

62696-5

62696-5

NO. 62696-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL RELFE,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GEORGE T. MATTSON

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**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	4
C. <u>ARGUMENT</u> .....	9
1. THE JURY WAS CLEARLY AND CORRECTLY INSTRUCTED ON THE STATE'S BURDEN OF PROVING THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT .....	9
2. THE TRIAL COURT EXERCISED SOUND DISCRETION IN REJECTING RELFE'S PROPOSED INSTRUCTIONS ON ASSAULT IN THE THIRD DEGREE BECAUSE THE FACTS DID NOT SUPPORT THESE INSTRUCTIONS .....	15
3. THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT WERE PROPER, HARMLESS, OR BOTH .....	26
D. <u>CONCLUSION</u> .....	31

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Beck v. Alabama, 447 U.S. 625,  
100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)..... 17, 22

Schad v. Arizona, 501 U.S. 624,  
111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991)..... 24, 25

Spaziano v. Florida, 468 U.S. 447,  
104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984)..... 23

Washington State:

In re Personal Restraint of Relfe, 138 Wn. App. 1032,  
2007 WL 1314547 ..... 3

State v. Acosta, 101 Wn.2d 612,  
683 P.2d 1069 (1984)..... 13, 14

State v. Alphonse, 147 Wn. App. 891,  
197 P.3d 1211 (2008), rev. denied,  
166 Wn.2d 1011 (2009)..... 11

State v. Bowerman, 115 Wn.2d 794,  
802 P.2d 116 (1990)..... 17

State v. Boyer, 91 Wn.2d 342,  
588 P.2d 1151 (1979)..... 11

State v. Bradley, 141 Wn.2d 731,  
10 P.3d 358 (2000)..... 11

State v. Brown, 132 Wn.2d 529,  
940 P.2d 546 (1997)..... 26, 27

State v. Brown, 147 Wn.2d 330,  
58 P.3d 889 (2002)..... 14, 15

<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	27
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003).....	14, 15
<u>State v. Eastmond</u> , 129 Wn.2d 497, 919 P.2d 577 (1996).....	14
<u>State v. Enstone</u> , 137 Wn.2d 675, 974 P.2d 828 (1999).....	18
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	17
<u>State v. Guilliot</u> , 106 Wn. App. 355, 22 P.3d 1266 (2001).....	25
<u>State v. Hansen</u> , 46 Wn. App. 292, 730 P.2d 706 (1986).....	25
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	13, 14
<u>State v. Jones</u> , 95 Wn.2d 616, 628 P.2d 472 (1981).....	22
<u>State v. Kincaid</u> , 103 Wn.2d 304, 692 P.2d 823 (1985).....	11
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	12
<u>State v. Labanowski</u> , 117 Wn.2d 405, 816 P.2d 26 (1991).....	21
<u>State v. McClam</u> , 69 Wn. App. 885, 850 P.2d 1377, <u>rev. denied</u> , 122 Wn.2d 1021 (1993).....	18
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	12

<u>State v. Neher</u> , 112 Wn.2d 347, 771 P.2d 330 (1989).....	11
<u>State v. O'Hara</u> , ___ Wn.2d ___ (No. 81062-1, filed 10/1/09).....	11, 12, 14
<u>State v. Parker</u> , 102 Wn.2d 1, 683 P.2d 189 (1984).....	22
<u>State v. Relfe</u> , 128 Wn. App. 1048, 2005 WL 1729703 .....	2, 3
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	14, 15
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001).....	22
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	27
<u>State v. Walden</u> , 131 Wn.2d 469, 932 P.2d 1237 (1997).....	23
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	18
<u>State v. Warden</u> , 133 Wn.2d 559, 947 P.2d 708 (1997).....	17
<u>State v. Workman</u> , 90 Wn.2d 443, 548 P.2d 382 (1978).....	16

Statutes

Washington State:

