No. 48166-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Marcus Thornton,

Appellant.

Pierce County Superior Court Cause No. 14-1-03813-7

The Honorable Judge Jerry Costello

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Marcus Thornton is from Chicago but was living in Tacoma following his military service. RP (9/21/15) 814-815. He became loosely acquainted with John Ware, Jr., a member of the Hilltop Crips gang. RP (9/21/15) 814-815; RP (9/8/15) 28.

People in the neighborhood knew Ware to regularly carry a baseball bat around with him. RP (9/15/15) 544. One day, Ware asked Mr. Thornton if he could borrow his Bluetooth speaker to listen to music while he ran an errand. RP (9/21/15) 815-816. Mr. Thornton lent Ware the speaker, but Ware never came back to return it. RP (9/21/15) 816.

According to Ware's girlfriend, everyone knew not to give Ware anything electronic because he would sell it. RP (9/14/15) 430. But Mr. Thornton was not aware of that.

About a week later, Mr. Thornton saw Ware on the street and approached him to ask about his speaker. RP (9/21/15) 822-825. According to Mr. Thornton, Ware came after him with his baseball bat, and then drew a knife. RP (9/21/15) 825-826.[1]

Mr. Thornton grabbed Ware's arms and they began pushing and pulling one another. RP (9/21/15) 826-827. Both men ended up on the

ground, with Mr. Thornton on top of Ware. RP (9/21/15) 828. Mr. Thornton had Ware's left hand – the one with the knife – in his hands. RP (9/21/15) 828. Eventually, Mr. Thornton broke away and rode off on his bicycle. RP (9/21/15) 831.

Mr. Thornton did not realize it, but the knife blade had stabbed Ware during the fight. RP (9/21/15) 827; RP (9/14/15) 329-336.[2] Ware died a few minutes later. RP (9/14/15) 344-346. The police found a baseball bat in the grass near where Ware died. RP (9/8/15) 124.

The state charged Mr. Thornton with second degree felony murder (with an assault predicate).[3] CP 1-2.

At trial, Mr. Thornton sought to elicit that Ware and at least one of the state's civilian witnesses were in the same gang: the Hilltop Crips. RP (9/8/15) 23-30. Mr. Thornton explained that the gang evidence was relevant to show the witnesses' bias and affiliation with Ware and with one another. RP (9/8/15) 23-30.

Ware had a "Hilltop Crip" tattoo on his body. RP (9/8/15) 28. One of the state's key witnesses, Christopher Scales, would have

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[1] Others did not see the beginning of the altercation, but only saw the two struggling after the fight commenced. RP (9/15/15) 509-514; RP (9/16/15) 642-649.

[2] Another witness claimed that she saw Mr. Thornton punching Ware, and later saw that he had a knife in his hand while doing so. RP (9/15/15) 512.

[3] The state also charged Mr. Thornton with premeditated first degree murder, but the jury acquitted him of that charge. CP 1-2; RP (9/24/15) 1081.

acknowledged that he was also aligned with the Crips. RP (9/8/15) 28.[4] Mr. Thornton, on the other hand, was not from the area, was not associated with the Crips, and was relatively unknown to the state's witnesses. RP (9/8/15) 23; RP (9/15/15) 558.

The court did not permit Mr. Thornton to elicit the proffered evidence on cross-examination. RP (9/8/15) 30.

Ware's girlfriend, Rayneisha Gardner, testified that Mr. Thornton had been looking for Ware earlier on the day of his death. RP (9/14/15) 419, 426. According to Gardner, Mr. Thornton said he should follow her and wait for Ware to contact her so he could find him. RP (9/14/15) 432. She said that Mr. Thornton waited near her house for Ware to show up.[5] RP (9/14/15) 434-435. Gardner asked Mr. Thornton if he was going to hurt Ware, and he said that he was not. RP (9/14/15) 432-433.

