury selection, the trial court employed a procedure that prevented the public from scrutinizing the parties' peremptory challenges. Did this violate appellant's constitutional right to a public trial?

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[1] RP 1413.

6. Did the court err in including in Justice's offender score an Arizona conviction that was neither legally nor factually comparable to a Washington offense?

C. STATEMENT OF THE CASE

On July 14, 2012, Justice and his wife ShaQuina Justice[2] were visiting from Arizona. RP 1719. The couple was considering relocating here. RP 1521, 1719. ShaQuina received job offers from the City of Seattle and King County District Court. RP 1521. Justice interviewed with the City of Tacoma water department. RP 1522, 1719. Both grew up here, but each moved to Arizona in early adulthood to attend college. RP 1519, 1717-18.

The Justices have many friends and family members still living in Seattle. RP 1717, 1720-22. Edward Roy used to be one of them. RP 1089, 1721. Not only did Justice and Roy grow up together, both were members of a fairly tight knit athletic community. RP 1472-1478, 1492, 1721-22. Justice played football in high school and college. RP 1477, 1718. Roy played high school basketball and reportedly, was (at one time) as good as his

[2] To avoid confusion, ShaQuina Justice will be referred to by her first name. No disrespect is intended.

younger brother, Brandon Roy,[3] who played professionally. RP 1368.

Douglas Wrenn was a member of the same tight knit athletic community. RP 1472-78, 1492. He played professional basketball and knew both Justice and Roy. RP 1472-75. Wrenn testified Roy has a reputation for violence, which is one of the reasons he did not go further in his basketball career. RP 1492-93.

Justice considered Roy to be like a brother to him. RP 1720-22. In the months preceding the shooting, however, Roy began to harbor a grudge against Justice. RP 1722. Apparently, Justice's mother made some unkind remarks about Brandon while at a beauty shop that were repeated to Roy. RP 1722-23, 1732.

Justice was unaware of Roy's grudge until March 2012, when he was in Seattle for a wedding. RP 1482, 1723. It was Wrenn who informed Justice there was a potential problem. RP 1483, 1724. Wrenn testified that once when he brought up Justice's name in conversation, Roy responded, "Fuck that nigger. He's a bitch." RP 1480. Wrenn further testified Roy said he was going to "pop him." RP 1480.

[3] To avoid confusion, Brandon Roy will also be referred to by his first name. No disrespect is intended.

One day while Justice was visiting, Wrenn asked if everything was okay between Justice and Roy. RP 1483, 1724. When Justice said it was, Wrenn suggested Justice call Roy to make sure. RP 1483, 1724.

When Justice called, Roy was antagonistic. RP 1485-87, 1725. At first, Roy pretended not to know Justice. RP 1485, 1725. He later threatened to shoot Justice, vaguely threatening that Justice should wear a "vest," but also that Roy would be aiming for his head. RP 1477-78, 1729. Justice eventually hung up. RP 1489, 1729. Wrenn told Justice about the previous conversation he had with Roy. RP 1734.

Back in Arizona, Justice heard rumors Roy was threatening to kill Justice's older brother. RP 1732. Justice again telephoned Roy in an effort to quash the one-sided feud. RP 1732. Initially, Roy was hostile again. RP 1732. Justice was contrite and attempted to persuade Roy that whatever the issue was, Justice's brother had no involvement. RP 1732, 1753. Justice believed that by the end of the conversation, the men were on good terms. RP 1733.

The apparent cease-fire was short lived, however, as Justice soon heard additional rumors Roy continued to insult Justice

behind his back and threaten to kill Justice and his brother. RP 1761.

The morning of the shooting, the Justices had just finished breakfast at Geraldine's Counter, a popular restaurant on the corner of Rainier Avenue and South Ferdinand Street. RP 1522. They walked back to their rental car, a red Dodge Challenger, which they parked in a pay lot just east of Geraldine's on the south side of Ferdinand. RP 1523, 1543.

As the Justices prepared to exit the parking lot, Roy turned into the lot in a black SUV,[4] drove around the parking lot and came to a stop behind the Justices' car. RP 1525, 1760. Justice got out of the car and approached Roy's SUV, hoping to resolve past issues face-to-face. RP 1526, 1763.

Justice testified that when he looked Roy in the eye and said he thought they resolved the dispute, Roy immediately pulled out a gun and said: "Fuck you, boy. I'll kill you." RP 1764-65. Justice tried to reason with Roy, but Roy got out of his truck and became physical. RP 1765. ShaQuina testified that Roy started "chest bumping" Justice while loudly asking, "what the fuck do you want nigger?" RP 1526-27.

[4] Roy drives a black Yukon Denali truck-based SUV. RP 1016, 1085.

At 6 feet 6 inches tall, Roy is taller than Justice and stood over him, gun still in hand, berating Justice.[5] RP 1236, 1766. Justice started to back away, urging: "Don't do this, bro." RP 1767. Roy responded, "This ain't what you want." RP 1767. Justice was scared, but told Roy he spoke to Brandon recently; Justice thought he was starting to diffuse the situation. RP 1769. But Roy said, "The money's already on your head." RP 1770.

Roy eventually got back in his truck and parked. RP 1526-27, 1766. Justice walked back to his car and told ShaQuina to leave. RP 1529, 1773. ShaQuina kept a gun in her purse for protection. RP 1534. Unbeknownst to ShaQuina, Justice took it from her purse, before she drove off. RP 1525, 1568.

Justice testified he was afraid and did not want to jeopardize his wife's safety by getting in the car with her. RP 1774. He did not plan to use the gun, but took it in case he needed to protect himself. RP 1776.

Justice testified he was afraid Roy was going to shoot him. RP 1740. Since Brandon made it into the NBA, Roy acted above the law. RP 1740. In fact, Roy bragged the police would never touch him. RP 1735.

[5] Although not as tall as Roy, Justice is also tall at 6 feet 3 inches. RP 410.

Justice knew about an incident during which Roy threw a metal marijuana grinder at his sister Jaamela Roy[6] and hit her in the face. RP 1944. The grinder knocked out three of Jaamela's top teeth, chipped a bottom tooth and busted her upper and lower lips. RP 1944-45. Christopher Watkins was Jaamela's boyfriend at the time and received Jaamela's teary phone call shortly after it happened. RP 1943, 1945. He also saw her busted up face once she returned home from the emergency room. RP 1945.

Considering what Roy had done to his own sister, Justice was particularly fearful of Roy's violent tendencies. RP 1739.

Roy walked west towards Geraldine's Counter. RP 1777. Justice intended to follow him there to have another conversation, possibly beg for his life and end the dispute. RP 1779. Justice crossed over to the north side of the street by Rookies, another restaurant on Ferdinand, east of Geraldine's. RP 1873-74.

Justice admitted he started mouthing off:

> I – I was yelling, "You bitch ass nigger." I was like – I was yelling, "you's a sucker." I was yelling – you know what I'm saying? -- basically he's a bitch.

RP 1785.

[6] To avoid confusion, Jaamela Roy will also be referred to by her first name. No disrespect is intended.

Meanwhile, ShaQuina had gone around the block and returned to South Ferdinand Street, where she asked Justice to get in the car. RP 1539.

