No. 97357-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ROYALE THORNTON,

Respondent.

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

ANSWER TO PETITION FOR REVIEW

LILA J. SILVERSTEIN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org
wapofficemail@washapp.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. INTRODUCTION

This Court should deny the petition for review. The Court of Appeals applied well-settled law in holding the prosecutor committed misconduct by shifting the burden to Mr. Thornton to prove self-defense.

The State acknowledges it bears the burden of disproving self-defense beyond a reasonable doubt. It repeatedly claims the prosecutor properly argued that Mr. Thornton's testimony "disproved the defense." But that is not what the prosecutor said. The Court of Appeals correctly quoted the prosecutor's argument verbatim. The prosecutor repeatedly stated that Mr. Thornton "fail[ed] to meet" the three criteria for self-defense, and that therefore, "his defense fails." The State's rewriting of the record is not a reason for review.

There is also no issue with harmless error analysis. The Court of Appeals carefully considered all of the evidence in concluding the misconduct was prejudicial as to one conviction and harmless as to the other. It was prejudicial as to the murder conviction because the State's evidence showed the eventual decedent was yelling at Mr. Thornton while pacing back and forth in front of him with his hand in his pocket on a loaded gun, and that Mr. Thornton and his companion (a State's witness) accurately perceived that this person was armed and angry. This Court should deny review.

B. ISSUES

Contrary to the State's claim in its petition, the prosecutor never argued Mr. Thornton's testimony "disproved his justifiable homicide defense." Rather, the prosecutor repeatedly argued to the jury that Mr. Thornton "failed to meet the requirements" of self-defense.

1. Did the Court of Appeals properly hold the prosecutor committed misconduct by shifting the burden of proof?

2. Did the court properly hold the misconduct was not harmless on the murder count because the State's evidence showed the eventual decedent was carrying a loaded gun in his pocket as he paced back and forth in front of Mr. Thornton yelling at him, and that both Mr. Thornton and his companion (correctly) perceived that this person was armed with a loaded gun?

3. Should this Court deny review because the above holdings are based on well-settled law, the opinion is unpublished, and the State simply disagrees with the application of the law to the facts of this case?

C. STATEMENT OF THE CASE

1. Royale Thornton and his cousin encountered the eventual decedent at a store; that person yelled at Mr. Thornton and paced in front of him with his hand on a loaded gun in his pocket, and Mr. Thornton shot him.

Royale Thornton was born in 1995 to a mother who smoked crack cocaine while pregnant and had just been imprisoned for killing her three-year-old daughter. CP 315-16. With his mother in prison and his father absent, Mr. Thornton was raised by his grandparents. CP 316. In addition

to suffering the effects of fetal cocaine exposure, he also had PTSD and severe learning deficits, and he dropped out of school in the ninth grade. CP 316-17.

Mr. Thornton had several sisters but no brothers, and he treated his cousin, Carlos Pace, like a brother. CP 315; RP (5/23/17) 155-56. The two saw each other daily. RP (5/17/17) 1022-23.

On New Year's Eve of 2014, Mr. Thornton and Mr. Pace planned to attend parties together. RP (5/17/17) 1027. They stopped at the Victory grocery store to buy cigars. RP (5/17/17) 1038-39. Two young men they knew, Rhaman ("Junior") Karriem and Jahlil Ray, were in the parking lot of the store. RP (5/16/17) 872-74, 887-88; RP (5/17/17) 1041.

Mr. Thornton and Mr. Karriem did not get along. RP (5/17/17) 1042-43. In fact, Mr. Thornton had previously told Mr. Pace that Mr. Karriem fired a gun at him while he was driving his car a few months earlier. RP (5/17/17) 1043, 1096-98. Mr. Thornton and Mr. Karriem apparently had a falling out over a burglary they had participated in, and Mr. Karriem was also angry that Mr. Thornton was dating his sister. RP (5/16/17) 881-82; RP (5/17/17) 1106.