Two of Ware's friends, Patrice Sims and Anthony Thomas, testified that they witnessed the fight. RP (9/15/15) 509-514; RP (9/16/15) 642-649. They painted Mr. Thornton as the aggressor and claimed that he had been holding the knife. RP (9/15/15) 513-514; RP (9/16/15) 646-647.

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[4] The rest of the state's civilian witnesses – including those who claimed to have seen the fight happen – were also friends with Ware. RP (9/15/15) 490-491; RP (9/16/15) 626. One of the key prosecution witnesses was Ware's girlfriend. RP (9/14/15) 419.

[5] Gardner also claimed that Mr. Thornton admitted to pulling a knife on Ware a few days previously. RP (9/14/15) 427. Mr. Thornton denied saying that. RP (9/21/15) 818.

Thomas said that he was the one who told Christopher Scales about what had happened to Ware later that day. RP (9/16/15) 671-673. He said Scales was surprised when he heard the news from Thomas. RP (9/16/15) 672.

Scales claimed that Mr. Thornton had admitted the stabbing to him immediately after the fight. RP (9/15/15) 563. Scales wrote a letter to the prosecutor from jail, asking for leniency on his own charges in exchange for this testimony. RP (9/15/15) 578, 581. The prosecutor's office ended up striking a deal with Scales, lowering his sentence in exchange for his testimony in a different case. RP (9/15/15) 583.

Mr. Thornton testified in his own defense. He explained that Ware had been stabbed accidentally while Mr. Thornton was defending himself. RP (9/21/15) 825-831.

The court gave an "aggressor instruction" over Mr. Thornton's objection. CP 110; RP (9/21/15) 927.

The instruction told the jury that Mr. Thornton was not permitted to act in self-defense if he provoked a belligerent response through any intentional act. CP 110. The instruction did not require that the intentional act be unlawful. CP 110. Nor did it clarify that the act had to be one that would have provoked a belligerent response from a reasonable person:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create the necessity for acting in self defense and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.
> CP 110

During closing, the prosecutor showed the jury a slide with two photos of Ware's bloodied body lying on the ground. The heading above the photos read in large font: "What Does Murder Really Look Like." State's PowerPoint Presentation, p. 7 filed 09/24/15, Supp CP (emphasis in original).

The prosecutor argued that Mr. Thornton had set out that day to kill Ware. RP (9/22/15) 952-989. He claimed that Gardner had testified that Mr. Thornton had told her "I'm going to kill him." RP (9/22/15) 980. Gardner had not testified to that. RP (9/14/15) 432-433.

The jury convicted Mr. Thornton of second degree felony murder. RP (9/24/15) 1081. This timely appeal follows. CP 144.

ARGUMENT

I. THE COURT'S AGGRESSOR INSTRUCTION MISSTATED THE LAW AND IMPROPERLY STRIPPED MR. THORNTON OF HIS RIGHT TO ARGUE SELF-DEFENSE.

When there is some evidence showing the lawful use of force, the state must disprove self-defense beyond a reasonable doubt. *State v.*

McCreven, 170 Wn. App. 444, 462, 284 P.3d 793 (2012). Jury instructions impermissibly lowering the state's burden in a self-defense case violate the constitutional right to due process. *Id.*; U.S. Const. Amend. XIV. The court's instructions must make the state's burden of disproving self-defense manifestly apparent to the average juror. *Id.*

Here, the court's aggressor instruction improperly stripped Mr. Thornton of his right to argue that he had acted in self-defense. It precluded Mr. Thornton from claiming self-defense, even if he "provoked" Ware through lawful action that would not have provoked a reasonable person. CP 110.

The instruction was improper and prejudicial. Lawful conduct does not strip a person of the right to self-defense. This is especially true where the attacker's belligerent response is unreasonable or illegal.

The court's aggressor instruction violated Mr. Thornton's right to due process. It impermissibly lowered the state's burden to disprove self-defense.[6] *Id.*

[6] Mr. Thornton objected to the aggressor instruction at trial. RP (9/21/15) 927. If, however, the court determines that these specific issues were not preserved, they nonetheless constitute manifest error affecting a constitutional right. RAP 2.5(a)(3). *McCreven*, 170 Wn. App. at 462.