RCW 9.94A.535 .....	24
RCW 9A.08.010 .....	18, 20
RCW 10.61.003.....	16

Rules and Regulations

Washington State:

RAP 2.5..... 11, 12

Other Authorities

WPIC 17.02..... 13

**A. ISSUES PRESENTED**

1. Under Washington law, the State has the burden of disproving self-defense beyond a reasonable doubt. Controlling authorities hold that the jury should be given a separate instruction that clearly sets forth the State's burden of proof, and that the absence of self-defense need not be in the "to convict" instruction. In this case, Relfe proposed instructions consistent with these controlling authorities, and the trial court gave instructions consistent with these controlling authorities. Relfe now challenges these instructions for the first time on appeal. Should his claim be rejected?

2. A defendant is entitled to instructions on a lesser degree offense if the evidence supports a reasonable inference that the lesser offense was committed instead of the greater offense. Also, if the jury is given a choice between the charged offense and a lesser offense and convicts the defendant as charged, the failure to give additional lesser offense instructions is harmless. In this case, Relfe proposed third-degree assault instructions, despite the fact that he intentionally fired his gun and shot the victim in the back. The jury was instructed on first-degree assault as charged, and on second-degree assault as a lesser offense. The jury convicted

Relfe as charged. Did the trial court exercise sound discretion in refusing to instruct the jury on third-degree assault, and was the failure to do so harmless?

3. A defendant who claims that prosecutorial misconduct in closing argument deprived him of a fair trial must demonstrate both that the remarks were improper and that prejudice resulted. If the defendant did not object at trial, he must show that the remarks were so flagrant and ill-intentioned that a curative instruction would not have ameliorated the resulting prejudice. In this case, the remarks that Relfe claims were improper were not objected to at trial. The record shows that the prosecutor's remarks were proper, harmless, or both. Do Relfe's claims fail?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The State charged the defendant, Michael Relfe, with assault in the first degree with a firearm enhancement for shooting James Lee on July 22, 2002 following a road rage incident. CP 1-4. The jury in Relfe's first trial was unable to reach a verdict. The second jury convicted Relfe as charged, and this Court affirmed that conviction in an unpublished opinion. State v. Relfe,

128 Wn. App. 1048, 2005 WL 1729703. Two years later, this Court granted Relfe's personal restraint petition and remanded for a new trial on grounds that Relfe's trial counsel was ineffective for failing to request instructions on the lesser degree offense of assault in the second degree. In re Personal Restraint of Relfe, 138 Wn. App. 1032, 2007 WL 1314547.

Relfe's third trial took place in October 2008 before the Honorable George Mattson. As he had in the first two trials, Relfe claimed that he had acted in self-defense, and the jury was instructed accordingly. CP 42-45, 84-87. In addition, in accordance with this Court's ruling on Relfe's personal restraint petition, Relfe requested and the trial court gave instructions on the lesser degree offense of assault in the second degree. CP 47-49, 78-83. The trial court rejected Relfe's proposed instructions on assault in the third degree, finding that the evidence did not support an inference that Relfe had acted only with criminal negligence in shooting James Lee. CP 50-52; RP (10/20/08) 2-7.

After hearing all of the evidence, the jury convicted Relfe of first-degree assault with a firearm enhancement as charged. CP 60-61; RP (10/21/08) 45-52. Relfe requested an exceptional sentence below the standard range on grounds that James Lee had

initiated, participated in, and provoked the incident, and on grounds of failed self-defense.<sup>1</sup> CP 107-10. The trial court imposed a mitigated exceptional sentence of 120 months on grounds that Lee had initiated, participated in, or provoked the incident to a significant degree. CP 191-94, 197-204; RP (11/14/08) 75-78. Relfe now appeals. CP 205-15.

