Supreme Court No.: 98113-2
Court of Appeals No.: 75510-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HENDERSON,

Petitioner.

PETITION FOR REVIEW

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

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A. IDENTITY OF PETITIONER AND THE DECISION BELOW

Michael Henderson is back before this Court as the petitioner. Previously, this Court granted the State's petition for review and reversed and remanded for the Court of Appeals to consider issues previously briefed by Henderson but not decided. Henderson was the appellant below. He now asks this Court to grant review pursuant to RAP 13.4(b) of the decision of the Court of Appeals in *State v. Henderson*, No. 75510-2-I, filed December 23, 2019. A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the Court should grant review because the Court of Appeals decision guts Henderson's right to a fair trial and goes against this Court's settled law that the subjective portion of self-defense does not depend upon the reasonableness of the defendant's action. Instead, reasonableness pertains to the objective portion of the test. RAP 13.4(b)(1), (3).

2. Whether the Court should grant review where the prosecutor committed additional misconduct by suggesting Henderson had a duty to produce evidence? RAP 13.4(b)(3), (4).

3. Whether the Court should grant review to resolve a conflict between the opinion below, which declined to review Henderson's Fifth

Amendment issue, and *State v. Ruiz*, 176 Wn. App. 623, 309 P.3d 700 (2013), in which Division Three reviewed a similar assertion of the Fifth Amendment privilege? RAP 13.4(b)(2).

4. Whether the Court should grant review where, in *State v. Pierce*,[1] this Court very recently overruled the *Townsend* rule[2] yet three jurors were excused based on their views of the death penalty in Henderson's noncapital case. RAP 13.4(b)(1), (3), (4).

5. Whether the Court should grant review to determine whether trial testimony about a weapon removed from the victim and the presence of an additional witness at the crime scene that was not produced in discovery violates *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963) and the Sixth Amendment? RAP 13.4(b)(3).

6. Whether the Court should grant review to determine if cumulative trial errors violated Henderson's right to a fair trial under the Fourteenth Amendment (U.S. const. amend. XIV) and article I, § 3? RAP 13.4(b)(3).

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[1] *State v. Pierce*, Slip Op., __ Wn.2d ___, 2020 WL 103341 (Jan. 9, 2020).
[2] *State v. Townsend*, 142 Wn.2d 838, 846, 15 P.3d 145 (2001).

C. STATEMENT OF THE CASE

1. The only defense Michael Henderson was allowed to present to the jury was self-defense.

This case centered on the death of Abubakar Abdi. On the night he died, Abdi was carrying a screwdriver as a weapon and intending to fight an unrelated "dude" for knocking out his tooth. RP (5/24/16) 260-65, 280-82, 323-24. He consumed alcohol and marijuana and seemed to be feeling its effects. RP (5/24/16) 250, 254-55, 59-60; RP (5/25/16) 426-28, 432-33.

Abdi was with his friends, arguing with Nekea Terrell. RP (5/23/16) 142-53. Terrell's friend Henderson came upon the group and gave her a hug. *Id*. at 152.

Abdi's banter with Terrell escalated, and their friends feared Abdi would act violently. RP (5/23/16) 155-56, 165; RP (5/24/16) 326-28. Henderson also thought Abdi would engage in a fight. RP (6/1/16) 726-28. Abdi started gesturing, puffing out his chest, waving his arms, moving closer, and "bucking up." RP (5/23/16) 166-67. Then, Abdi "flinched" his shoulders, lunged forward, moved his arms towards his waist, and seemed to reach for something in his pocket. RP (6/1/16) 643-44, 682-83, 736-39, 747-50; Ex. 26. Henderson grew afraid Abdi would start firing shots. RP (6/1/16) 739-41. In response, Henderson drew a gun, a shot fired, and

Abdi was killed. RP (5/25/16) 519-20; RP (6/1/16) 666, 682-83, 750-52, 789-90.