Roy – who by this time had crossed over to the south side of Ferdinand Street and was walking east toward the Pure Alchemy and Reign Concept Salons (1788-89) – patted his hip and said, "you better get in that car, boy." RP 1539, 1596-98, 1926, 1794, 1889. Justice responded, "don't go there." RP 1598, 1603. Afraid to take his eyes off Roy, Justice did not get in the car. RP 1795.

Trees blocked Justice's view of Roy as he reached the area by the salons. RP 1792-93. Unsure of what was happening, Justice crossed to the south side of the street and slightly west toward Roy. RP 1788, 1793. ShaQuina backed up into the alley/parking lot on the north side of South Ferdinand. RP 1541.

Justice testified that as Roy continued to approach, he said, "too late now," took his left hand and lifted up his shirt to get his gun. RP 1796. It was at that moment, Justice reacted and fired the first shot. RP 1790. As Justice described, his "body took over" and his "arm just immediately went up." RP 1796. Remembering his past friendship with Roy, however, Justice did not fire at Roy

directly. RP 1797. Justice testified that as soon as he fired, Roy started shooting, all the while continuing to advance. RP 1797.

Meanwhile, when ShaQuina heard the gunshot, she panicked and drove out of the alley and east on South Ferdinand. RP 1541. She testified Roy shot at the car. RP 1607. When she turned left on 39th Avenue South, she heard Justice yelling at her to stop. RP 1543. He came out from between some houses and got in the passenger side of the car. RP 1543. ShaQuina heard more shots. RP 1543. Fearing for her life, her only thought was to get out of the area. RP 1544.

ShaQuina feared the flashy red rental car would become a target and therefore decided to exchange the Challenger for a different car at the rental agency. RP 1570. She did not think to telephone police; growing up in the Central District, it was her experience that police were not helpful. RP 1627. Justice testified he feared further retaliation by Roy if he called police. RP 1800.

It was a busy day in Columbia City, and there were many witnesses to the shooting. John Hayes was standing on the southeast corner of South Ferdinand Street and Rainier Avenue outside a coffee shop across from Geraldine's. RP 1672. He heard yelling and turned to look east down Ferdinand. RP 1673.

On the northeast side of the street he saw a man yelling at someone to the west towards Rainier. RP 1673.

Hayes' attention was drawn to a young couple crossing to his side of the street from Geraldine's. RP 1675. The woman was lagging behind, and her attention was focused on the man to the east who was yelling. RP 1675.

Hayes testified he saw the man closer to him pull up his tee shirt, as if to display something. RP 1675-76. Hayes, who has extensive experience with handguns, saw "what appeared to be the butt of a semiautomatic weapon." RP 1677. It appeared to be inside the man's waistband on the right side. RP 1677-78.

All of the sudden, Hayes heard gunfire. RP 1678-79. Hayes grabbed his wife and hid. RP 1679. When the shooting stopped, Hayes saw the young woman pop out of the Reign Salon and head east on South Ferdinand. RP 1680. Hayes rushed to catch up with her and told her she needed to talk to police. RP 1680.

When police arrived, Hayes herded the woman over to talk to them. RP 1682. One of the officers asked her a couple of questions, but she denied any involvement, at which point, the officer walked away. RP 1683. Hayes contacted another officer and directed him to the Reign Salon. RP 1686.

Peter Lamb manages the parking lot on the south side of Ferdinand, and maintains an office across the street. RP 392, 398, 402. Lamb installed a number of surveillance cameras at the office, two facing the south parking lot, one facing west down Ferdinand and one facing west toward the adjacent alley/parking lot. RP 392, 430-31.

Around noon, Lamb left the office to check the parking lot pay box. RP 402. He noticed a man on the north side of Ferdinand yelling west toward Rainier; the man reportedly said, "Hey, so and so, get up here right now." RP 402.

As Lamb crossed the street toward the parking lot, the man also started to cross. RP 404. Around the same time, a woman drove east to west on Ferdinand in a shiny red Dodge (RP 1285), and the man spoke to her through the window. RP 404, 406.

Lamb testified the man continued crossing the street, in a southwesterly direction and appeared to be yelling at another man, approximately 70 feet away to the west. RP 407-408. According to Lamb, the man closest to him glanced back at him briefly, turned back towards the west, and moments later, pulled a gun and started shooting. RP 407. Lamb ran back towards his office and hid, fearing he'd be caught in the crossfire. RP 412.

Lamb testified the man to the east, closest to him, fired 1-3 shots and ran north through the parking lot between Lamb's office and the adjacent building. RP 413.

The man to the west ran after the man who ran into the alley and fired 3-4 shots into the alley, before taking off in a black SUV. RP 413-416. Lamb provided the DVD from the security cameras to police. RP 419.

Derek Baylor was returning to his townhouse on 39th Avenue South and South Ferdinand Street just before the shooting. RP 448. He noticed a man near the parking lot shouting loudly. RP 448.

Baylor went inside his house on the south side of the street, but could still hear yelling 2-3 minutes later. RP 448. Curious, Baylor opened his deck door to take a look. RP 455. Baylor testified the man he saw yelling was focused on a similar sized man further west down the street. RP 459-60. The man to the east called the man to the west a "punk" and said, "come back up here and I'll kick your ass." RP 465.

Baylor testified the man to the east crossed to the south and west. RP 460. At that point, Baylor saw the man to the west walk slowly east. RP 460. Baylor testified the man to the west stopped behind a bush in front of the Reign Salon, when the men were about 15 feet apart. RP 462. Baylor could not see what the westerly man was doing, because bushes blocked Baylor's view. RP 462, 464.

According to Baylor, the easterly man pulled out a pistol and shot at the westerly man. RP 463. Baylor dropped to the floor, fearing he would be caught in the crossfire. RP 463. Baylor kept down, but heard 10-12 shots total. It sounded like a gunfight. RP 463. As an experienced shooter, too many shots overlapped to have come from one gun. RP 464.

That morning, Shelly Tonge-Seymour had gone to the Pure Alchemy Salon, with her partner Jill Tonge-Seymour and their 15-year-old daughter for consecutive hair appointments.[7] RP 526, 555, 581. Shelly and her daughter had finished and gone down the street to shop. RP 527.

[7] To avoid confusion, this brief will refer to the Tonge-Seymours by their first names.

On the way back, Shelly noticed a man and a woman on the sidewalk looking east on Ferdinand. RP 530. The man started to slowly walk up the street, but the woman lagged behind. RP 531. Shelly testified the man was saying something to a man further east; it sounded like, "you are barking too loud." RP 532.

Shelly described the man closer to her as "sauntering." RP 534. The man was "very large" and "towering" over Tonge-Seymour's daughter, who was tall in her own right, at 5 feet 11 inches. RP 535.

As Shelly and her daughter reached the salon and turned to go up the stairs, Shelly heard a loud "bang." RP 536-37. Shelly saw the man who had been walking in front of her and another man in the street, both with pistols. RP 538. Shelly saw a spark near the man closest to her and shoved her daughter up the stairs, into the salon. RP 538.

Jill was still getting her hair cut at the time of the shooting. Immediately before, she noticed a tall man walking east on Ferdinand. RP 567. Although she heard shouting, she could not tell whether he was involved. RP 567. Jill testified she heard 2 shots and then saw the man in front of the salon pull out a gun and start shooting. RP 566, 569-70. According to Jill, the man fumbled

while trying to pull the gun out from the right hand pocket of his baggy pants. RP 569. Jill thought she heard 6 to 8 shots. RP 571.