A. The aggressor instruction erroneously directed jurors to disregard Mr. Thornton's self-defense claim even absent a criminally aggressive provoking act.

The "aggressor doctrine" derives from the common-law rule that a person who provokes a fight may not claim self-defense. *See, e.g., State v. McCann*, 16 Wash. 249, 47 P. 443 (1896). The common law has always required evidence of an unlawful (or "lawless") aggressive act.[7]

When first published, the pattern jury instruction on the aggressor doctrine required the jury to determine whether the defendant created the need to act in self-defense "by any *unlawful* act." Former WPIC 16.04 (1977) (emphasis added). However, the Court of Appeals found this language unconstitutionally vague unless "directed to specific unlawful intentional conduct." *State v. Thompson*, 47 Wn. App. 1, 8, 733 P.2d 584 (1987) (citing *State v. Arthur*, 42 Wn. App. 120, 708 P.2d 1230 (1985)).[8]

The WPIC was subsequently changed to replace the word "unlawful" with "intentional." *See* WPIC 16.04. This was an attempt to address the *Arthur* court's concern that the jury could have considered the accidental fender bender in that case to be an unlawful act prohibiting the

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[7] *See, e.g., State v. Turpin*, 158 Wash. 103, 290 P. 824 (1930); *State v. Thomas*, 63 Wn.2d 59, 385 P.2d 532 (1963), *overruled on other grounds by State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974); *State v. Upton*, 16 Wn. App. 195, 556 P.2d 239 (1976); *State v. Bailey*, 22 Wn. App. 646, 591 P.2d 1212 (1979).

[8] In *Arthur*, jurors may have believed that the defendant was the aggressor because he was involved in an automobile accident. *Id.*, at 123-124. The Court of Appeals found that this was "not rational, reasonable, or fair." *Id.*

accused in that case from claiming self-defense. *See Arthur*, 42 Wn. App. at 124.

While the switch from "unlawful" to "intentional" does address the specific facts in *Arthur*, it also significantly lowers the state's burden by precluding a self-defense claim in any context in which an intentional – even if wholly lawful – act may foreseeably provoke a belligerent response.

For example, approaching a drug dealer to ask him/her to leave one's neighborhood is an intentional act reasonably likely to produce a belligerent response. Starting a business next to a competitor is an intentional act reasonably likely to produce a belligerent response. Hosting numerous late-night parties after neighbors complain is an intentional act reasonably likely to produce a belligerent response.

None of these actions are unlawful, but all come within a literal reading of the aggressor instruction. The instruction's language prohibits each of these actors from using force to resist an attack.

This is so even though Washington courts have continued to require that the aggressor doctrine be applied only in cases in which an accused person's unlawful act provoked a fight. [9]

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[9] *See State v. Hardy*, 44 Wn. App. 477, 484, 722 P.2d 872 (1986) ("the jury, by treating the name-calling as an unlawful act, [may have] improperly denied Hardy her claim of self-defense"); *State v. Brower*, 43 Wn. App. 893, 902, 721 P.2d 12 (1986) ("Here, there is no

For example, the Supreme Court has held that "words alone do not constitute sufficient provocation" for an aggressor instruction. *State v. Riley*, 137 Wn. 2d 904, 911, 976 P.2d 624 (1999). The *Riley* court's explanation rested, in part, on the "unlawful" force requirement inherent in the aggressor rule:

> the reason one generally cannot claim self-defense when one is an aggressor is because "the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense."

Id. (quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 657–58 (1986) (footnotes omitted by court)).

Accordingly, if this court agrees with the *Arthur* court that the word "unlawful" in the previous version of the WPIC aggressor instruction is too vague, then some other language must be formulated to inform juries that a lawful – even if provocative – act is not enough to

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indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident"); *State v. Douglas*, 128 Wn. App. 555, 563-564, 116 P.3d 1012 (2005) ("The record [did] not show that Douglas was the aggressor or that he was involved in any wrongful or unlawful conduct."); *State v. Stark*, 158 Wn. App. 952, 960, 244 P.3d 433 (2010) (lawfully obtaining a restraining order was not provocation that warranted an aggressor instruction).

