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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEAN MICHAEL O'NEAL, Appellant.	No. 50796-0-II UNPUBLISHED OPINION ON REMAND

WORSWICK, J. — A jury returned verdicts finding Dean O'Neal guilty of first degree unlawful possession of a firearm and three counts of first degree assault. O'Neal appealed from his first degree assault convictions, asserting that (1) the trial court erred by providing a first aggressor jury instruction, (2) the prosecutor committed misconduct during closing argument, (3) his defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct and to the first aggressor jury instruction, and (4) cumulative error denied him a fair trial.[1] In our previous opinion, we held that the trial court erred in giving the first aggressor jury instruction and that this constitutional error was not harmless. We also held that none of the additional issues raised in O'Neal's Statement of Additional Grounds warranted relief. Subsequently, our Supreme Court remanded this case back to our court for reconsideration in light of its decision in *State v. Grott*, 195 Wn.2d 256, 458 P.3d 750 (2020), which clarified several issues regarding first aggressor instructions.

[1] O'Neal raised several additional arguments in a Statement of Additional Grounds, which we addressed in our first opinion. We do not revisit those claims.

In light of *Grott*, we hold that O'Neal cannot challenge the first aggressor instruction for the first time on appeal because its issuance was not a manifest error affecting a constitutional right. However, we also hold that the prosecutor's closing argument amounted to misconduct, and O'Neal received ineffective assistance of counsel when defense counsel failed to object to the prosecutorial misconduct during closing argument. Accordingly, we reverse his first degree assault convictions and remand for a new trial on those charges.

FACTS

On April 4, 2016, Tacoma Police Officer Leslie Jacobsen responded to a report of multiple gunshots fired at a gas station in Tacoma's Hilltop neighborhood. When Officer Jacobsen arrived, a nearby resident told her that a bullet had struck his neighbor's gas meter. Officer Jacobsen saw bullet damage to the gas meter and to two nearby houses. Officer Jacobsen also saw bullet damage to three of the gas station's gas pumps. Police officers recovered a bullet and five shell casings from the scene.

Tacoma Police Detective Kimberly Cribbin retrieved security video footage of the shooting incident. The video shows a white Ford sedan pull into a crowded gas station parking lot and stop next to a gas pump. A white male, later identified as O'Neal, exits the passenger side of the car and appears to exchange words with three occupants of a dark-colored vehicle at a different gas pump. Several other vehicles are at the gas station, including a maroon Dodge. As the dark-colored vehicle starts to drive away from the gas pump, O'Neal leans into the white Ford through the front passenger side window. A female passenger of the dark-colored vehicle sticks her head out of the back window and appears to say something to O'Neal while the vehicle slowly exits the parking lot. The passenger is also waiving her hand and it appears she is either holding a pistol or pointing her finger and making a gun-like gesture. O'Neal walks toward the

dark-colored vehicle, pulls out a handgun from his waistband, and quickly fires a shot before walking back to the white Ford. As the dark-colored vehicle drives on the street in front of the gas station, O'Neal appears to take cover from shots fired in his direction before firing multiple shots at the dark-colored vehicle.

On May 5, 2016, the State charged O'Neal with first degree unlawful possession of a firearm and three counts of first degree assault. On May 21, 2016, Pierce County Sheriff's Deputy Matthew Smith initiated a traffic stop on a vehicle in which O'Neal was a passenger. Deputy Smith arrested O'Neal after a records check showed that he had a felony arrest warrant for his alleged conduct at the gas station. Deputy Smith told O'Neal that he was being arrested for suspected first degree unlawful possession of a firearm and three counts of first degree assault. O'Neal was visibly upset and crying while waiting to be booked at the jail, telling Smith that he was "going to be in prison for life over this." 3 Verbatim Report of Proceedings (VRP) at 195.

Tacoma Police Detective Vicki Chittick interviewed Danielle Carter, a person associated with the maroon Dodge that was at the gas station on the night of the shooting. Based on information obtained during her interview with Carter, Detective Chittick sought to locate and interview Alyxandria McGriff, Jessica Handlen, and Christopher Legg. Detective Chittick interviewed McGriff and Legg but could not locate Handlen. During her interview with Legg, Legg told Detective Chittick that he was shot at, but he did not say who shot at him or why. Legg then told Detective Chittick that he does not speak with police before leaving the room and slamming the door.[2]

[2] Chittick's testimony regarding Legg's statements were admitted at trial for the limited purpose of determining Legg's credibility.