Elizabeth Scott was cutting Jill's hair at the time of the shooting. RP 661-70. Scott testified she heard yelling outside and opened the door to see what was happening. RP 663. She testified she saw a man across the street and thought she heard him shout, "Get back in the car, boy." RP 663.

When Scott looked west to see whom the man was shouting at, she noticed Shelly and her daughter heading back toward the salon. RP 665. They were walking behind a couple, although the woman was lagging behind. RP 665, 673, 688.

Scott testified the man was large and walked with a "swagger" – "a definite sort of, you know, moving down, you know, making an impression." RP 668. The man's swagger stood out to Scott. RP 669. There was "a deliberateness about his – the way he was moving[.]" RP 691.

Scott testified the man further east started to cross the street at an angle toward the man closer to the salon. RP 669. According to Scott, by the time the man to the east reached the middle of the street, he pulled a gun and started shooting. RP 670. Scott testified that right after the man to the east pulled out a gun, the

man by the salon pulled out a gun "and they just stood there and shot at each other." RP 671.

Scott testified the man by the salon did not appear surprised when he was fired upon. RP 693. He did not duck or try to run. RP 692. Rather, he extended his arm, began to fire and continued walking forward while firing. RP 693. To Scott, "it was one of the things that struck me about this whole scenario." RP 699.

Michael Parham was having breakfast with a friend at Rookies on the north side of Ferdinand at the time of the shooting. RP 778-79. Around 11:45 a.m., he saw a man on the sidewalk further east. RP 794. According to Parham, the man was yelling profanities, such as "Bitch ass nigger" in a forceful, serious tone.[8] RP 794. Parham testified the man's words were likely to lead to escalation because they were highly offensive. RP 794.

[8] Parham's lunch date Naomi Ishisaka similarly testified the man said, "bitch ass nigger" four times in a loud, angry tone. RP 826.

Parham testified the man was addressing someone behind Parham towards Rainier Avenue. RP 795. According to Parham, the man to the east started walking toward the middle of the street with his hand near his hip, but not like he was reaching for something.[9] RP 796. Parham and his lunch date decided to go inside the restaurant. RP 798. When Parham looked back, the man to the east was brandishing a gun. RP 798. Parham and the other restaurant goers dropped to the floor. RP 798.

Robert Aguirre and his wife were walking to their car on South Ferdinand at the time of the shooting. RP 902-903, 906, 926. As they approached Rookies, Aguirre noticed a man on the south side of the street talking to someone 50 yards away towards Rainier Avenue. RP 907, 910, 917. Aguirre testified the man said, "don't go in there" several times. RP 901. According to Aguirre, the man then said, "too late," just before the shooting.[10] RP 910.

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[9] In contrast, Ishisaka claimed the man reached towards his waistband as if attempting to show he was armed. RP 829. But Ishisaka testified she saw the other man reach for his waistband as well, "like trying to show like he might be armed as well." RP 853. As Ishisaka testified, "it was almost like, you know, doing the same thing that the other guy was doing." RP 855.

[10] Aguirre's wife testified similarly. RP 931.

Mauricio Martinez was walking south on 39th Avenue on his way to Rookies when the shooting started. RP 972. After hearing gunfire, Martinez saw a man come running up the alley and get in a red car with a young woman in the driver's seat heading north. RP 977-78. Martinez recorded the license plate number. RP 977.

Police canvassed the area for evidence. RP 418, 476. Officers recovered several shell casings on the south side of Ferdinand (RP 609, 891), as well as an intact round in front of the Reign Salon where, according to witnesses, the westerly man had been standing when the shooting started. RP 483, 723, 888, 1306-1307. One of the detectives testified the round could have been ejected from the man's gun if he racked the slide when a bullet was already chambered. RP 888, 1305.

Police also recovered an iPod at the scene. RP 954. The device name was "Ed Roy" and contained a phone book with contact information, including contact information for Elissa Rosenberg. RP 957, 962.

Police followed up on the license plate number of the red Dodge and learned it came from a rental car agency. RP 482, 484, 976. Police responded to the agency and impounded the car, which had been returned shortly after the shootout. RP 486. The

driver's license supplied at the time the car was rented was that of Michael Justice. RP 487, 864.

Police also spoke to the owner of the Reign Salon, as suggested by witness Hayes. She told police the woman's name was Elissa Rosenberg and gave them her phone number.[11] RP 619, 1193. Police called and asked Rosenberg to come down to the station to make a statement. RP 503. When Rosenberg arrived, she told police she did not know anyone involved in the shooting.[12] RP 765. Through their investigation, police came to believe the shooter to the west was Edward Roy. RP 1234, 1248-1250.

At trial, Rosenberg admitted she is Roy's girlfriend. RP 1005. On July 14, 2012, Roy was meeting her for breakfast at Geraldine's following Rosenberg's hair appointment at the Reign Salon. RP 1006, 1008.

After her hair appointment, Rosenberg claimed she went to her car to put on make-up before breakfast. RP 1013. She testified she then went and put her name on the waiting list at

[11] At trial, Rosenberg admitted she left without providing police any contact information. RP 1058.

[12] Rosenberg later agreed to an interview with a detective, but then lied and said she had been called into work and could not meet the detective. RP 1071.

Geraldine's and sat down on a bench outside to wait. RP 1018. When Roy arrived, Rosenberg noticed he kept looking east towards Rookies. RP 1020. Rosenberg eventually noticed a man down there. RP 1020. Rosenberg claimed she could not hear what was said, but Roy and the other man were exchanging words, which she described as "not good." RP 1021.

Rosenberg testified she told Roy she was going to her car, as the exchange between Roy and the other man was ruining her day. RP 1021, 1024. Roy crossed with Rosenberg to the south side of Ferdinand and began walking east towards the Reign Salon. RP 1022.

Rosenberg claimed that as they were walking to her car, the man to the east lifted up his shirt to show he had a gun. RP 1024. Rosenberg was walking slightly behind Roy at this time. RP 1027. According to Rosenberg, the man to the east was still talking and Roy was still responding. RP 1029. Rosenberg heard shots and ducked into the Reign Salon. RP 1029.

Rosenberg acknowledged Roy usually carries a handgun. RP 1040. She claimed she did not know whether he was carrying it the day of the shooting. RP 1041.

Rosenberg also acknowledged that while she was having her hair done, her stylist pointed out "big Mike" when Justice and his wife walked by. RP 1045, 1056. Rosenberg knew Roy had an ongoing dispute with Justice. RP 1056.

The surveillance video showed Rosenberg spoke to Roy briefly when he first arrived at the parking lot, before entering and driving around to stop behind the Justice's car. RP 1053, 1284. Rosenberg claimed she merely told Roy she didn't want to wait by herself at the restaurant. RP 1053.

Edward Roy testified that when he pulled into the parking lot on South Ferdinand Street, Rosenberg was standing there. RP 1085. Roy reportedly told her to go get a table while he parked. RP 1085.

Roy testified he turned into the parking lot but there was a red car blocking the driveway. RP 1085, 1087. Roy went around the car and circled the parking lot to the left, ending up behind the red car. RP 1088. Roy claimed he was heading for a space closer to the entrance, but was approached by Justice. RP 1088.