Other decisions have upheld use of the aggressor instruction based on the defendant's unlawful conduct, even where the unlawfulness determination was left to the jury. *Thompson*, 47 Wn. App. at 8 (noting that former WPIC 16.04 "is vague and overbroad unless directed to specific unlawful intentional conduct"); *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986) ("the evidence of unlawful conduct was clear").

deprive an accused person of the right to use force in self-defense if attacked.[10]

In this case, the jury could have believed that Mr. Thornton provoked the fight by riding around the neighborhood and approaching Ware to discuss his stolen speaker. As such, the jury could have read the instruction to say that Mr. Thornton was not entitled to act in self-defense even if Ware attacked him first with the baseball bat.

The instruction here lowered the state's burden of disproving that Mr. Thornton had acted in self-defense. The court erroneously told jurors that Mr. Thornton was not entitled to defend himself if he provoked Ware—*even if* his "provocative" actions were wholly lawful.[11] *McCreven,* 170 Wn. App. at 462. Mr. Thornton's conviction must be reversed and his case remanded for a new trial. *Id.*

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[10] For example, the new instruction could require an "intentional criminal act" or "an intentionally assaultive act."

[11] Division I has held that the instruction given in Mr. Thornton's case was a proper statement of the law. *State v. Cyrus*, 66 Wn. App. 502, 510, 832 P.2d 142 (1992). But the *Cyrus* court only addressed a claim that the instruction was unconstitutionally vague. *Id.* *Cyrus* does not control Mr. Thornton's claims.

B. The court failed to instruct jurors that the aggressor doctrine only applies to a provoking act that is reasonably likely to provoke a belligerent response from a reasonable person.

The court instructed jurors that Mr. Thornton was not entitled to act in self-defense if he had committed "any intentional act reasonably likely to provoke a belligerent response..." CP 110. The instruction did not require proof that the intentional act would provoke a belligerent response from a reasonable person. CP 110.

But the common law aggressor doctrine cannot be premised on unreasonable or illegal belligerence, no matter how foreseeable. If it were, it would grant those who are known to be bellicose, combative, and thin-skinned the right to attack others with impunity.[12]

The instruction given at Mr. Thornton's trial was flawed: it failed to fully and properly set forth the aggressor rule's objective standard. Specifically, the instruction did not require jurors to evaluate the reasonableness or legality of any belligerent response.

For example, a letter carrier who approaches the house of a person known to hate postal workers would be guilty of an "intentional act reasonably likely to provoke a belligerent response." Similarly, efforts to

[12] This is especially true if the "unlawfulness" requirement is eliminated as well, as argued above.

calm someone who is having an angry public meltdown might be "reasonably likely to provoke a belligerent response."

Here, the jury may have concluded that approaching Ware to ask about the speaker was reasonably likely to provoke a belligerent response, given Ware's gang membership, association with the drug world, and regular habit of carrying a baseball bat. In essence, the instruction retroactively stripped Mr. Thornton of his right to talk to Ware without fear of being attacked.

Instruction No. 25 did not properly convey the aggressor rule's objective standard. It stripped Mr. Thornton of his right to use self-defense even if his lawful act of approaching to talk about his speaker was likely to provoke Ware into attacking Mr. Thornton with a baseball bat.

The court's aggressor instruction violated due process because it improperly relieved the state of its burden to disprove self-defense. *McCreven,* 170 Wn. App. at 462. Mr. Thornton's conviction must be reversed and his case remanded for a new trial. *Id.*

C. The erroneous aggressor instruction prejudiced Mr. Thornton because it improperly stripped him of his legitimate self-defense claim.