## **2. SUBSTANTIVE FACTS**

In the evening on July 22, 2002, Bob Cole was driving in the Auburn area, and had just turned off the West Valley Highway onto Peasley Canyon Road when he noticed a Ford Probe, which was driven by Relfe, driving directly in front of him. Cole then saw a flatbed truck, driven by James Lee, passing him on the left and pulling up parallel to the Probe. RP (10/15/08) 109-10. At that point, the truck swerved and hit the Probe on the driver's side, then swerved back into the left lane of travel. Although Cole expected that both drivers would pull over after such a "severe" collision, the truck accelerated and the Probe took off after it. RP (10/15/08)

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<sup>1</sup> Relfe had also requested and received a mitigated exceptional sentence after his first conviction. CP 5-11, 18.

109, 112. After he got home, Cole called 911 to report what he had seen. Ex. 44.

Loran Hayworth was riding his motorcycle that evening when he looked in his rearview mirrors and saw Lee's flatbed truck and Relfe's Ford Probe pull up behind him on Peasley Canyon Road. RP (10/14/08) 102-04. Hayworth noted that the drivers of both vehicles were agitated, and that both drivers were exchanging obscene and/or threatening hand gestures. RP (10/14/08) 104-05. As Hayworth continued up Peasley Canyon Road, he looked in his mirrors again and saw the truck directly behind him and the Probe driving next to the truck on the shoulder. RP (10/14/08) 105-06. The truck then accelerated and passed Hayworth at a fairly high rate of speed, and ran over the curb making a right turn on a side street. Immediately after that, the Probe also ran over the curb while making the turn in pursuit of the truck. RP (10/14/08) 106-08. As the Probe passed Hayworth, Hayworth saw "creases" on the side of the car, leading Hayworth to believe that the Probe and the truck had collided. RP (10/14/08) 110. Hayworth pulled over and called 911 to report what he had seen. Ex. 44.

John Duchemin and his wife were out walking in their neighborhood when they heard Lee's truck and Relfe's Probe

pulling up behind them. RP (10/15/08) 130-32. After the two vehicles stopped, Duchemin heard what he described as a "loud conversation" followed by a gunshot. RP (10/15/08) 132-33. After Duchemin heard someone yelling that they had been shot, he turned and saw Lee getting into his truck, while Relfe moved his car in front of the truck in order to block it. RP (10/15/08) 134-38. Duchemin also saw Lee's passenger, Mark Morgan, get out of the truck and walk away. RP (10/15/08) 145-46.

David Parks was standing on the roof of his garage, doing some home repairs, when the truck and the Probe suddenly pulled up in front of his house. RP (10/15/08) 7. After the vehicles came to a stop in front of Parks's house, Lee got out of the truck and walked back to the driver's window of the Probe. Parks could hear Lee and Relfe "yelling and screaming at each other" at Relfe's driver's side window. RP (10/16/08) 11. After 5 to 15 seconds of yelling, Parks saw Lee walk back to the truck and put his right foot and right hand inside, as if he were about to leave. RP (10/16/08) 15-16. Parks then saw Relfe get out of his car and walk to the rear bumper of Lee's truck with a gun in his right hand. As the two men continued to yell at each other, Relfe shot Lee in the back. RP (10/16/08) 16-19. Immediately after the gunshot, Parks saw

Morgan get out of the truck and walk away. Parks noted that Morgan was staggering and appeared to be intoxicated. RP (10/16/08) 23-24. Parks told his wife to call 911, and she did so. RP (10/16/08) 21; Ex. 44.

James Lee testified at trial, but he had suffered a serious head injury on a job site in May 2005, which resulted in severe memory loss. He remembered nothing about the shooting, or the events leading up to it. RP (10/15/08) 57. Accordingly, Lee read his prior testimony from Relfe's previous trial. RP (10/15/08) 61-62. According to Lee's prior testimony, Lee had been working on July 22, 2002. He worked as a "hod carrier," which is a bricklayer's assistant. RP (10/15/08) 64. Lee went to Mark Morgan's apartment and had approximately 3 beers before he and Morgan decided to drive to the store for more beer. RP (10/15/08) 64-65.