Henderson stood trial for felony murder predicated on assault with a deadly weapon. CP 1-8, 56; RP (6/1/16) 804. In defense of the charge, he asserted both self-defense to an imminent serious bodily injury or death (justifiable homicide) and excusable homicide (an accidental killing predicate by an intentional act of self-defense). RP (6/1/16) 652-56; RP (6/2/16) 820-31, 837-38. The trial court denied Henderson's request for an excusable homicide instruction. CP 43-70; RP (6/2/16) 820-31, 837-38. Thus, Henderson had only one defense at trial: self-defense.

2. Procedural posture.

On appeal, Henderson challenged the denial of the excusable homicide instruction, application of the rule from *State v. Townsend* during voir dire, prosecutorial misconduct, and several additional issues in a Statement of Additional Grounds. Br. of App't, No. 75510-2-I (filed Feb. 9, 2017); Statement of Add'l Grounds, No. 75510-2-I (filed Mar. 13, 2017). The Court of Appeals, Division One, reversed and remanded for a new trial, holding the trial court improperly denied the defense instruction on excusable homicide. *State v. Henderson*, 2 Wn. App. 2d 1031, 2018 WL 834216, *1-5 (2018). The court also reached the *Townsend* error, finding it raised for the first time on appeal and that the intermediate

appellate court could not overrule it as Supreme Court precedent. *Id*. at *5. The court declined to reach any other issues. *Id*.

This Court granted the State's petition for review on the issue whether the excusable homicide instruction should have been provided. After briefing and argument, this Court reversed the Court of Appeals and remanded for that court to decide the remaining issues raised on appeal.

After supplemental briefing in the Court of Appeals, the court affirmed Henderson's conviction and denied all remaining issues on appeal. *See* Appendix.

D. ARGUMENT

1. The Court should grant review and hold a prosecutor commits reversible misconduct by misstating the legal standard for self-defense and arguing to the jury that application of the subjective portion of the test was not what the laws were intended for.

a. Henderson's defense focused on the subjective component of self-defense.

Henderson's sole defense at trial was that he killed Abdi in an act of self-defense. *See generally* RP (6/2/16) 875-909 (defense closing argument). Henderson's subjective belief and experience was central to the defense. Henderson argued that the particular circumstances at hand, "this community of actors," and this "particular set of people," mattered for Henderson's defense. RP (5/23/16) 127 (opening

statement); *see id*. at 130-31 (discussing Henderson's perception of danger). He argued the jury should look at the evidence from Henderson's perspective, his life experiences and circumstances. RP (6/2/16) 877-78, 886-87, 893-94 ("Does he have the circumstantial history and background so that his inference was he is at risk?"), 906-08.

This perspective was important because trial produced copious evidence about Henderson's experience in this community with this set of actors. Henderson testified about experiencing regular danger in his Rainier Beach Valley neighborhood. RP (6/1/16) 666-67. He referred to it as a "war zone" where people regularly carry firearms and other weapons. *Id*. at 666-67, 672-73. As a result, when he encounters someone he does not know, he is worried he "will get shot, period." *Id*. at 669. Henderson testified that his specific experiences cause him to view shoulder movements and moves towards the waist as signs another is about to draw a weapon. *Id*. at 673-75.

Other evidence also supported that Abdi was a threat: Henderson and other witnesses testified they were fearful and anticipated a fight; Abdi was drunk, had a screwdriver as a weapon, and made movements consistent with escalating the confrontation and reaching for a weapon. RP

(5/23/16) 155-56, 167; RP (5/24/16) 250, 254-55, 260-65, 280-82, 323-28; RP (5/25/16) 426-28, 432-33; RP (6/1/16) 643-44, 682-83, 726-28, 736-41, 747-50; Ex. 26.

b. The opinion below, like the prosecutor's argument, misstates the law by writing out the subjective component of self-defense.