According to Roy, Justice had an attitude, said he thought "this" was over and asked why Roy was still talking about him. RP

1090. Roy claimed he didn't know what Justice meant. Roy further claimed there was no problem on his end. RP 1091.

But Roy admitted he was carrying a 9 mm semi-automatic handgun that could have been visible to Justice while he sat in his truck. RP 1092-1094, 1162, 1176. Roy did not recall showing Justice his gun, but testified it was possible Justice knew he was armed. RP 1105.

Roy asked if Justice was going to move his car. RP 1094. When Justice reportedly did not respond, Roy got out of his car to ask what the problem was. RP 1095. Again, Justice reportedly did not respond. Roy testified he made a sarcastic comment, got back in his car, parked and walked to Geraldine's. RP 1100. Roy claimed that while he was parking, he saw Justice go to his car and get something. RP 1101.

Roy testified Justice followed him as he walked towards Geraldine's but stopped near the alley as Roy continued on to the restaurant to meet Rosenberg. RP 1106. Roy claimed Justice was signaling for him to return, but Roy could not hear what he was saying. RP 1106.

Roy claimed that because there was a long wait at Geraldine's, he suggested he and Rosenberg leave. RP 1109.

Roy testified that when he and Rosenberg crossed to the south side of the street, Justice also crossed to the south side of the street. RP 1110.

Roy claimed Justice was still gesturing but had one hand in his pocket. RP 1111. According to Roy, as the two walked toward each other, Justice pulled out a gun and shot at him. RP 1111. Roy testified he returned fire. RP 1114. Roy admitted he also shot at the red car when it came out of the alley and turned onto Ferdinand. RP 1116. Roy testified he got in his truck and drove away. RP 1117.

For convenience, additional facts pertaining to the specific assignments of error will be set forth in their respective argument sections.

D. ARGUMENT

1. THE COURT'S UNSUPPORTED AND INCOMPLETE AGGRESSOR INSTRUCTION REQUIRES REVERSAL.

The court properly gave self-defense instructions. CP 404-407. But the state proposed and the court – over defense counsel's objection – also gave Instruction 20, the "aggressor" instruction:

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

CP 408; RP 1646, 1918.

Not only did the court err in giving this instruction in the absence of evidence Justice committed a provocative act apart from the assault itself, but the court failed to instruct the jury that "words alone" are not sufficient to defeat a self defense claim. This was error.

Aggressor instructions are disfavored. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), overruled on other grounds as noted in In re Pers. Restraint of Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). Courts should use care in giving an aggressor instruction because it impacts a claim of self-defense, which the State bears the burden of disproving beyond a reasonable doubt. State v. Riley, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). Indeed, "[f]ew situations come to mind where the

necessity for an aggressor instruction is warranted." State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985).

"[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force." Riley, 137 Wn.2d at 912. An aggressor instruction should be given only where there is credible evidence from which a jury can reasonably determine the defendant provoked the need to act in self-defense. Id. at 909-10. Whether the evidence was sufficient to support the giving of an aggressor instruction is a question of law reviewed de novo. State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948, 951, review denied, 173 Wn.2d 1003, 271 P.3d 248 (2011).

Pointing to the first aggressor instruction, the prosecutor invited the jury to disregard Justice's self-defense claim because he shot first:

> Instruction number 20 – number 20 also pertains to any claim of self-defense as to the assault in the first degree, and I invite you to go over this instruction carefully as well, because it says if the defendant crated a necessity, if he created the necessity for acting in self-defense or the defense of another, then it's not self-defense. If he provoked the incident, then it's not self-defense. And that's what we have here because he is the one who created the situation that everyone on that street was subjected to when he decided to fire his gun.

RP 2014-15 (emphasis added).

But the shooting cannot be considered the belligerent act entitling the state to an aggressor instruction. The law is clear. "The provoking act cannot be the actual assault." Bea, 162 Wn. App. at 577 (citing State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847, review denied, 115 Wn.2d 1010 (1990)).

Here, there was no aggressive act – other than the assault itself – that provoked a belligerent response. This was not a situation where the defendant engaged in a provocative act, the complainant responded with force, and the defendant then claimed self-defense in assaulting the complainant. Rather, at the time of the shooting, Justice was merely standing on the street. And based on Roy's own testimony, Justice did not behave belligerently earlier, while in the parking lot. Rather, he did not respond to Roy's sarcastic comments. Necessarily, the state therefore had to rely on the shooting itself as the aggressive act. But the intentional act reasonably likely to provoke a belligerent response must be an act *separate* from the charged assaultive conduct. State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039, review denied, 113 Wn.2d

1014 (1989); State v. Brower, 43 Wn. App. 893, 902, 721 P.2d 12 (1986).

The only other evidence to potentially support the instruction was Justice's act of yelling profanities at Roy. Many of the witnesses testified, and Justice himself admitted, he yelled profanities at Roy immediately preceding the shooting. Witness Parham went so far as to say Justice's words were likely to lead to escalation because they were "highly offensive." RP 794. But words alone do not constitute sufficient provocation to warrant an aggressor instruction. Riley, 137 Wn.2d at 909-11. Words do not give rise to a reasonable apprehension of bodily harm, and an individual faced with only words is not at liberty to respond with force. Id. at 910-11. It is error to give an aggressor instruction where words alone are the asserted provocation. Id. at 911.

Assuming arguendo there was some evidence apart from the assault itself and Justice's profanities to support the instruction, it was error for the court not to inform jurors that words alone do not constitute sufficient provocation to defeat a self defense claim. In the absence of such language, it is likely jurors relied on Justice's act of yelling at Roy to defeat his self defense claim. That Justice was yelling was the one fact upon which all witnesses agreed.

Moreover, the prosecutor highlighted this evidence in closing. RP 2038, 2049. Because the aggressor instruction did not apprise the jury of the applicable law, it was erroneous. See State v. Clausing, 147 Wash.2d 620, 626, 56 P.3d 550 (2002) (jury instructions are sufficient if they are supported by substantial evidence, permit each party to argue their theory of the case, and properly inform the jury of the applicable law).

The court thus erred in giving an aggressor instruction that was not supported by the evidence and failed to apprise the jury of the applicable law. Wasson, 54 Wn. App. at 161; Brower, 43 Wn. App. at 901-02. The error is constitutional in nature and cannot be deemed harmless unless the state proves it is harmless beyond a reasonable doubt. Birnel, 89 Wn. App. at 473; State v. Stark, 158 Wn. App. 952, 961, 244 P.3d 433 (2010), review denied, 171 Wn.2d 1017, 253 P.3d 392 (2011).

An improper aggressor instruction is prejudicial because it guts a self-defense claim. Birnel, 89 Wn. App. at 473; Brower, 43 Wn. App. 902. Here, the first aggressor instruction negated Justice's claim of self defense, effectively and improperly removing it from the jury's consideration. Evidence showed Justice had good reason to believe Roy intended to shoot him. Roy previously

threatened to shoot Justice in the head during a phone conversation, Roy threatened to kill Justice only moments before in the parking lot while holding a gun, and Roy lifted up his shirt to retrieve his gun only moments before Justice shot. Significantly, witness Hayes saw Roy pull up his shirt to reveal his gun. Based on this evidence, the jury may have believed Justice acted in self defense in shooting, but concluded from the aggressor instruction that it could not acquit him because he shot first or because he yelled at Roy, thereby provoking a belligerent response.