An improper aggressor instruction creates constitutional error, requiring reversal unless the state proves harmlessness beyond a

reasonable doubt. *Stark*, 158 Wn. App. at 961. The state cannot do so in this case.

The jury could have believed Mr. Thornton's testimony but still convicted him. If jurors believed that Mr. Thornton precipitated the fight by approaching Ware to ask about his speaker, they would have applied the aggressor instruction and ignored his legitimate self-defense claim. The state relied on the aggressor instruction in closing argument. RP (9/22/15) 1031. The instruction relieved the state of its burden to disprove self-defense. *Stark*, 158 Wn. App. at 961.

The court violated Mr. Thornton's right to due process by instructing the jury on the aggressor doctrine in a manner that lowered the state's burden of proof. *Id.* Mr. Thornton's conviction must be reversed and his case remanded for a new trial. *Id.*

II. THE TRIAL COURT SHOULD HAVE DECLINED TO GIVE THE AGGRESSOR INSTRUCTION, BECAUSE MR. THORNTON'S LAWFUL CONDUCT (LOOKING FOR WARE ON PUBLIC STREETS) WAS INSUFFICIENT TO SHOW THAT HE WAS THE FIRST AGGRESSOR.

Washington courts disfavor aggressor instructions. *Stark*, 158 Wn. App. at 960. Such instructions are rarely necessary to permit the parties to argue their theories of the case, and have the potential to relieve the state of its burden self-defense cases. *Id.*

Courts review *de novo* whether sufficient evidence justifies a first aggressor instruction in a self-defense case. *Stark*, 158 Wn. App. at 959. Here, the state produced no evidence that Mr. Thornton engaged in any unlawful aggressive act before the fight began.

The first aggressor doctrine cannot apply to someone who lawfully rides his bicycle on public streets.[13] The assault, itself, also cannot constitute the allegedly aggressive act. *Brower*, 43 Wn. App. at 902. Otherwise, the aggressor doctrine would apply in every self-defense case.

Here, the court justified giving the aggressor instruction on the grounds that Mr. Thornton lawfully wandered public streets looking for Ware. RP (9/21/15) 932. No other intentional act was advanced to justify the instruction.

The court's improper aggressor instruction violated Mr. Thornton's right to due process by stripping him of his valid self-defense claim and relieving the state's of its burden of proof. *Stark*, 158 Wn. App. at 961.

The state cannot show that this error was harmless beyond a reasonable doubt. *Id.* Mr. Thornton's conviction must be reversed. *Id.*

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[13] As outlined above, only an intentional and unlawful act that is likely to provoke a belligerent response can warrant giving an aggressor instruction. *See Hardy*, 44 Wn. App. at 484; *Brower*, 43 Wn. App. at 902; *Douglas*, 128 Wn. App. at 563-564; *Stark*, 158 Wn. App. at 960.

III. PROSECUTORIAL MISCONDUCT DEPRIVED MR. THORNTON OF A FAIR TRIAL.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. A conviction must be reversed where the misconduct prejudices the accused. *Id.* Even absent objection, reversal is required when misconduct is "so flagrant and ill intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

To determine whether a prosecutor's misconduct warrants reversal, the court looks to its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

A. The prosecutor committed misconduct by displaying a highly inflammatory PowerPoint slide showing photos of Ware's bloodied body and the added caption: "What Does Murder Really Look Like"

During closing argument, the prosecutor at Mr. Thornton's trial displayed a PowerPoint slide with two side-by-side images of Ware's bloody body, lying on the ground. The prosecutor had added the following caption to the admitted exhibits: "What Does Murder Really Look Like". State's PowerPoint Presentation, p. 7 filed 09/24/15, Supp CP (emphasis in original).

The prosecutor committed misconduct by showing jurors this slide. First, the slide altered admitted exhibits by displaying them with a caption. *Glasmann*, 175 Wn.2d at 708. Second, the slide was designed to inflame the jury's passion and prejudice. *Id.*

Images displayed during closing argument "may sway a jury in ways that words cannot," and the effect is difficult to overcome with an instruction. *Glasmann*, 175 Wn.2d at 707 (*quoting State v. Gregory*, 158 Wn.2d 759, 866-867, 147 P.3d 1201 (2006)). This is because of the manner in which the human brain processes visual material:

> [W]ith visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system.