However, the prosecutor struck a foul blow to thwart Henderson's defense in rebuttal closing argument. He misstated the law on self-defense and encouraged the jury to go beyond the instructions to consider the appropriateness of the law. He argued to the jury,

> [Henderson] told you that "When I see someone who is making these hand gestures and moving, I naturally assume they are armed so I'm going to shoot them if I think they are armed."
>
> Is that really what we have come to? Is that really what the law is, that if a person can convince themselves that another person is armed and is threatening to them, that they can shoot them? Is that what these laws are intended for?
>
> Remember what I said in my opening closing arguments. The laws are designed to make sense.

RP (6/2/16) 914. Henderson objected that the "line of argument that invites the jury to consider the appropriateness of the law in an effort

perhaps to find the law is wrong." *Id*. The court overruled the objection. RP (6/2/16) 915.[3]

This argument misstated the law because the prosecutor argued self-defense cannot be defined subjectively. He created a false opposition between a subjective self-defense standard (which he claimed the law was not intended for and does not make sense) and an objective self-defense standard. But the actual self-defense standard incorporates both. "To prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; [and] (3) the defendant exercised no greater force than was reasonably necessary." *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) (quoting *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997)). Henderson's subjective belief is relevant to whether he lawfully acted in self-defense.

The prosecutor's remarks created a strawman out of Henderson's defense. He misleadingly claimed the law cannot depend

[3] The court reminded the jury that "the lawyers' statements are not evidence," but this instruction applied equally to comments from the defense and the prosecution. The court did not repeat its instructions on self-defense. *Id*. at 915.

upon a subjective self-defense standard. He thereby asserted that only objective reasonableness is relevant to evaluate Henderson's self-defense claim. This was a misstatement of the law. *State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015) (misconduct to misstate the law in argument).

The Court of Appeals sanctioned this misstatement, reasoning "the prosecutor's argument was as a call to the jury to question whether the hand movements Henderson saw would reasonably precipitate the shooting, which goes to the subjective element of self-defense." Slip Op. at 5 (emphasis added). But the reasonableness the Court of Appeals relies on goes to the objective component of the test, not the subjective component the prosecutor wanted the jury to ignore.

The prosecutor not only misstated the law but encouraged the jury to depart from the court's instructions. The jury was instructed on the mixed objective-subjective self-defense standard. CP 60. The jury was further instructed, "A person is entitled to act on appearances in defending himself" even if it later "develop[s] that the person was mistaken as to the extent of the danger." CP 62. Yet, the prosecutor's rebuttal argument urged the jury not to "tak[e] into consideration all the facts and circumstances as they appeared to him, at the time of and

prior to the incident." *Id*. The prosecutor urged the jury to reject the subjective component.

The prosecutor's remarks encouraged the jury to question the reach of the law in the court's instructions. It took aim to limit Henderson's only remaining defense—that the homicide was justifiable self-defense. The Court of Appeals fails to account for this by holding the prosecutor "call[ed] on the jury to question whether the hand movements Henderson saw would reasonably precipitate the shooting." Slip Op. at 5 (emphasis added). Calling on the jury only to consider reasonableness was a misstatement of the law of self-defense.

By overruling Henderson's objection to this argument, the court increased the likelihood that the misconduct affected the jury's verdict. *State v. Swanson*, 181 Wn. App. 953, 964, 327 P.3d 67 (2014). The court's ruling "lent an aura of legitimacy to what was otherwise improper argument." *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984).

c. Upon review in this Court, the Court should hold the misconduct requires reversal for a new trial.

Prosecutorial misconduct violates a defendant's right to a fair trial where the prosecutor makes an improper statement that has a

prejudicial effect. *E.g.*, *State v. Russell*, 125 Wn.2d 24, 882 P.2d 747 (2002); *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). The misconduct is prejudicial if there is a substantial likelihood it affected the verdict.