Essentially, the court instructed self-defense was not available as a defense if Justice was the first aggressor. Without supporting evidence to justify giving the aggressor instruction, the court prevented Justice from fully asserting his self-defense theory. See Wasson, 54 Wn. App. at 160 (unjustified aggressor instruction "effectively deprived Mr. Wasson of his ability to claim self-defense."); Birnel, 89 Wn. App. at 473-74 (aggressor instruction not supported by evidence "effectively deprived [defendant] of his ability to claim self-defense."); Stark, 158 Wn. App. at 960-61 ("without supporting evidence to justify giving the aggressor instruction, the court prevented Ms. Stark from fully asserting her self-defense theory). The issuance of an aggressor instruction

relieved the state of its burden of proving lack of self defense beyond a reasonable doubt. Reversal of the assault conviction is required.

Reversal of the unlawful possession of a firearm conviction is also required. Pursuant to Instruction 20, the jury was instructed that if the jury found Justice's acts and conduct provoked or commenced the fight, he was not entitled to act in self defense. CP 408. If the jury concluded based on this instruction Justice was not entitled to act in self defense, it necessarily would conclude he also did not possess the firearm by necessity. Indeed, Instruction 24 required jurors to find "the threatened harm was not brought about by the defendant[.]" CP 412.[13] And the prosecutor emphasized this requirement in closing. RP 2201. Thus, the aggressor

[13] Instruction 24 provided:

> Necessity is a defense to a charge of Unlawful Possession of a Firearm if:
>
> (1) the defendant reasonably believed the commission of the crime was necessary to avoid or minimize harm; and
>
> (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law;
>
> (3) the threatened harm was not brought about by the defendant; and
>
> (4) no reasonable legal alternative existed.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be you duty to return a verdict of not guilty as to this charge.

instruction would naturally feed into how the jury evaluated Justice's necessity defense. Both convictions therefore must be reversed.

2. INEFFECTIVE ASSISTANCE OF COUNSEL REQURIES REVERSAL.

Defense counsel properly objected to the court's aggressor instruction. However, once the objection was overruled, it was incumbent on counsel to request that language be included to apprise jurors that words alone are insufficient provocation to defeat a self defense claim. Without this language, the instruction allowed jurors to reject Justice's self defense claim based on his admitted act of yelling at Roy, contrary to well established law.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Deficient performance is that which falls below an objective standard of reasonableness. Id. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); Kyllo, 166 Wn.2d at 869.

Counsel has a duty to research the relevant law. Kyllo, 166 Wn.2d at 862. Based on cases such as State v. Riley,[14] counsel should have known "words alone" are not sufficient to render one a first aggressor. Based on Riley, counsel should have known provocative words, such as profanity, do not alone justify an aggressor instruction. Competent counsel would have requested the court include language in the instruction to fully inform the jury

[14] State v. Riley, 137 Wn.2d 904 (1999).

of the law, once his objection to the instruction was overruled. This is particularly true in light of the evidence of the case, where the defendant himself admitted mouthing off to Roy immediately preceding the shooting. Having objected to the instruction in the first instance, there was no legitimate tactical reason for defense counsel not to seek to limit the evidence upon which the jury could rely in considering the instruction.

There is a reasonable probability the outcome might have been different but for counsel's failure to request modification of the instruction. As indicated above, all of the witnesses testified Justice mouthed off to Roy immediately preceding the shooting. Without an instruction that Justice's words alone could not be considered as an aggressive act likely to provoke a belligerent response, it is likely jurors did just that. This is particularly likely in light of Parham's testimony that Justice's words were so offensive they were likely to lead to escalation.

Had counsel requested modification of the instruction, the trial court would have been required under the law to include the words alone language. The jury then at least would have had to evaluate the self-defense claim fully. Counsel's inaction undermines

confidence in the outcome of the trial. This Court should reverse Justice's convictions.

3. PROSECUTORIAL MISCONDUCT IN CLOSING DEPRIVED JUSTICE OF HIS RIGHT TO A FAIR TRIAL AND REQUIRES REVERSAL.

In closing argument, the prosecutor invited jurors to disregard Justice's self-defense claim because he shot first:

> Instruction number 20 – number 20 also pertains to any claim of self-defense as to the assault in the first degree, and I invite you to go over this instruction carefully as well, because it says if the defendant created a necessity, if he created the necessity for acting in self-defense or the defense of another, then it's not self-defense. If he provoked the incident, then it's not self-defense. And that's what we have here because he is the one who created the situation that everyone on that street was subjected to when he decided to fire his gun.

RP 2014-15 (emphasis added).

But it is well established the intentional act reasonably likely to provoke a belligerent response must be an act *separate* from the charged assaultive conduct. State v. Wasson, 54 Wn. App. at 159; State v. Brower, 43 Wn. App. at 902. The prosecutor's misstatement of the law constituted flagrant misconduct depriving Justice of his right to a fair trial.

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions.

State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. Monday, 171 Wn.2d at 676 (citing Case, 49 Wn.2d 66, 70–71)).

> A prosecutor serves two important functions. A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law. A prosecutor also functions as the representative of the people in a quasijudicial capacity in a search for justice.

Id. Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id.

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Id. at 578. Failure to object to a prosecutor's improper remark constitutes waiver unless the remark is deemed to be flagrant and ill-intentioned. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). If it is, the

petitioner has not waived his right to review of the conduct. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

The prosecutor may not misstate the law to the jury. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). Although defense counsel did not object to the prosecutor's misstatement, the error is preserved because the prosecutor's misstatement was flagrant and ill intentioned. See e.g. State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011). In Walker, the prosecutor misstated the law of defense of others 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. Walker, 164 Wn. App. at 734-35. Defense counsel eventually objected to this line of argument during the prosecutor's rebuttal closing, but the objection was overruled. Walker, 164 Wn. App. at 735.

Division Two of this Court held that because defense counsel objected, the error was properly reviewed under the less exacting prejudice standard. Walker, 164 Wn. App. at 736, n. 7. But the court noted that "prejudice exists even when we use the more demanding standard of whether the conduct creates an enduring and resulting prejudice incurable by a curative instruction." Walker, at 736, no. 7.

That is what happened here. As Division Two in Walker noted:

> When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. State v. Gotcher, 52 Wn. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious trial irregularity having the grave potential to mislead the jury. State v. Davenport, 100 Wn.2d 757, 764 P.2d 1213 (1984).

Walker, 164 Wn. App. at 736.

As in Walker, the prosecutor's misstatement of the law could not have been cured by an instruction. Because the jury likely relied on it in discounting Justice's self defense claim, prosecutorial misconduct denied him a fair trial. This Court should reverse.

4. THE COURT'S EXCLUSION OF EXCULPATORY EVIDENCE DEPRIVED JUSTICE OF HIS RIGHT TO PRESENT A DEFENSE AND REQUIRES REVERSAL.

Defense witness Miliken would have testified that just after the shooting, when he approached Roy to discuss what had happened, Roy said: "Don't make me do you like I almost killed your boy." RP 1413. This was tantamount to an admission on Roy's part that he was trying to kill Justice. As such, it was directly relevant to Justice's self defense claim and its exclusion deprived Justice of his right to present a defense.

The Sixth Amendment[15] to the United States Constitution and Const. art. 1, § 22[16] grant criminal defendants two rights: (1) the right to present evidence in one's defense and (2) the right to confront witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983).