Detective Chittick also interviewed O'Neal at the jail. Detective Chittick told O'Neal that he had been identified as the shooter and showed him photographs taken from the security video. O'Neal denied having knowledge of the shooting incident and said that he would not say anything even if he knew something "because he wasn't a rat or a snitch." 3 VRP at 299. Before trial, the State obtained material witness warrants for McGriff, Handlen, Carter, and Legg. Only Legg appeared at trial to testify.

At trial, Officer Jacobson, Detective Cribbin, Deputy Smith, and Detective Chittick testified consistently with the facts stated above. The security video showing the shooting was played for the jury.

Detective Chittick also testified that people who are shot at are not always willing to cooperate with police and that courts may have to issue material witness warrants to compel people to testify at trial. Detective Chittick stated that multiple warrants had to be issued to compel Legg to testify and that there were currently outstanding warrants for Carter, Handlen, and McGriff. Detective Chittick said that she believed Carter was in Idaho and that material witness warrants are not enforced outside of the issuing state. The State asked Detective Chittick about Carter's unwillingness to return to Washington to testify, and defense counsel objected. The trial court sustained the objection, stating that there was not adequate foundation for Detective Chittick to testify about Carter's reasons for not returning to Washington to testify.

Drake Ackley testified that he lives in Gig Harbor and was at the Tacoma gas station on the night of the shooting. Ackley stated that he was looking between the seats of his car for his cell phone when he heard gunshots. Ackley also stated that, immediately before hearing the gunshots, he heard a female voice yelling or screaming something in a hostile manner. Ackley said that it "sounded like something was about to happen, like I figured someone was about to

get beat up or something." 4 VRP at 357. When the State asked whether he could detect an accent in the female's voice, Ackley responded that it sounded "like a hood rat tone." 4 VRP at 357. The State asked what a "hood rat tone" meant, and Ackley stated, "Very street, ethnic tone." 4 VRP at 358.

Legg testified that he did not remember being at a gas station during a shooting. Legg stated that he did not recognize himself or the car in the security video footage. Legg further stated that he remembered Detective Chittick attempting to interview him but that he does not talk to police. Legg denied telling Detective Chittick that he was at the gas station on the night of the shooting or that someone had shot at him.

O'Neal also testified. He admitted that he was the person on the security video firing a handgun but claimed he was acting in self-defense. O'Neal testified that he heard a female screaming and yelling at him. O'Neal stated that he saw the female hanging out the back of a car and that he thought he saw a gun. O'Neal said that he heard a gunshot and fired one shot because he felt threatened and was afraid of getting shot again. O'Neal stated that more gunshots were fired at him and that he took cover before returning fire at the vehicle. O'Neal also testified that he had been shot in the stomach in 2015 and required the use of colostomy bag.

On cross-examination, the State asked O'Neal, "[t]he colostomy bag that you have, it's because you shot yourself, right?" 5 VRP at 438. When O'Neal answered "no," the State asked him who had shot him, to which O'Neal replied that he did not know. When asked why he did not report the 2015 shooting to the police, O'Neal responded that he did not have any reason for not reporting it. O'Neal also testified that he did not remember who was in the car with him on the night of the shooting.

The trial court provided the jury with a first aggressor instruction that stated:

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

Clerk's Papers (CP) at 58. Defense counsel did not object to this instruction.

During closing, the State argued:

> Victims of a shooting who nearly got killed that night, who don't stick around and don't want to cooperate or report to the police.
>
> The defendant, who nearly kills others and nearly gets a whole bunch of other people, innocent bystanders, killed that night, who doesn't want to stick around and tell the police about what he did.
>
> Whole bunch of people in that parking lot that night, who once the scene is safe and once these players are all out of there don't want to stick around because they know the police are coming and have no interest in reporting to the police what happened that night.
>
> Witnesses and victims of crimes who don't want to come in and testify. Warrants have to be issued for them to try and find them, and when they are found are told by the Court you stay in touch with the state, you stay in touch with the prosecutor, and then they just disappear again. And even when they are found, they get on the stand and they tell you something entirely different from what they told a detective.
>
> Someone like the defendant who takes the stand, swears to tell the truth, and then just lies through his teeth.
>
> All of it, all of it is a black eye and shameful, shameful, all of it, all around.
>
> And what it tells you is that you cannot always rely on human beings to do the right thing. That more often than not all someone cares about is me. I don't care about how dangerous this was. I don't care about doing the right thing and coming in to testify. I don't care about honoring the oath I swear to tell the truth. I just don't care. What's most in my personal interest.
>
> And so what it should tell you is that when you can't rely on human beings to do the right things, you have to look for other types of proof, other types of evidence.