The prosecutor committed misconduct by disparaging the only defense the court allowed Henderson to present—justifiable homicide (self-defense). As discussed, Henderson's defense particularly relied on the subjective component of self-defense—that Henderson's particular experiences and perception caused a reasonable fear of imminent serious injury. The evidence derived from Henderson's testimony; it could not be seen in the video or other evidence. But, the prosecutor argued the jury could not consider that evidence under the law. The prosecution, as a representative of the government, can be particularly persuasive to a jury. *United States v. Young*, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985). The prosecutor's "opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id*.

Moreover, the court sanctioned the misconduct by overruling the objection. *Davenport*, 100 Wn.2d at 764; *Swanson*, 181 Wn. App.

at 964. The misconduct likely affected the jury by diminishing Henderson's defense.

2. The Court should grant review on additional prosecutorial misconduct which the Court of Appeals held attacked the defendant's credibility but was actually burden shifting.

The prosecution committed additional misconduct by shifting the burden. In closing, the prosecutor implied the defense had the burden to produce evidence by discussing questions Henderson did not ask of police witnesses.

> What's interesting, ladies and gentlemen, and maybe you picked up on this or maybe you didn't, there were numerous witnesses. I counted over 60 years of experience from police officers who worked that very area. Not one of them was asked, "What's that area like?" because the Rainier Valley, ladies and gentlemen, is not a war zone. The Rainier Valley is not the concrete jungle. It's a part of Seattle. Does crime happen there? Sure, it does. Does crime happen there more than other places? Possibly.
>
> The only person who provided you with this understanding of how this war zoned [sic] worked was the defendant.

RP (6/2/16) 861.

It is improper for the prosecution to shift the burden to the defense. "[A] prosecutor generally cannot comment on the lack of

defense evidence because the defense has no duty to present evidence." *State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011).

The opinion below holds the prosecutor did not shift the burden but questioned Henderson's credibility. Slip Op. at 7. Yet the Court of Appeals cites no case law supporting this argument. The Court of Appeals fails to explain why this burden-shifting argument goes to credibility but others constitute misconduct. But the opinion suggests that any time the defendant opens the door to the credibility of his evidence, prosecutors are at liberty to shift the burden under the guise of questioning the defendant's credibility. *See id*.

The Court should grant review to clarify this unclear area and hold the prosecutor's argument improperly shifted the burden to the defense. *See State v. Emery*, 174 Wn.2d 741, 759-60, 278 P.3d 653 (2012).

3. The Court should grant review because the opinion below conflicts with another Court of Appeals opinion on an important issue related to the Fifth Amendment privilege against self-incrimination.

Here below, Henderson argued the prosecutor committed further misconduct and violated the Fifth Amendment by coercing witness Siyad Shamo into testifying and having improper contact with the witness. U.S. Const. amends. V, XIV; Statement of Add'l Grounds,

Issue 3 (filed Mar. 13, 2017). Henderson further argued the court also coerced the witness into testifying in violation of the Fifth Amendment privilege against self-incrimination. U.S. Const. amends. V, XIV. *See* Statement of Add'l Grounds, Issue 3.

The prosecutor met with witness Shamo "several times about this case." RP (5/24/16) 234. But Shamo refused to testify and did not want to be involved. RP (5/24/16) 231-34. Despite Shamo's Fifth Amendment privilege against self-incrimination, Shamo was coerced into testifying under threat of contempt charges. *Id*. at 235-38, 242-43. Moreover, he was denied access to an attorney to assert his rights or provide him counsel. *Id*. at 232, 235-36, 242-43. The State then called Shamo to testify in its case and Shamo did testify. *Id*. at 245. Henderson asserts this testimony was improperly coerced.