Although these rights are of constitutional magnitude, they are subject to the following limits: (1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the state's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. See Washington v. Texas, 388

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[15] The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[16] Const. art. 1, § 22 provides in relevant part:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); Hudlow, 99 Wn.2d at 15; State v. Reed, 101 Wn. App. 704, 709, 6 P.3d 43 (2000).

Under these criteria, a defendant must be permitted to present even minimally relevant evidence unless the state can demonstrate a compelling interest for its exclusion. Moreover, no state interest can be compelling enough to preclude evidence with high probative value. Hudlow, 99 Wn.2d at 16; Reed, 101 Wn. App. at 715.

Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. "To be relevant ... evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case." Davidson v. Municipality of Metro. Seattle, 43 Wash. App. 569, 573, 719 P.2d 569 (1986). This definition includes "facts which offer direct or circumstantial evidence of any element of a claim or defense." Davidson, 43 Wn. App. at 573, 719 P.2d 569 (citing 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 83 (2d Ed. 1982)).

Justice testified he acted in self defense when he shot in response to Roy's threat on the day of the shooting and Roy's act of reaching for his gun immediately preceding the shooting. Roy's admission that he almost killed Justice – "Don't make me do you like I almost killed your boy" – necessarily bore on the reasonableness of Justice's fear and the reasonableness of Justice's actions in defending himself.

The trial court erred in finding the statement irrelevant because it was made after-the-fact. RP 1413-1414. How Roy perceived his own actions that day – whether in hindsight or in the moment – was of consequence to Justice's self defense claim. An admission Roy was trying to kill Justice necessarily lent credibility to Justice's self defense claim. As defense counsel argued, it tended to show Roy was the aggressor, not Justice. RP 1413. It could also be interpreted as a threat from Roy to Miliken, don't confront me or I'll come after you, just like I did to Justice. Either way, the statement directly bore on Justice's self defense claim and he should have been allowed to elicit it.

Where evidence is material to the defendant's defense, it is "a denial of due process to exclude it." State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990) (citing Taylor v. Illinois, 484 U.S.

400, 406–09, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)). The trial court's exclusion of Roy's admission constituted a denial of due process and violated Justice's right to fair trial. This Court should reverse his convictions.

5. BECAUSE THE EXERCISE OF PEREMPTORY CHALLENGES IN THIS CASE VIOLATED JUSTICE'S RIGHT TO PUBLIC JURY SELECTION, THIS COURT SHOULD REVERSE.

(i) Facts

The court explained before voir dire that it would take the parties' peremptory challenges on a piece of paper:

> THE COURT: . . . And I'm not the inventor of this, but I've adopted it; I do like it.
>
> There is a clipboard with a piece of paper on it with one through – you'll get, is it eight peremptories for the defense, because you've got two defendants, but two alternates?
>
> MR. HANCOCK [defense counsel]: We have additional peremptories.
>
> THE COURT: So the State gets seven, the defense gets eight. And you'll pass the piece of paper back and forth. If you'd like to take a look at it so that you have a visual.
>
> What I don't do is excuse people one by one and then have people from the back come and fill in the seats. So it's a bit of a challenge because you have to visualize, you know, X'ing out the people that are in their seats and move down chronologically.
>
> Obviously, you want to limit you peremptories only to those people who are seated in the box or on the bench far enough that they will be in the box.

If you get to a point where you accept the panel as it is, but you have more peremptory challenges still coming, you write "pass" on the line, that you are passing that particular turn, and you hand it back to the other side. And then when it's back to your turn again, you have limited yourself to only those folks that would be seated after you passed. So in other words, you can't say number three is fine with me for now and then pass, and then later come back and excuse number three.

MR. HANCOCK: I remember that.

THE COURT: You'd only be excusing someone else that comes next because of – by virtue of someone else's peremptory.

So is that clear enough?

MS. KLINE [prosecutor]: Yes.

MR. HANCOCK: It is.

RP 166-68.

Consistent with the outlined approach, the court instructed the jury of the following while the parties exercised peremptories:

. . . So while this process is going on, right now the attorneys are making their decisions and I'm going to go ahead and give you all some instructions on the trial and process. And this applies to jurors who are going to hear the case and ultimately deliberate on a verdict.

. . . Thank you. I just have been reminded, please all of you put your numbers right up here so that while the attorneys do their work they have a number to associate with you. And just hopefully keep them that way as comfortably as you can. Thank you.

RP 348-49.

After the court gave its introductory instructions, the court indicated, "we will stand by until the attorneys have finished their selections." RP 356. The court thereafter announced the jurors who would be excused:

> All right. Ladies and gentlemen, thank you so much for your patience with this process. Just a moment and then I'm going to announce the folks who are being excused.
>
> All right. So the following individuals are going to be excused. And so when you hear your number called or when I get through this list, it's about 15 people long, you can leave your badge behind, your Judge Linde badge, and your number placard, and then you are excused with the Court's and the parties great thanks and appreciation. And you'll follow those instructions about checking in with the website or the juror hotline tonight after 5:00 o'clock.
>
> And that applies to these individuals. Juror number one, three, 14, 16, 17, 22, 23, 25, 26, 29, 33, 35, 36, 37 and 47. So would those individuals whose names I just called kindly take their leave. Thank you very much for your service. Hope the rest of it is good.

RP 357-58. The piece of paper on which the parties exercised their peremptory challenges was made part of the Superior Court file. CP 423-24.

(ii) Law

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558

U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, he or she must first apply on the record the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). A violation of the right to a public trial is presumed prejudicial on a direct appeal and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006).

Jury selection in a criminal case is subject to the public trial right and is typically open to the public. Strode, 167 Wn.2d at 227 (lead opinion); Strode, 167 Wn.2d at 236 (concurrence). Strode

supports the conclusion that the public trial right attaches to parties' challenges of jurors. There, jurors were questioned, and "for-cause" challenges conducted, in chambers. The state Supreme Court treated the "for-cause" challenges in the same manner as individual questioning and held exercise in chambers violated the right to a public trial. Strode, 167 Wn.2d at 224, 227, 231 (lead opinion); Strode, 167 Wn.2d at 236 (concurrence).

The State v. Wilson[17] decision also supports a conclusion that the public trial right attaches not only to "for-cause," but also to peremptory challenges. There, the court applied the "experience and logic" test adopted by the court in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), to find that the administrative excusal of two jurors for illness did not violate Wilson's public trial rights. The court noted that, historically, the public trial right has not extended to excusals for hardship before voir dire begins. But in doing so, Division Two expressly differentiated between those excusals and "for-cause" and peremptory challenges, which must occur openly. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges,

[17] State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013).

governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

Thus, in Wilson, Division Two appeared to recognize, correctly, that "for-cause" and peremptory challenges are part of voir dire, which must be conducted openly, to be distinguished from the broader concept of "jury selection," which may encompass proceedings that need not. Wilson, 139 Wn. App. at 339-40.

In response, the state may point to Division Two's recent decision in State v. Marks, __ Wn. App. __, 339 P.3d 196 (2014), in which it held peremptory challenges are not part of voir dire. But the court's current attempt in Marks to reframe its prior consideration of the matter makes little sense. There, the court observes that CrR 6.4(b) refers to "voir dire examination." Marks, 339 P.3d at 199. But, contrary to the court's reasoning, the court rule's inclusion of the term "examination" instead indicates that the "examination" portion should be differentiated from "voir dire" as a whole. Court rules are interpreted in the same manner as statutes, Jafar v. Webb, 177 Wn. 2d 520, 526, 303 P.3d 1042 (2013), and courts presume statutes do not include superfluous language. State v. Roggenkamp, 153 Wn.2d 614, 624-25, 106 P.