Id. at 709 (*quoting* Lucille A. Jewel, *Through A Glass Darkly: Using Brain Science and Visual Rhetoric to Gain A Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 293 (2010)).

Accordingly, a prosecutor may not display exhibits that have been altered by the addition of captions during closing argument. *Glasmann*, 175 Wn.2d at 706. Such visuals are akin to exposing the jury to unadmitted evidence. *Id.*

The prosecutor at Mr. Thornton's trial did just that. He took admitted photos of the deceased and altered them by adding an incendiary caption equating them to murder. State's PowerPoint Presentation, p. 7 filed 09/24/15, Supp CP. The prosecutor committed misconduct by displaying slides containing exhibits altered to include inflammatory captions. *Glasmann*, 175 Wn.2d at 706. The prosecutor's improper use of altered exhibits requires reversal. *Id.*

The prosecutor also committed misconduct by making arguments designed to inflame the jury's passion and prejudice. *Id.* at 704.

It was not disputed at trial that Ware had been stabbed and had died of his wounds. The photos of his bloody, dead body were unnecessary to argue the state's theory of the case: that Mr. Thornton had not acted in self-defense. The state's only purpose in displaying the

gruesome photos and accompanying caption was to play on the jurors' emotions.

The prosecutor also committed misconduct by appealing to passion and prejudice. *Id.*

Mr. Thornton was prejudiced by the prosecutor's improper PowerPoint slide. *Glasmann*, 175 Wn.2d at 711. As outlined, above, improper visual imagery carries a high risk of prejudice because of the way it is processed in jurors' brains. *Id.* at 707-709.

The only real factual issue for the jury was whether Mr. Thornton had acted in self-defense. The improper slide suggested that the images, themselves, proved that murder had taken place.

The evidence against Mr. Thornton was also not overwhelming. No physical evidence demonstrated that he had touched the knife or had attacked first. The state's civilian witnesses were closely tied to Ware—as his girlfriend, gang-mate, and friend. Each had reason to sympathize with Ware, and to downplay his role in precipitating the fight.

Mr. Thornton was prejudiced by the prosecutor's misconduct. *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct is flagrant and ill-intentioned if it violates case law and professional standards that were available to the prosecutor at the time of the argument. *Glasmann*, 175 Wn.2d at 707. At

the time of Mr. Thornton's trial, the prosecutor had access to two Supreme Court cases disallowing the strategy he used in closing. *See Id.*; *State v. Walker*, 182 Wn.2d 463, 341 P.3d 976 *cert. denied,* 135 S.Ct. 2844, 192 L.Ed.2d 876 (2015).

Arguments with an "inflammatory effect on the jury" are also generally not curable by an instruction. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). The prosecutor's misconduct was flagrant and ill-intentioned. *Id.*; *Glasmann*, 175 Wn.2d at 708. It could not have been cured by an instruction. *Glasmann*, 175 Wn.2d at 708.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by displaying images during closing argument that altered admitted exhibits and inflamed the jury's emotions. *Id.* Mr. Thornton's conviction must be reversed. *Id.*

B. The prosecutor improperly "testified" to "facts" not in evidence when he claimed that Mr. Thornton told Gardner he was going to kill Ware.

Gardner testified that Mr. Thornton told her that he was not going to hurt Ware:

> GARDNER: I believe I told [Mr. Thornton], don't hurt [Ware], if he did see him.
>
> PROSECUTOR: What did he say?
>
> GARDNER: He did like a chuckle and said, "Oh, I'm not going to hurt him."

> PROSECUTOR: What was your understanding of what he was saying?
>
> GARDNER: I don't know. But I told him if he did hurt him, I would tell.
> RP (9/14/15) 432-433.