In his supplemental briefing, Henderson cited *State v. Ruiz*, 176 Wn. App. 623, 309 P.3d 700 (2013) (cited by trial counsel at RP (5/24/16) 240)). In that case, the Court of Appeals, Division Three, reviewed alleged errors related to a third parties' Fifth Amendment rights. 176 Wn. App. at 633-44. In *Ruiz*, the Court did not find the defendant lacked standing to raise those claims. Yet here, the Court of Appeals declined to review Henderson's assertion that Shamo's Fifth

Amendment privilege was violated, holding Henderson could not assert the privilege on Shamo's behalf. Slip Op. at 7-8.

Because the court's ruling below conflicts with its decision in *Ruiz*, the Court should grant review. RAP 13.4(b)(2).

4. The Court should grant review and decide whether the new rule from *State v. Pierce* overruling *Townsend* requires reversal.

In the Court of Appeals, Henderson argued the *Townsend* rule was incorrect and harmful and required reversal because its application led to the excusal of three jurors based on their views of the death penalty. Br. of App't, No. 75510-2-I, pp.16-20 (filed Feb. 9, 2017).

This Court recently overruled *Townsend* in *Pierce*, 2020 WL 103341. There the Court agreed with Henderson that *Townsend* is "is incorrect and harmful because it artificially prohibits informing potential jurors whether they are being asked to sit on a death penalty case." *Pierce*, 2020 WL 103341, at *7; *id*. (Stephens, J. concurring in overruling *Townsend* and reversing conviction).

Because the now-overruled *Townsend* rule was applied at trial here, three jurors from Henderson's jury panel were excused on the irrelevant ground that they were unable to sit on a death penalty case. RP (5/18/16 VD) 127-29, 142-44, 151-53 (excusing jurors 16, 48, and

49 for cause). For example, Juror 48 was excused after the following exchange:

> Juror 48: . . . I don't know if capital punishment is a possible outcome if a guilty verdict was rendered, but that's not something that I'd be willing to participate in.
>
> Court: . . . Under well established law I cannot tell you whether case is subject to the death penalty. . . . With these instructions in mind, do you anticipate any difficulty following the Court's legal instructions?
>
> Juror: It sounds like I do, because I won't be able to know until later. . . . So that would prevent me from being impartial, yeah.

RP (5/18/16 VD) 127-28.

The Court should grant review to determine the application of *Pierce* to this case still on direct review. RAP 13.4(b)(1), (3), (4); *see* RAP 1.2(a) (providing the Rules of Appellate Procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits); RAP 1.2(c) (subject to inapplicable restrictions, "The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice."). Review at this juncture is in the interest of judicial economy and efficiency, and the issue is one that the Court will almost certainly be called on to resolve at some point.

5. The Court should grant review and hold the prosecution improperly withheld evidence.

In his Statement of Additional Grounds, Issue 4, Henderson alleges a violation of *Brady*, 373 U.S. 83. U.S. Const. amend. VI. The alleged violation derives from trial testimony, the content of which was not previously disclosed to the defense. First, Shamo testified he took a weapon from the crime scene—he removed a screwdriver from the area where Abdi was shot. RP (5/24/16) 306-07. Second, Shamo testified Faissal Adan was present during the altercation. RP (5/24/16) 248-49, 290, 321. Adan was not interviewed or called as a witness. *See* RP (5/25/16) 368. The Court should grant review of this constitutional issue. RAP 13.4(b)(3).

6. Cumulative errors violated Henderson's constitutional right to a fair trial.

If the Court grants review, it should also consider whether cumulative error denied Henderson a constitutionally fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the

cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010).

The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

If not standing alone, then the combined effect of the prosecutorial misconduct and violations of due process and the privilege against self-incrimination require reversal. The prosecutor urged the jury not to consider any subjective evidence in determining whether the State disproved self-defense beyond a reasonable doubt. And he shifted the burden to the defense by questioning Henderson's lack of evidence to corroborate his own testimony. In combination, these two errors and the others discussed above denied Henderson a fair trial.

E. CONCLUSION

The Court should grant review of these important issues.

DATED this 22nd day of January, 2020.