106 P.3d 196 (2005). Division Two's reframing of its discussion of the matter in Wilson violates this principle.

Moreover, if "voir dire examination" enables the intelligent exercise of peremptory challenges, then it follows that peremptory challenges themselves are an integral part of "voir dire." Contrary to the court's opinion in Marks, and consistent with its decision in Wilson, such challenges are part of that portion of jury selection that must be conducted openly, and are subject to existing law clearly establishing that the public trial right applies.

Assuming for the sake of argument that the exercise of challenges is *not* an integral part of jury selection, it would be necessary to apply the "experience and logic" test to determine whether the public trial right applies to a portion of the trial process. This Court examines (1) whether the place and process have historically been open and (2) whether public access plays a significant positive role in the functioning of the process. Sublett, 176 Wn.2d at 73 (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

But the result of analysis under the experience and logic test is no different than the result dictated by Strode and Wilson. First, Justice can satisfy the "logic" prong because meaningful public

scrutiny plays a significant positive role in the exercise of peremptory challenges. The right of an accused to a public trial "keep[s] his triers keenly alive to a sense of their responsibility" and "encourages witnesses to come forward and discourages perjury." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). "[J]udges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings." Estes v. Texas, 381 U.S. 532, 588, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965) (Harlan, J., concurring). The openness of jury selection (including which side exercises which challenge) enhances core values of the public trial right, "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see Orange, 152 Wn.2d at 804 (process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

While peremptory challenges may be made for almost any reason, openness still fosters core values of the public trial right to ensure that there is no inappropriate discrimination. This protection can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether a

party is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[18] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds, Sublett, 176 Wn.2d at 71-73; see also State v. Saintcalle, 178 Wn.2d 34, 46, 88-95, 118-19, 309 P.3d 326 (2013) (opinions highlighting difficulty of obtaining appellate relief for discriminatory acts even where discriminatory exercise may have occurred).

Regarding the historic practice, State v. Love,[19] the Division Three case relied on by Division Two in State v. Dunn,[20] appears to have reached an incorrect conclusion based on the available evidence. Love cites to one case, State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976), as "strong evidence that peremptory challenges can be conducted in private."

[18] Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[19] State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013).

[20] State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014).

Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret — written — peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. But most significantly, the fact that Thomas challenged the practice suggests it was atypical even at the time. In summary, both prongs of the experience and logic test support that the public trial right was implicated in this case.

In response, the state may also argue the opportunity to find out, sometime after the process, which side eliminated which jurors serves to satisfy the pubic trial right. In other words, that the peremptory challenge sheet was filed in Justice's case obviates any error.

Any such argument should be rejected, however, because a piece of paper fails to adequately insure the right to a public trial. For example, members of the public would have to know the sheet documenting peremptory challenges had been filed *and* that it was subject to public viewing. Moreover, even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the identity, gender, and

race of those individuals to determine whether protected group members had been improperly targeted. In Justice's case, this would have required members of the public to recall the specific features of 15 individuals. See CP 423-24. This is not realistic, and public access to a sheet of paper after the fact is simply inadequate to protect the right to a public trial. But see State v. Filitaula, __ Wn. App. ___, 339 P. 3d 221 (2014) (Division One opinion holding it is sufficient to file written form containing names and numbers of the prospective jurors who were removed by peremptory challenge, listing the order in which the challenges were made, and identifying the party who made them).

In addition, Wise holds individual questioning of jurors in chambers, even when questioning was recorded and transcribed, violates the public trial right. 176 Wn.2d 1. By analogy, filing a juror information sheet or similar document is also insufficient to protect the public trial right.

Because Justice's right to a public trial was violated by the manner in which the court took peremptory challenges, this Court should reverse his convictions.

6. THE COURT SENTENCED JUSTICE USING AN INCORRECT OFFENDER SCORE BASED ON AN ARIZONA CONVICTION THAT IS NOT LEGALLY OR FACTUALLY COMPARABLE TO A WASHINGTON OFFENSE.

(i) Facts

The defense agreed with the state's calculation of Justice's standard sentence range of 240-318 months plus the 60-month enhancement, but disagreed with the state's calculation of his offender score. CP 192. Inter alia, the defense disagreed that Justice's Arizona conviction for possessing a forgery device was comparable to a Washington felony.[21] CP 197-98.

On June 4, 2008, Justice pled guilty to criminal possession of a forgery device, under A.R.S. § 13-2003. Supp. CP __ (sub. no. 70, Attached/Certified Prior Convictions of the Defendant, (2/1/13) (Maricopa County Superior Court No. 159242-001).

[21] The defense also challenged an Arizona theft conviction, not at issue here. See CP 196-97.

Justice was originally charged with forgery. Id. The complaint alleged that on September 11, 2007, Justice, with intent to defraud, knowingly possessed a forged instrument, to wit: a Minnesota Driver's license, in violation of A.R.S. § 13-2002. Id.

The probable cause statement alleged:

> After his arrest, the defendant was found to be in possession of a Minnesota driver's license number T39253739519 identifying him as Lorenzo Thompson 120485 and a [sic] airline ticket in the name of Lorenzo Thompson. He identified himself as Michael Keith Justice with a DOB of 100683 and had a felony warrant out of Colorado for several counts of forgery. The forged Minnesota license he had in his possession was not official as it did not contain UV ink, did not contain micro printing and did not come up as a valid Minnesota license number.

Supp. CP __ (sub. no. 70, Attached/Certified Prior Convictions, 2/1/13).

As indicated, however, Justice pled guilty to possession of a forgery device, in violation of A.R.S. § 13-2003. Id. As stated in the plea: "This agreement serves to amend the complaint, indictment, or information, to charge the offense to which the Defendant pleads, without the filing of any additional pleading." Id. The only factual statement contained in the plea paperwork is the following:

> My lawyer has explained the nature of the charge(s) and the elements of the crime(s) to which I am pleading. I understand that by pleading GUILTY I will be waiving and giving up my right to a determination of probable cause, to a trial by jury to determine guilt and to determine any fact used to impose a sentence within the range stated above[.]

Id. The court's minutes indicate the court accepted the plea after going over the paperwork with Justice. Id.

At sentencing in this case, Justice argued the Arizona conviction was not comparable because the Arizona statute (A.R.S. § 13-2003[22]) broadly criminalizes the possession of any device that can be used to forge any "written instrument,"[23] whereas the

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[22] Under A.R.S. 13-2003:

> A. A person commits criminal possession of a forgery device if the person either:
>
> 1. Makes or possesses with knowledge of its character and with intent to commit fraud any plate, die, or other device, apparatus, equipment, software, access device, article, material, good, property or supply specifically designed or adapted for use in forging written instruments.
>
> 2. Makes or possesses any device, apparatus, equipment, software, access device, article, material, good, property or supply adaptable for use in forging written instruments with intent to use it or to aid or permit another to use it for purposes of forgery.

[23] Under A.R.S. 12-2001(12), "written instrument" means either:

> (a) Any paper, document or other instrument that contains written or printed matter or its equivalent.
>
> (b) Any token, stamp, seal, badge, trademark, graphical image, access device or other evidence or symbol of value, right, privilege or identification.

analogous Washington provision (RCW 9A.56.320(3)[24]) criminalizes only the possession of devices that can be used to forge identification cards. CP 198.