6 VRP at 511-12. O'Neal did not object to this argument. Later in its closing argument, the State discussed the legal standards for evaluating a self-defense claim as provided in the jury instructions, stating:

> The law talks about what would a reasonably prudent person do. Not what Dean O'Neal would do, because Dean O'Neal would tell you that I had to act in self-defense no matter what. What would a reasonably prudent person do.
>
> And you're reasonably prudent people. That's your job, to decide what a reasonably prudent person would do.
>
> The law also talks about look at all the circumstances, everything that was happening, to gauge whether a reasonably prudent person would have done what the defendant did that night.
>
> If—if, hypothetically, someone from that car did shoot first, but then they're driving off and they are no longer a threat to you, you don't get to return fire and call it self-defense, because it's not necessary.

6 VRP at 523. During the defense closing, defense counsel referred to Ackley's testimony regarding a female yelling something in a hostile tone, stating, "If Mr. Ackley can have that same uneasy queasy feeling that something is about to happen, why can't Dean O'Neal have that same uneasy queasy feeling that something bad is about to happen." 6 VRP at 557.

The State addressed defense counsel's reference to Ackley's testimony in its rebuttal closing, arguing:

> Do not compare those two people. Mr. Ackley, *straightlaced from Gig Harbor* is not the defendant. Mr. Ackley, coming over at midnight to the Hilltop to get some gas, doesn't have the same state of mind as the defendant.
>
> Yeah. Mr. Ackley there at midnight hears a woman yelling, hears a woman taunting, hears a woman running her mouth. It probably did make him queasy. Anyone who's just a normal, everyday person who sees that unfold at a gas station would get uncomfortable.
>
> Maybe you've been there and just someone is acting crazy; someone is being stupid; someone is creating drama and makes you uncomfortable.

> And of course, it really makes Mr. Ackley uncomfortable when he thinks about that in the context of what happened afterwards.
>
> But just because Mr. Ackley got uncomfortable with what he heard that night doesn't tell you that what the defendant did was justified. Because you don't get to shoot someone for running their mouth.

6 VRP at 575-76 (emphasis added). Finally, in rebuttal, the State also argued:

> When you talk about self-defense, it's very tempting to say well, no one got hit that night, or the victims are probably dirtbags, or the victims don't care so why should we. It's very tempting to have that state of mind.
>
> But be mindful of how dangerous this was in the bigger picture. Be mindful how innocent people could have been hit and killed that day.
>
> And when you're thinking about the idea that this was self-defense, remember what you're justifying. When you say that something is self-defense, you say that pulling that trigger was justified, consequences be damned.
>
> Wherever that bullet goes after it leaves the barrel of that gun, it's irrelevant to the equation.
>
> You are saying that in the moment that the defendant pulled that trigger that was a lawful act of self-defense, and whatever happens as a result is irrelevant to the equation. The fact that no one was hit, irrelevant. If someone driving down Sprague had been hit, caught in the crossfire, tragic, irrelevant to the equation.
>
> If that bullet pierces that gas vein at 1018 South Sprague Street and the home erupts, tragic. But the act of pulling that trigger was justified.
>
> So whatever your conclusion is about self-defense, make sure that you're comfortable with that conclusion regardless of the consequences, because the consequences tell you the reasonableness of the actions.

6 VRP at 576-77. Defense counsel did not object to this argument.

The jury returned verdicts finding O'Neal guilty of first degree unlawful possession of a firearm and three counts of first degree assault. The jury also returned special verdicts finding that O'Neal was armed with a firearm during his commission of the first degree assaults. The trial court imposed an exceptional downward sentence of 342 months of incarceration and 36 months of community custody. O'Neal appeals his first degree assault convictions.

ANALYSIS

I. FIRST AGGRESSOR INSTRUCTION NOT PRESERVED FOR APPEAL

O'Neal argues that the trial court erred by providing the jury with a first aggressor instruction because his only alleged conduct provoking the need to act in self-defense was the charged assault itself. In our previous opinion, we held that giving the first aggressor instruction involved a manifest error affecting a constitutional right such that O'Neal could raise the issue for the first time on appeal. *State v. O'Neal*, No. 50796-0-II, slip op. at 6-7 (Wash. Ct. App. Sept. 4, 2019) (unpublished), https://www.courts.wa.gov/opinions/. Since we issued our opinion, the Supreme Court decided *Grott* and clarified when unpreserved objections to first aggressor instructions may be reviewed on appeal under RAP 2.5(a)(3). 195 Wn.2d at 268-69. The Supreme Court remanded this case back to our court for reconsideration in light of *Grott*. Accordingly, we revisit the issue.