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APPENDIX

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12/23/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MICHAEL HENDERSON, Appellant, v. STATE OF WASHINGTON, Respondent.	)	No. 75510-2-I DIVISION ONE UNPUBLISHED OPINION FILED: December 23, 2019

MANN, A.C.J. — Michael Henderson appeals his conviction for second degree felony murder. After we reversed Henderson's conviction based on instructional error, the Supreme Court reversed and remanded for consideration of Henderson's remaining arguments. Henderson argues that the State committed prosecutorial misconduct during closing argument. Henderson also raises several contentions in his statement of additional grounds under RAP 10.10.

We affirm.

I.

On review, the Supreme Court of Washington stated the facts as follows:

> On October 11, 2015, Henderson shot and killed 20-year-old Abdi. Abdi and his friends were socializing at a restaurant and, later, at a Shell gas station across the street. There, Abdi began arguing with Nekea Terrell.

> While Terrell was buying alcohol at the gas station, Abdi called her names and told her to hurry up. Terrell, Abdi, and Abdi's acquaintances continued to insult each other. One of Terrell's acquaintances tried to calm her down.
>
> Terrell knew Henderson because he dated her cousin. Terrell testified at trial that at this point, Abdi was "getting really bold" and "pumped up." Report of Proceedings (RP) (May 23, 2016) at 155. She said they continued to argue and she thought she was going to have to fight a "dude." Id. at 156. Terrell said she was ready to fight Abdi and Abdi never claimed he was armed or displayed a weapon. Henderson joined the small group gathered around Abdi and Terrell as they argued.
>
> Henderson, the people with him, and Abdi's group were "cussing each other out." RP (May 24, 2016) at 296. Nobody made overt threats, despite tension being high. To this point, no weapons were shown, seen, or talked about. Henderson testified that Abdi "flinched" his shoulders, lunged forward, moved his arms toward his waist, and seemed to reach for something in a pocket. RP (June 1, 2016) at 682. Henderson drew a handgun from his rear pants pocket, pointed it directly at Abdi, and pulled the trigger at close range. Abdi died almost instantly. The shooting was captured on surveillance video.
>
> Henderson's reason for drawing the gun, whether he pulled the trigger intentionally or accidentally, and his objective when he fired the weapon were all in dispute at trial. The jury found him guilty of felony murder based on second degree assault with a deadly weapon.

State v. Henderson, 192 Wn.2d 508, 510-11, 430 P.3d 637 (2018).

Henderson appealed his conviction to this court raising several issues including that the trial court erred in declining to instruct the jury on accidental homicide. We reversed Henderson's conviction based on the instructional error in an unpublished opinion. State v. Henderson, No. 75510-2-I, slip op. at 1 (unpublished) (Wash. Ct. App. Feb. 12, 2018), http://www.courts.wa.gov/opinions/pdf/755102.pdf, rev'd, 192 Wn.2d 508, 430 P.3d 637 (2018). The Supreme Court reversed our decision and remanded for us to consider the remaining arguments raised by Henderson. State v. Henderson, 192 Wn.2d at 510.

II.

Henderson argues the prosecutor committed misconduct during closing argument. We disagree.

Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). To prevail on a claim of prosecutorial misconduct, a defendant bears the burden of proving: (1) that the prosecutor's comments were improper and (2) that the comments were prejudicial. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). A prosecutor's "allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). In determining if the comments were prejudicial, "the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial." State v. Davenport, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984).

Henderson argues the prosecutor committed misconduct by making the following argument:

> Was there anything reasonable about what the defendant did here, ladies and gentleman, based on the information and the evidence that you have?
>
> He told you that "when I see someone who is making these hand gestures and moving, I naturally assume they are armed, so I'm going to shoot them if think they are armed."
>
> Is that really what we have come to? Is that really what the law is, that if a person can convince themselves that another person is armed and is threatening to them, that they can shoot them? Is that what these laws are intended for?
>
> Remember what I said in my opening closing arguments. The laws are designed to make sense.