Lee said that he accidentally cut Relfe off on the West Valley Highway, and that he made a friendly gesture out the window to apologize. According to Lee, Relfe responded by pulling in front of him and hitting his brakes, "and the little road rage thing began." RP (10/15/08) 66. Lee denied colliding with Relfe's car, and stated that Relfe pursued him until Lee finally pulled over in a residential area to apologize. RP (10/15/08) 66-67. When Lee approached

Relfe's car, he saw that Relfe had a gun. As Lee turned around to leave, he felt a "sting" in his back. RP (10/15/08) 68-69.

Relfe did not testify at trial, but his statements to the 911 operator and to the detectives following his arrest were admitted and played for the jury. Ex. 41, 44. Relfe first called 911 at the point where he was turning right in pursuit of Lee, as seen by Loran Hayworth, to report that he had been the victim of a hit and run. Ex. 44, p. 1-2. Relfe next spoke to 911 after the shooting,<sup>2</sup> when he reported that "I think he was beating the crap out of me and he saw the pistol and he jumped back and I shot him." Ex. 44, p. 9.

In speaking with the detectives following his arrest, Relfe claimed that Lee had pulled over and assaulted him three times during the road rage incident. Relfe also claimed that he had never got out of his car, even when he fired the gun. Ex. 41, p. 5-6, 8, 13. Relfe said he pulled the .38 revolver out of the door pocket, and "by the time I pulled the trigger, [Lee] had turned around and was on his, trying to get the hell out of Dodge." Ex. 41, p. 7. Although Relfe claimed that he was not aiming the gun at Lee, he admitted that he pointed it in Lee's direction "to scare him." Ex. 41, p. 7-8.

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<sup>2</sup> Remarkably, the 911 operator who was speaking with David Parks's wife asked her to walk outside and hand her cordless phone to Relfe. Ex. 44, p. 7. David Parks was, quite understandably, alarmed by this. RP (10/16/08) 22.

On the other hand, Relfe stated that he had shot Lee intentionally because he feared for his life. Ex. 41, p.14.

As a result of being shot in the back, Lee suffered injuries to his kidney, colon, large intestine, and diaphragm. Without emergency surgery and medical treatment, Lee would have died. RP (10/16/08) 119-20. As it was, Lee suffered serious complications, and had to have additional surgical procedures as a result of his injuries. RP (10/16/08) 120-22.

**C. ARGUMENT**

**1. THE JURY WAS CLEARLY AND CORRECTLY INSTRUCTED ON THE STATE'S BURDEN OF PROVING THE ABSENCE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT.**

Relfe first argues that the trial court's instructions to the jury were inadequate on the issue of self-defense. Specifically, Relfe argues that the "to convict" instruction for assault in the first degree omitted an essential element because it did not include the State's burden to disprove self-defense beyond a reasonable doubt. Relfe further argues that this is a so-called "structural error," which mandates reversal, or, in the alternative, that the error is not harmless. Brief of Appellant, at 7-14.

This claim should be rejected. First, because Relfe did not object to the "to convict" instruction for first-degree assault, and because Relfe proposed "to convict" instructions on two lesser degree offenses that also did not include the lack of self-defense as an element of those crimes, the error Relfe alleges is both invited and not preserved, and thus, it cannot be raised. But in any event, the jury was correctly instructed on the State's burden of disproving self-defense beyond a reasonable doubt in a separate instruction as required. Therefore, whether invited or otherwise, no error occurred.

As a preliminary matter, it is not disputed that Relfe did not object to the "to convict" instruction for assault in the first degree as given by the trial court. CP 75; RP (10/20/08) 33. In fact, Relfe proposed "to convict" instructions for the lesser degree crimes of assault in the second degree and assault in the third degree that also did not include the absence of self-defense as an element of those lesser crimes. CP 49, 52.