In response, the state argued:

> The financial fraud statute, RCW 9A.56.320, defines the machinations under which an individual can be charged with a financial fraud crime. All of the crimes listed under this section are class C felonies. . . . The Arizona statute is alalogous [sic] to the Washington this section of the RCWs when read as a whole, not just the subsection section cited by the defendant, subsection 3. "Written Instrument" as used in the Arizona statute is a legal term of art, with the same meaning as the common term of 'check.' Therefore the Arizona conviction for Possession of a forgery Device is clearly comparable to subsections (3) and (5)[25] in conjunction with one another.

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[24] Under RCW 9A.56.320:

> A person is guilty of unlawful possession of a personal identification device if the person possesses a personal identification device with intent to use such device to commit theft, forgery, or identify theft. "Personal identification device" includes any machine or instrument whose purpose is to manufacture or print any driver's license or identification card issued by any state or the federal government, or any employee identification issued by any employer, public or private, including but not limited to badges and identification cards, or any credit or debit card.

[25] Under RCW 9A.56.320(5):

> A person is guilty of unlawful possession of instruments of financial fraud if the person possesses a check-making machine, equipment, or software, with intent to use or distribute checks for purposes of defrauding an account holder, business, financial institution, or any other person or organization.

Supp. CP __ (sub. no. 73, State's Response, 2/1/13). The court sided with the state, stating: "I will say I don't think it's tremendously important to anyone here, given that it doesn't change the amount of time you're going to serve, I do think the correct offender score based on my review of the certified copy and comparison of the statute is an eleven here as opposed to a nine or a ten." RP 2147.

(ii) Law

"Washington law employs a two-part test to determine the comparability of a foreign offense." State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, courts determine legal comparability: "whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." Id. Second, if the out-of-state offense's elements are broader than the Washington offense's elements, courts turn to factual comparability: "whether the conduct underlying the foreign offense would have violated the comparable Washington statute." Id. (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). "In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." Thiefault, 160 Wn.2d at 415 (citing In re Pers.

Restraint of Lavery, 154 Wn.2d 249, 258, 11 P.3d 837 (2005); State v. Farnsworth, 133 Wn. App. 1, 22, 130 P.3d 389 (2006); State v. Ortega, 120 Wn. App. 165, 171-74, 84 P.3d 935 (2004)). When a foreign conviction is neither legally nor factually comparable, it cannot be counted in an offender score. Thiefault, 160 Wn.2d at 415.

The Arizona conviction at issue here is not legally comparable to a Washington offense because the Arizona statute criminalizes broader conduct than Washington's analogous provision. Specifically, the Arizona statute (A.R.S. § 13-2003) broadly criminalizes the possession of any device that can be used to forge any "written instrument," whereas the analogous Washington provision (RCW 9A.56.320(3)) criminalizes only the possession of devices that can be used to forge identification cards. CP 198. Nor does the state's reliance on subsection (5) of RCW 9A.56.320 change the legal incomparability, as subsection (5) criminalizes even narrower behavior – possessing a check-making machine.

The State bears the burden of proving factual comparability based on facts admitted to, stipulated to, or that were proved beyond a reasonable doubt. Thiefault, 160 Wn.2d at 420; accord

Lavery, 154 Wn.2d at 258. The state failed to carry its burden here, as no such facts appear in the record.

Because Justice pleaded guilty to the Arizona conviction, none of the facts underlying the charge was proved to a fact finder beyond a reasonable doubt. Thus, the only question is whether Justice admitted or stipulated to any facts pertaining to the Arizona charge. He did not. According to the plea agreement, he merely pled to the elements of the offense as set forth in the statue. Supp. CP __ (sub. no. 70).

In response, the state may argue the court could infer the pertinent facts from the Arizona charging documents. But Justice's plea agreement does not reference the charging documents even once. Supp. CP __ (sub. no. 70). Justice's plea agreement is not sufficient to conduct a factual comparability analysis.

The State failed to prove Justice agreed or stipulated to the facts underlying his Arizona conviction. The trial court therefore erred in concluding Justice's conviction was factually comparable to a Washington crime and in including the conviction in Justice's offender score.

A correct offender score must be calculated before a presumptive or exceptional sentence is imposed. State v. Tili, 148

Wn.2d 350, 358, 60 P. 3d 1192 (2003). However, the sentencing court need not calculate a precise offender score that exceeds 9 points unless considering an exceptional sentence. State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004), review denied, 154 Wn.2d 1002, 113 P.3d 482 (2005).

Typically, remand for resentencing is unnecessary where it is apparent the sentencing court would simply impose the same sentence again. Id. (citing State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)). Remand also is generally unnecessary where a standard range sentence was imposed and the error does not impact that range. State v. Argo, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996).

Despite these rather forgiving standards, remand is necessary. Although not required to do so, Judge Linde determined a precise score above 9, that score is wrong, and it is inscribed on Justice's judgment for consideration in any future cases. CP 377. This is error. Under RCW 9.94A.441, all disputed issues as to criminal history shall be decided at the sentencing hearing. It is safe to presume the Legislature intended all disputed issues to be decided correctly whether they impact the overall

sentence or not.[26] Thus, minimally, the offender score should be corrected on the judgment.

Moreover, it is impossible to conclude that Judge Linde would necessarily have imposed the same sentence with the reduced offender score. The defense sought a base sentence below the standard range for a combined total of 240 months, whereas the state sought a mid-range, base sentence of 288 months, for a total of 348. CP 198; RP 2136. In sentencing Justice to 265 months, plus the firearm enhancement, the court declined to find a basis for an exceptional sentence. RP 2146.

However, the court also noted that "[t]here may be other individuals whose conduct was problematic and not something to be commended." RP 2146. The court did not impose the top of the range, or go as high as the state sought. Thus, it is impossible to conclude with confidence that the erroneous calculation of Justice's offender score did not impact the 265-month prison sentence Judge Linde imposed.

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[26] Recently, this Court remanded for resolution of a same criminal conduct dispute even though it was apparent the outcome would not impact the defendant's mandatory life sentence. See State v. Salinas, 169 Wn. App. 210, 279 P.3d 917 (2012) (same criminal conduct issue must be properly resolved even where any impact depends on some future reversal of convictions), review denied, 176 Wn.2d 1002, 297 P.3d 67 (2013).

Thus, remand for reconsideration of the sentence is the proper course.

E. CONCLUSION

The court wrongly gave an aggressor instruction over defense counsel's objection. The instruction was not a complete statement of the law because it did not instruct jurors that words alone are not sufficient provocation to defeat a self defense claim. Defense counsel was ineffective in failing to request the inclusion of such language once his objection to the instruction was overruled. The prosecutor committed misconduct in closing argument when she argued the jury should find Justice was the first aggressor because he fired the first shot. This was a misstatement of the law, as it is well settled the aggressive act likely to provoke a belligerent response cannot be the assault itself. The errors related to the aggressor instruction require reversal.

Reversal is also required because the court wrongly excluded exculpatory evidence Roy admitted he was trying to kill Justice. Finally, a new trial is required, because Justice's right to a public trial was violated.

Alternatively, this Court should remand for resentencing to allow the court to reconsider Justice's sentence based on a correct offender score.

Dated this 22nd day of January, 2014

Respectfully submitted

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