Still the prosecutor claimed in closing that Mr. Thornton had said he would kill Ware. The prosecutor argued that:

> The defendant chuckled when she told him not to hurt Ware, to which he said, "Oh, I'm not going to hurt him. *I'm going to kill him.*"
> RP (9/22/15) 980 (emphasis added).

The prosecutor committed flagrant and ill-intentioned misconduct by "testifying" to "facts" not in evidence and putting words in Mr. Thornton's mouth in closing argument. Because the prosecutor's misstatements went directly to the primary factual issue at trial – whether Mr. Thornton intended to hurt Ware – there is a substantial likelihood that the misconduct affected the outcome of Mr. Thornton's case.

A prosecutor commits misconduct by urging a jury to consider "facts" that have not been admitted into evidence. *Glasmann*, 175 Wn. 2d at 705. It is, likewise, misconduct for a prosecutor to fabricate statements and attribute them to the accused in closing argument. *Pierce*, 169 Wn. App. at 554.

Gardner did not testify that Mr. Thornton told her he was going to kill Ware. RP (9/14/15) 432-433. The prosecutor's attribution of that confession to Gardner (and, by proxy, to Mr. Thornton) constituted misconduct. *Id.*; *Glasmann*, 175 Wn. 2d at 705.

There is also a reasonable probability that the prosecutor's improper argument affected the jury's verdict. *Glasmann*, 175 Wn.2d at 704. The prosecutor's misquotation was directly relevant to the key factual issue at trial: whether Mr. Thornton had intended to harm Ware. Given the length of the trial and the "fact-finding facilities presumably available to the [prosecutor's] office," the jury could have taken the prosecutor's misstatement of the evidence at face value. Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Mr. Thornton was prejudiced by the prosecutor's improper argument. *Id.*; *Glasmann*, 175 Wn.2d at 704.

The prosecutor's misconduct was also flagrant and ill-intentioned because it violated professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707; *Pierce*, 169 Wn. App. at 553.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by distorting the evidence in closing argument and putting

words into Mr. Gaines's mouth that made him appear guilty. *Glasmann*, 175 Wn. 2d at705; *Pierce*, 169 Wn. App. at 553. Mr. Thornton's conviction must be reversed. *Id.*

IV. THE COURT VIOLATED MR. THORNTON'S RIGHT TO CONFRONTATION BY PROHIBITING HIM FROM CROSS-EXAMINING SCALES ABOUT HIS MEMBERSHIP IN THE SAME GANG AS THE DECEASED.

Scales provided testimony directly undermining Mr. Thornton's self-defense argument. He claimed to have spoken with Mr. Thornton directly after the fight, and testified that Mr. Thornton bragged about stabbing Ware on purpose. RP (9/15/15) 563.[14]

Scales and Ware were both members of the Hilltop Crips gang. RP (9/8/15) 28. Scales had reason to want to make his late friend look good and, accordingly, to claim that Mr. Thornton had acted intentionally rather than in self-defense.

But the court did not let Mr. Thornton elicit that critical bias evidence. RP (9/8/15) 30. The court violated Mr. Thornton's right to confront the state's witnesses. *State v. Darden*, 145 Wn.2d 612, 620, 26 P.3d 308 (2002).

[14] Scales's testimony was contradicted by that of Thomas, who told the jury that Scales had learned about the stabbing from him later in the day. RP (9/16/15) 671-673.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. *Id.* (citing *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)); U.S. Const. Amend. VI; art. I, § 22.

The confrontation clause protects more than "mere physical confrontation." *Darden*, 145 Wn.2d at 620 (quoting *Davis*, 415 U.S. at 315). The bedrock of the confrontation right is the guarantee of an opportunity to conduct a "meaningful cross-examination of adverse witnesses" to test for memory, perception, and credibility. *Darden*, 145 Wn.2d at 620. Confrontation helps assure the accuracy of the fact-finding process. *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The right to confront adverse witnesses must be "zealously guarded." *Darden,* 145 Wn.2d at 620.