When they ran into Mr. Karriem and Mr. Ray on New Year's Eve, Mr. Pace thought it would be a good idea to convince Mr. Karriem and Mr. Thornton to resolve their differences. Mr. Pace got out of the car,

approached Mr. Karriem and Mr. Ray, and asked if they wanted to "go head up" – i.e., fist fight – with Mr. Thornton. RP (5/17/17) 1044-45. Mr. Karriem agreed, but when Mr. Pace went back to the car and advised Mr. Thornton of the plan, Mr. Thornton demurred. RP (5/17/17) 1045-48. Mr. Karriem then approached the passenger window, and Mr. Thornton told him he did not want to fight. RP (5/17/17) 1052.

Mr. Karriem had his hands in his pockets, and both Mr. Thornton and Mr. Pace perceived Mr. Karriem as armed. Ex. 47; RP (5/17/17) 1108; RP (5/23/17) 193-96. As they talked, Mr. Karriem paced back and forth and kept his hand in his pocket. RP (5/24/17) 1345. According to Mr. Pace, Mr. Karriem told Mr. Thornton not to do anything "funny" like shoot him when he walked away. RP (5/17/17) 1052-53. According to Mr. Thornton, Mr. Karriem threatened to shoot him when he got around the corner. RP (5/23/17) 192. Mr. Thornton understood Mr. Karriem's "movements" to indicate an imminent attack. RP (5/23/17) 193-96.

Mr. Karriem backed up with his hand still in his pocket. Mr. Thornton grabbed his gun and shot Mr. Karriem, who died of his wounds. RP (5/17/17) 1054; RP (5/23/17) 116. One or two shots went toward Mr. Ray, but he was not hit. RP (5/17/17) 900-01. Mr. Pace drove the car around the corner, stopped, and yelled at Mr. Thornton. RP (5/17/17) 1058.

Police officers later arrested Mr. Thornton and Mr. Pace in connection with the shooting. RP (5/23/17) 214. Mr. Pace told the detectives he did not know why Mr. Thornton shot Mr. Karriem, but thought it was because he was scared to fight. Ex. 47. Mr. Pace also told detectives that Mr. Karriem gave the impression he had a gun, and that his hand was in his pocket. Ex. 47; RP (5/17/17) 1108. A loaded gun was found in Mr. Karriem's jacket pocket at the hospital on the night of the shooting. RP (5/10/17) 588-89.

2. The State charged Mr. Thornton with murder, and the jury received evidence and instructions on self-defense.

The State eventually charged Mr. Thornton with one count of felony murder with a firearm enhancement, one count of first-degree assault with a firearm enhancement (for the stray shots that went toward Mr. Ray), and one count of unlawful possession of a firearm. CP 12-13. Although he had initially told police he was not at the Victory on New Year's Eve, at trial Mr. Thornton acknowledged he was there but testified he shot at Karriem in self-defense. RP (5/23/17) 154-214. Like Mr. Pace, Mr. Thornton (correctly) perceived that Mr. Karriem was armed. RP (5/23/17) 193-96. Mr. Thornton testified, and the surveillance video showed, that Mr. Karriem had his hand in his pocket and was pacing back and forth. Ex. 24; RP (5/17/17) 1108; RP (5/23/17) 193-96; RP (5/24/17)

1345. Although Mr. Pace did not hear any threats, Mr. Thornton testified that Mr. Karriem threatened to shoot him if he was still there after Mr. Karriem rounded the corner. RP (5/17/17) 1064; RP (5/23/17) 192. Mr. Thornton testified that he felt he either had to shoot or be killed. RP (5/23/17) 214.

Mr. Pace testified for the State. He testified that Mr. Thornton never told him he shot that night because he was acting in self-defense, but he acknowledged that Mr. Karriem appeared to be armed. RP (5/17/17) 1071, 1108. The Court instructed the jury that a person is entitled to act in self-defense and the State bears the burden of disproving self-defense. CP 280. However, in closing argument, the prosecutor accused Mr. Thornton of not presenting evidence of self-defense, and repeatedly told the jury that Mr. Thornton "fail[ed] to meet" the criteria of self-defense. RP (5/30/17) 1568-71. A defense objection to the burden-shifting was overruled. RP (5/30/17) 1569.