(Emphasis added). Defense counsel objected, arguing that the prosecutor was inviting the jury to question the appropriateness of the law. The trial court overruled the objection, but stated,

> members of the jury, I'll reread to you a portion from Instruction No. 1: "Lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It's important to remember, however that the lawyers' statements are not evidence. Evidence is the testimony and exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." Go ahead, please.

The prosecutor then continued,

> So, ladies and gentlemen, when you go back to the jury room -- and I assume you will look at the video again -- you can look at it slowly or quickly or at normal speed. You have all sorts of options. But at the end of the day, you have to ask yourself this: was the defendant, given his situation, based on what you learned from him, reasonable?

Henderson argues the prosecutor's statement "misstated the law and encouraged the jury to go beyond the instructions to consider the appropriateness of the law." He argues that his defense depended on jurors being able to consider his subjective opinion when evaluating his right to act in self-defense. The State argues the prosecutor did not misstate the law, but simply highlighted the reasonableness element required for self-defense in response "to the defense argument, which attempted to portray the self-defense standard as being almost entirely subjective."

A claim of self-defense is assessed "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). In other words, the self-defense inquiry has both a subjective and an objective portion. Janes, 121 Wn.2d at

238. "The subjective portion ensures that the jury fully understands the defendant's actions from the defendant's own perspective, while the objective portion allows the jury to determine what a reasonably prudent person similarly situated would have done." Janes, 121 Wn.2d at 238.

It is not misconduct for the prosecutor to argue that evidence does not support the defense's theory or to fairly respond to defense counsel's argument. State v. Thorgerson, 172 Wn.2d 438, 449, 258 P.3d 43 (2011). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

Henderson argues the prosecutor's rhetorical questions referring to the intent of the law could be interpreted as encouraging jury nullification or jury activism. However, taken in the context of the rest of the argument, a more reasonable interpretation of the prosecutor's argument was as a call to the jury to question whether the hand movements Henderson saw would reasonably precipitate the shooting, which goes to the subjective element of self-defense. Moreover, even if the State did misstate the law, any improper comment was cured by the court instructing the jury to "disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." Additionally, the prosecutor immediately provided the correct standard, stating, "[b]ut at the end of the day, you have to ask yourself this: was the defendant, given his situation, based on what you learned from him, reasonable?"

In the context of the entire closing argument, the prosecutor's comment was not a misstatement of the law, and there is no substantial likelihood that the prosecutor's argument affected the jury verdict.

III.

Henderson raises several additional arguments in his statement of additional grounds. We address each in turn.

A.

Henderson argues that the prosecutor committed additional misconduct by shifting the burden to produce evidence onto Henderson. Henderson argues that the prosecutor committed misconduct by arguing:

> What's interesting, ladies and gentlemen, and maybe you picked up on this or maybe you didn't, there were numerous witnesses. I counted over 60 years of experience from police officers who worked that very area. Not one of them was asked, "What's that area like?" because the Rainier Valley, ladies and gentlemen, is not a war zone. The Rainier Valley is not the concrete jungle. It's a part of Seattle. Does crime happen there? Sure, it does. Does crime happen there more than other places? Possibly.
>
> The only person who provided you with this understanding of how this war zoned worked was the defendant.

Henderson did not object.

A prosecutor may not comment on the defense's lack of evidence because the defense has no duty to present evidence. Thorgerson, 172 Wn.2d at 467. An argument about the amount or quality of evidence presented by the defense, however, does not indicate that the burden of proof rests with the defense. Thorgerson, 172 Wn.2d at 466-67. A prosecutor can argue that the evidence does not support the defense's theory of the case. Lindsay, 180 Wn.2d at 431-32.