The *Darden* court set out a three-part test for when cross-examination may be limited. *Darden*, 145 Wn.2d at 612. First, cross-examination that is even minimally relevant must be permitted under most circumstances. Second, the state must demonstrate that the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process." Finally, the state's interest in excluding the evidence must be balanced against the accused person's need for the information sought. *Id.*

Bias evidence is always relevant. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002) (citing *Davis*, 415 U.S. at 316-18). Here, the evidence that Scales and Ware were in the same gang was relevant to Mr. Thornton's defense. It clarified that Scales was biased in favor of Ware and had reason to lie in order to make his friend look good.

The state's only interest in excluding the evidence is because it exposes potential bias and reveals prejudicial information about one of one of the prosecution's key witnesses. But Scales had already admitted that he had been in jail and frequented a drug house. RP (9/15/15) 573, 577. Within that context, additional evidence of his gang affiliation was unlikely to shock the jury. The evidence was certainly not "so prejudicial as to disrupt the fairness of the fact-finding process." *Id.*

Exposure of witness bias is "a core value of the Sixth Amendment." *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010), *as amended* (Sept. 1, 2010). A witness's bias or possible incentive to lie is a "quintessentially appropriate topic for cross-examination." *Id.*

When a trial court prohibits an accused person from eliciting evidence relevant to bias of the state's witnesses, prejudice is presumed. *Spencer*, 111 Wn. App. at 408. Reversal is required unless the state proves that no rational jury could have a reasonable doubt as to guilt even with the omitted evidence. *Id.*

Scales's testimony was key to the state's theory that Mr. Thornton had stabbed Ware intentionally. The state cannot overcome the presumption of prejudice in this case. *Id.*

The court violated Mr. Thornton's right to confront the state's witnesses when it prohibited him from eliciting critical bias evidence on cross-examination of Scales. *Darden*, 145 Wn.2d at 620. Mr. Thornton's conviction must be reversed. *Id.*

V. IF THE STATE PREVAILS ON APPEAL, THIS COURT SHOULD NOT REQUIRE MR. THORNTON – WHO IS INDIGENT – TO PAY APPELLATE COSTS.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, -- Wn. App. --, 367 P.3d 612 (2016).[15]

Appellate costs are "indisputably" discretionary in nature. *State v. Sinclair*, 367 P.3d 612. The concerns identified by the Supreme Court in

[15] Division II's commissioner has indicated that Division II will follow *Sinclair*.

Blazina apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Thornton indigent at the end of the proceedings in superior court. CP 140-143. That status is unlikely to change, especially with the imposition of a lengthy prison term. CP 128. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

The court's aggressor instruction violated Mr. Thornton's right to due process by impermissibly lowering the state's burden of disproving self-defense. The instruction was also not warranted by the evidence in Mr. Thornton's case.

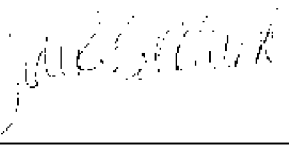
The prosecutor committed flagrant and ill-intentioned misconduct by showing the jury altered exhibits, appealing to the jury's passion and prejudice, and "testifying" to "facts" not in evidence. The misconduct could not have been cured by an instruction, and requires reversal.

The court violated Mr. Thornton's right to confront the state's witnesses by precluding him from eliciting that Scales and Ware were members of the same gang. Mr. Thornton's conviction must be reversed.

In the alternative, if the state prevails on appeal, this court should exercise its discretion to deny appellate costs, if requested.

Respectfully submitted on April 19, 2016,

BACKLUND AND MISTRY



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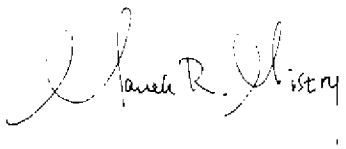

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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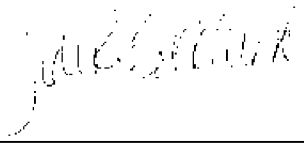
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 19, 2016.



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