Mr. Thornton was convicted as charged and sentenced to 500 months in prison. CP 352-60.

3. The Court of Appeals reversed one of two convictions because of the prosecutor's repeated burden-shifting on the self-defense issue in closing argument.

In an unpublished opinion, the Court of Appeals affirmed the assault conviction but reversed the murder conviction and remanded for a

new trial due to prosecutorial misconduct. Slip Op. at 1. The court accurately set out the black-letter law on the State's burden to disprove self-defense beyond a reasonable doubt and the standards of review for prosecutorial misconduct. Slip Op. at 10, 15-19. The court then applied the law to the facts – not by paraphrasing the prosecutor's closing argument, but by quoting it verbatim. Slip Op. at 12-13. The court recognized the prosecutor shifted the burden of proof by repeatedly stating Mr. Thornton "fail[ed] to meet" the requirements of self-defense. Slip Op. at 13, 16. And it noted the response brief's "characterization of the prosecutor's closing argument does not reflect a fair reading of it." Slip Op. at 16.

The State filed a motion to reconsider in which it repeatedly insisted that the prosecutor told the jury the evidence "disproved" the defense. Mr. Thornton filed an Answer, pointing out this claim was contrary to the record. The court denied the motion to reconsider.

D. ARGUMENT

Review is unwarranted. The Court of Appeals followed settled law in reversing one of two convictions for prejudicial prosecutorial misconduct.

1. The State's argument is based on what it wishes the prosecutor had said, but the Court of Appeals reversed based on what the prosecutor actually said.

The petition meets none of the criteria of RAP 13.4(b) because all of the prosecution's arguments are premised on an inaccurate description of the facts. The Court of Appeals properly relied on the actual facts in the record, and there is no basis for this Court's review.

The parties agree on the law. It is well-settled that the State bears the burden of disproving self-defense beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 500, 656 P.2d 1064 (1983). A prosecutor commits misconduct by shifting the burden to the defendant to prove he acted in lawful self-defense. *State v. McCreven*, 170 Wn. App. 444, 470, 284 P.3d 793 (2012). This rule is consistent with the standard rule that a prosecutor may not shift the burden of proof in any criminal case. *See State v. Miles*, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007); *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996).

The Court of Appeals applied the above law to the facts. The State wishes the facts were different, but this Court cannot change facts. As set out more fully in the Court of Appeals' opinion, the prosecutor argued:

> [PROSECUTOR]: Again, if one of these fails, the entire defense fails. Again, even assuming the defendant told us the absolute truth on the stand, *where's the evidence that* –
> MR. MINOR: Objection. This is shifting the burden of proof.
> THE COURT: Overruled. …
> …
> [PROSECUTOR]: Again, if we were to accept [Mr. Thornton's] testimony as 100 percent credible, *he fails to meet* this first criteria, this first requirement. And by *failing to meet* this first requirement, self-defense fails. *His defense fails.*
> …
> So by the defendant's own admissions, there is no imminent danger of death or great personal injury. *Failing to meet this second requirement alone means that this defense fails,* that this homicide was not legally justified.
> …
> So again, even taking the defendant's own testimony at full face value, *he fails to meet this third requirement as well.* Again if one part fails, the entire defense fails. And here *the defendant fails all three*, and that's if we were to take his testimony as credible.

RP (5/30/17) 1568-71 (emphases added); *see* Slip Op. at 12-13.

Unlike the Court of Appeals' opinion, the petition for review does not quote the prosecutor's actual closing argument. The State claims "the prosecutor did not argue that Thornton should have produced additional or different evidence[.]" Pet. at 13. In fact, the prosecutor stated, "where's the evidence that …" after which Mr. Thornton's objection was improperly overruled. RP (5/30/17) 1568-69; *see* Slip Op. at 12.