Henderson argues that the prosecutor's statement shifted the burden of proving the evidence onto the defense. Henderson claimed that the Rainer Beach area was similar to a war zone without providing any evidence to support this theory aside from his own opinion. Because the defense opened the door to the credibility of this evidence, the prosecutor was justified in arguing that the evidence did not support Henderson's characterization of Rainer Beach.

Further, when considering the prosecutor's statement in context of the argument, it is clear that prosecutor was questioning Henderson's credibility, rather than shifting the burden of producing evidence onto the defendant. Immediately after that statement, the prosecutor said

> Again, you have to assess credibility when he is telling you these things, ladies and gentlemen. If you find or believe that the defendant was not credible, was not telling the truth about certain things, you have to ask yourself, well, why? Why was he not being credible? Why would he say that if I know that's not true? Then you have to question further: is he credible at all? Can I believe anything he told me?

Here, the prosecutor was challenging Henderson's credibility and demonstrating that the evidence did not support Henderson's theory of the case.

B.

Henderson argues that the prosecutor committed additional misconduct by coercing Shamo into testifying. Because Henderson cannot assert this issue on Shamo's behalf, we disagree.

An aggrieved party who is entitled to appeal is a party whose personal right or pecuniary interests have been affected. State v. Taylor, 150 Wn.2d 599, 603, 80 P.3d 605, 607 (2003). "Fifth Amendment immunity is a personal right of the witness and cannot be claimed by third parties." Seventh Elect Church in Israel v. Rogers, 34 Wn.

App. 91, 95-96, 660 P.2d 290 (1983) (citing Rogers v. United States, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951)).

Henderson claims that Shamo was coerced into testifying. The right to assert a privilege belongs to the witness alone. Even though Shamo did not want to testify, and was threatened with contempt, he did testify in Henderson's trial. Because Henderson cannot appeal on behalf of Shamo, this argument fails.

C.

Henderson argues that the prosecution improperly withheld evidence, constituting a Brady violation. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). We disagree.

We review Brady claims de novo. State v. Davila, 184 Wn.2d 55, 74, 357 P.3d 636 (2015). "Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. To establish a Brady violation, the defendant must establish that: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, (2) the evidence must have been suppressed by the State, either willfully or inadvertently, and (3) the evidence must be material. Davila, 184 Wn.2d at 69.

Here, Henderson contends that the Brady violation stems from the content of trial testimony that was not previously disclosed to the defense. Specifically, Shamo testified that he picked up the screwdriver that was in the victim's pocket. Shamo also

testified that Faissal Adan was present during the investigation. Adan was not called as a witness.

Henderson has not demonstrated that this evidence was favorable to him, that this evidence was suppressed by the State, or that the evidence was material. Because Henderson has not established any of the elements of a Brady violation, Henderson did not establish that the prosecution improperly withheld evidence.

D.

Henderson argues that cumulative error violated his constitutional right to a fair trial. We disagree.

"Cumulative error may call for reversal, even if each error standing alone would be considered harmless." Thorgerson, 172 Wn.2d at 454. The doctrine does not apply, however, "where the defendant fails to establish how claimed instances of prosecutorial misconduct affected the outcome of the trial or how combined claimed instances affected the outcome of the trial." Thorgerson, 172 Wn.2d at 454.

Here, Henderson has not demonstrated the prosecutor's comments affected the outcome of the trial. Henderson cannot assert a claim for Shamo's alleged coerced testimony. Finally, Henderson has not demonstrated that the prosecution withheld evidence. Because Henderson has not established errors in these instances, or established how these claimed instances affected trial, his argument for cumulative error fails.

We affirm.

Mann, A.C.J.

WE CONCUR:

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. MICHAEL HENDERSON, Appellant.	)	No. 75510-2-I CERTIFICATE OF SERVICE

I, Marla Zink, state that on the below indicated date, I caused to be filed in the Court of Appeals – Division One the preceding document and a true and correct copy of the same to be served on the following in the manner indicated below:

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