Generally, a defendant cannot challenge a jury instruction on appeal if they did not object to the instruction in the trial court. *Grott*, 195 Wn.2d at 267; CrR 6.15(c). But under RAP 2.5(a)(3), an appellant may raise an error for the first time on appeal if the error is "manifest" and truly of constitutional dimension. *Grott*, 195 Wn.2d at 267. The appellant must identify an error of constitutional magnitude and make a "'plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case.'" *Grott*, 195 Wn.2d at 269 (internal quotation marks omitted) (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)).

Jury instruction errors that have been held to be manifest constitutional errors involve errors "'directing a verdict, shifting the burden of proof to the defendant, failing to define the beyond a reasonable doubt standard, failing to require a unanimous verdict, and omitting an

element of the crime charged.'" *Grott*, 195 Wn.2d at 268 (internal quotation marks omitted) (quoting *O'Hara*, 167 Wn.2d at 100-01). *Grott* clarified that rather than relieving the State of its burden to prove beyond a reasonable doubt that a defendant did not act in self-defense, a first aggressor instruction explains to the jury one way in which the State may meet its burden. 195 Wn.2d at 268. Thus, erroneously given first aggressor instructions are not necessarily errors of constitutional magnitude. *Grott*, 195 Wn.2d at 268-69.

The *Grott* court held that because Grott was not prevented from arguing his theory of the case, and because the first aggressor instruction properly held the State to its burden of proof by requiring the jury to find that Grott was the aggressor beyond a reasonable doubt and that his acts and conduct provoked the fight, the error was not of constitutional magnitude. 195 Wn.2d at 269.

Here, as in *Grott*, the jury was instructed on self-defense, and O'Neal was not prevented from arguing that theory of the case. Additionally, the first aggressor instruction did not relieve the State of its burden of proof but instead accurately required the jury to find beyond a reasonable doubt that O'Neal was the aggressor and that his actions and conduct provoked or commenced the fight. Accordingly, even if the first aggressor instruction was erroneously given, here, the error was not of constitutional magnitude, and O'Neal cannot challenge it for the first time on appeal.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

O'Neal also argues that he received ineffective assistance of counsel because counsel failed to object to the prosecutor's improper statements during closing argument.[3] We agree.

[3] O'Neal also argues that he received ineffective assistance of counsel because counsel failed to object to the first aggressor instruction. Because we otherwise reverse O'Neal's convictions, we do not address this issue.

To prove that he received ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient and (2) that the deficient performance resulted in prejudice. *State v. Linville*, 191 Wn.2d 513, 524, 423 P.3d 842 (2018). Defense counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). We presume counsel is effective, and the defendant must show there was no legitimate strategic or tactical reason for counsel's action. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish prejudice, the defendant must show a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. *Grier*, 171 Wn.2d at 34. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

O'Neal also argues that he received ineffective assistance of counsel based on counsel's failure to object to the State's prosecutorial misconduct during closing arguments. We agree.

It is improper for a prosecutor to "'use arguments calculated to inflame the passions or prejudices of the jury.'" *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (quoting Am. Bar Ass'n., *Standards for Criminal Justice std*. 3-5.8(c) (2d ed. 1980)). A prosecutor improperly appeals to the passions and prejudices of a jury when arguing for the jury to convict a defendant "in order to protect the community, deter future law-breaking, or other reasons unrelated to the charged crime." *State v. Ramos*, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011) (discussing holding in *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991)).

A prosecutor commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Such misstatements have "grave potential to mislead the jury."

State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Repetitive misconduct can have a cumulative effect. *Allen*, 182 Wn.2d at 376.

Here, the prosecutor repeatedly used inflammatory arguments during closing which not only appealed to the passions and prejudices of the jury but also misstated the law of self-defense. The prosecutor argued that the jury should consider the "bigger picture" of how "dangerous" firing a gun at a gas station was when determining whether O'Neal acted in self-defense. 6 VRP at 576. The prosecutor also argued that the jury should be "mindful" of the potential injury to persons and property that could have occurred when deciding whether O'Neal's firing of a handgun was "justified, consequences be damned." 6 VRP at 576-77. And the prosecutor argued that, should the jury determine that O'Neal acted in self-defense, it would be justifying the "tragic" consequences that could have occurred from his act, such as "someone driving down" the street being "caught in the crossfire" or a home erupting as a result of a "bullet pierc[ing a] gas vein." 6 VRP at 577. Additionally, and perhaps most concerning, the prosecutor argued that the jury must be "comfortable" with these potential extraneous and hypothetical consequences when deciding whether O'Neal acted in self-defense. 6 VRP at 577.