The State then insists, contrary to the record and the opinion, that the prosecutor did not repeatedly shift the burden by accusing the defense

of "failing to meet" the requirements of self-defense. "Instead, he argued that the evidence Thornton chose to produce – his own testimony – *disproved the defense theory*." Pet. at 13; *see also* Pet. at 1 (claiming prosecutor argued the testimony "disproved his justifiable homicide defense"); Pet. at 7 (claiming prosecutor argued the testimony "*disproved* a justifiable homicide defense"); Pet. at 13 (claiming prosecutor argued the testimony "*disproved the defense theory*") (emphases in original). The State claims the difference between that argument and an improper argument is "a critical distinction." Pet. at 9. That is true, but as the Court of Appeals recognized, the prosecutor did not actually say anything about the evidence "disproving the defense." Instead, the prosecutor repeatedly stated that Mr. Thornton "fail[ed] to meet" the requirements of self-defense. RP (5/30/17) 1568-71; Slip Op. at 12-13.

The State implicitly acknowledges this fact at one point, introducing its rewrite of the prosecutor's statements by saying, "In other words …." Pet. at 7. But the Court of Appeals properly reviewed the words the prosecutor actually used, not the "other words" the State wishes he had used. There is no basis for this Court's review.[1]

[1] The State wrongly claims this case is contrary to *State v. Romero-Ochoa*, __ Wn.2d __, 440 P.3d 994 (2019). Pet. at 14-15. *Romero-Ochoa* involved an evidentiary issue; it had nothing to do with prosecutorial misconduct.

2. The court properly determined the burden-shifting was not harmless where the eventual decedent was yelling at Mr. Thornton while armed with a loaded gun.

There is also no issue with the prejudice analysis. This Court has emphasized that "deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict." *In re Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012). The Court of Appeals applied this standard. Slip Op. at 19. It carefully considered the evidence presented and found the misconduct harmless as to the assault conviction but prejudicial as to the murder conviction.

The State concedes the Court of Appeals correctly took into account the fact that the jury had been instructed properly, yet then complains that the Court did not presume the instructions cured the prejudice caused by its misconduct. Pet. at 13-14. Instructions, of course, are not always enough to overcome the prejudice caused by prosecutorial misconduct. *E.g. State v. Walker*, 182 Wn.2d 463, 480-81, 341 P.3d 976 (2015) (reversing for misconduct even though proper instructions given); *State v. Lindsay*, 180 Wn.2d 423, 443, 326 P.3d 125 (2014) (same); *Glasmann*, 175 Wn.2d at 699 (same). In this case, the misconduct was prejudicial as to the murder conviction because there was significant

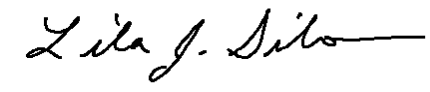
evidence of self-defense, yet the prosecutor shifted the burden on that very issue.

Moreover, the State fails to acknowledge the import of the trial court's treatment of the objection to the prejudice analysis. When the court overruled Mr. Thornton's objection to burden-shifting, it lent "an aura of legitimacy to what was otherwise improper argument." *State v. Allen*, 182 Wn.2d 364, 378, 341 P.3d 268 (2015) (quoting *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984)). This, combined with the repeated, pervasive nature of the burden-shifting and the undisputed evidence that the decedent was armed, demonstrate that the misconduct was prejudicial. The Court of Appeals carefully evaluated prejudice as to each conviction, and there is no basis for this Court's review.

E. CONCLUSION

This Court should deny the petition for review because the Court of Appeals applied settled law to the facts of this case in an unpublished opinion.

Respectfully submitted this 16th day of July, 2019.



Lila J. Silverstein – WSBA 38394
Washington Appellate Project – 91052
Attorneys for Respondent Royale Thornton

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 97357-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ petitioner Jennifer Joseph, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[jennifer.joseph@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ respondent

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: July 16, 2019
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

July 16, 2019 - 4:17 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97357-1
Appellate Court Case Title:	State of Washington v. Royale Tyrell-Scott Thornton

The following documents have been uploaded:

- 973571_Answer_Reply_20190716161719SC191866_6225.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was washapp.071619-02.pdf

A copy of the uploaded files will be sent to:

- jennifer.joseph@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Lila Jane Silverstein - Email: lila@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190716161719SC191866