These improper comments misstated the law on self-defense—a key issue in the case. The trial turned on whether O'Neal shot in self-defense. "The use of force is lawful and justified where the defendant has a 'subjective, reasonable belief of imminent harm from the victim.'" *Grott*, 195 Wn.2d at 266 (quoting *State v. LeFaber*, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), *abrogated on other grounds by O'Hara*, 167 Wn.2d at 91). Evidence of self-defense is properly evaluated "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). While a jury is to assess a claim of self-defense from the standpoint of a reasonably

prudent person, it must consider the conditions from the defendant's point of view as they appeared to him at the time of the act. *State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984).

The prosecutor's comments urged the jury to find that O'Neal did not act in self-defense based on potential collateral consequences identified with the benefit of hindsight. This is not the law. The prosecutor's purported rendition of self-defense is particularly troublesome in urban settings where the need to defend oneself is likely to arise in an area with more bystanders or nearby buildings. The law of self-defense does not require a defendant to consider every potential extraneous consequence that could occur before defending himself when he has a reasonable belief of imminent harm.

The prosecutor further improperly appealed to the jury's passions and prejudices by emphasizing the "shameful" behavior of witnesses who refused to testify or cooperate with law enforcement.

> Whole bunch of people in that parking lot that night, who once the scene is safe and once these players are all out of there don't want to stick around because they know the police are coming and have no interest in reporting to the police what happened that night.
>
> . . . .
>
> All of it, all of it is a black eye and shameful, shameful, all of it, all around.

VRP 511-12. This argument impermissibly suggested to the jury that these potential witnesses had additional knowledge favorable to the State which, but for their "shameful" refusal to cooperate, would have been presented. *See State v. Boehning*, 127 Wn. App. 511, 521-22, 111 P.3d 899 (2005).

The prosecutor's loaded emotional appeal to the jury continued as it distinguished Ackley's experience at the gas station from O'Neal's:

> Do not compare those two people. Mr. Ackley, *straightlaced from Gig Harbor* is not the defendant. Mr. Ackley, coming over at midnight to the Hilltop to get some gas, doesn't have the same state of mind as the defendant.
>
> Yeah. Mr. Ackley there at midnight hears a woman yelling, hears a woman taunting, hears a woman running her mouth. It probably did make him queasy. Anyone who's just a normal, everyday person who sees that unfold at a gas station would get uncomfortable.

6 VRP 575-76 (emphasis added). While the prosecutor did not explicitly invoke race or socioeconomic status, subtle references can be just as insidious. *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011).

The prosecutor's arguments were inflammatory, appealing to the emotions of the jury rather than the evidence presented at trial. The improper comments misstated the law on self-defense—a key issue at trial. The arguments were so removed from the appropriate reasonableness standard as to constitute a bare emotional appeal to the jury's passions and prejudices.

Defense counsel's failure to object to these comments constituted deficient performance. Not only did the prosecutor's comments improperly appeal to the emotions of the jury, they directly obfuscated O'Neal's defense theory of self-defense. There is no legitimate strategic or tactical reason for not objecting to such improper comments; the prosecutor's comments undermined O'Neal's argument and many of the comments were made during closing rebuttal when O'Neal had no opportunity to respond. We therefore hold that defense counsel performed deficiently by not objecting to these improper arguments.

Defense counsel's deficient performance prejudiced O'Neal. Defense counsel's failure to object to the prosecutor's improper remarks during closing argument undermined O'Neal's self-defense theory by misstating the law and encouraged the jurors to reach a verdict based on their passions and prejudices as opposed to the evidence presented at trial. Had counsel objected, the

trial court could have issued curative instructions and stopped the State's inflammatory arguments. Instead, defense counsel's failure to object implied to the jury that nothing was wrong with these comments. Given the misleading and inflammatory nature of the State's comments, it is reasonably probable that there may have been a different outcome at O'Neal's trial had defense counsel objected to the State's improper closing argument.

Accordingly, we reverse O'Neal's first degree assault convictions and remand for a new trial on those charges.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Lee, C.J.

Cruser, J.