To the extent Relfe argues that the absence of self-defense is an essential element of any crime when self-defense is claimed at trial, and that it is error not to include such language in every "to convict" instruction given to the jury, any such error is invited

because Relfe proposed instructions that lacked the very same language that he now claims is essential. Relfe is thus barred from raising this issue on appeal under the doctrine of invited error. State v. Alphonse, 147 Wn. App. 891, 899, 197 P.3d 1211 (2008), rev. denied, 166 Wn.2d 1011 (2009) (citing State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)); State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000); State v. Neher, 112 Wn.2d 347, 352-53, 771 P.2d 330 (1989); State v. Kincaid, 103 Wn.2d 304, 314, 692 P.2d 823 (1985).

In addition, because Relfe did not object to the "to convict" instructions given by the trial court, and because Relfe also proposed a separate self-defense instruction identical to the one given by the trial court (see CP 42), the error Relfe alleges is also not preserved and cannot be raised for the first time on appeal under RAP 2.5. The Washington Supreme Court's recent decision in State v. O'Hara, \_\_\_ Wn.2d \_\_\_ (No. 81062-1, filed 10/1/09), holds that a claim of error in a self-defense instruction cannot be raised for the first time on appeal if the error alleged is not of constitutional dimension and is not "manifest" under RAP 2.5. An error is "manifest" for these purposes only if there has been actual prejudice, meaning that the defendant has made a plausible

showing that the alleged error "had practical and identifiable consequences in the trial of the case." O'Hara, slip op. at 7 (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)).

Relfe cannot show that giving a separate self-defense instruction that accurately states the law and correctly allocates the burden of proof is a "manifest" constitutional error that resulted in practical and identifiable consequences. Therefore, under O'Hara, Relfe's claim cannot be reviewed for the first time on appeal under RAP 2.5.

In sum, the error Relfe alleges is both invited and not preserved, and this Court should not consider it. However, even if this Court chooses to consider this claim, it fails on the merits as well.

It is well-settled that "[j]ury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005) (alteration in original) (citation omitted). A jury instruction must be reviewed in the context of all the instructions given, not in isolation. Id. In self-defense cases, the

instructions as a whole must adequately convey to the jury that the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984).

However, contrary to what Relfe now claims, the State's burden with respect to disproving self-defense need not be in the "to convict" instructions. In fact, the Washington Supreme Court has previously rejected this very claim, holding that a separate self-defense instruction is entirely proper. State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991). As the court stated in Acosta, "the better practice is simply to give a separate instruction clearly informing the jury that the State has the burden of proving the absence of self-defense beyond a reasonable doubt." Acosta, 101 Wn.2d at 622. That is precisely what occurred here.

In this case, the trial court gave the standard instruction, WPIC 17.02, the final paragraph of which unambiguously states the burden of proof in a self-defense case:

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 84. This instruction is not only manifestly clear with respect to the State's burden of proof; it is also identical to the instruction Relfe proposed. CP 42. Thus, in accordance with Hoffman and Acosta, the jury was properly instructed and no error occurred, whether invited, waived, or otherwise.

Nonetheless, Relfe argues that Hoffman "has been substantially abrogated by" four subsequent Washington Supreme Court cases: State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996); State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997); State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002); and State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003). Brief of Appellant, at 10-11. Relfe's position is dubious in light of O'Hara, as discussed above. Moreover, nothing in the four cases Relfe cites calls either Hoffman or Acosta into question, and none of them are on point.

Eastmond concerned jury instructions that misstated the law and relieved the State of its burden of proving intent in a second-degree assault case. Eastmond, 129 Wn.2d at 502-04. Smith involved a defective "to convict" instruction for conspiracy that directed the jury to convict the defendant of conspiracy to commit conspiracy to commit murder, and thus clearly misinformed them of

an essential element of the crime. Smith, 131 Wn.2d at 262. Brown held that a faulty accomplice liability instruction does not relieve the State of its burden of proof and is subject to harmless error analysis. Brown, 147 Wn.2d at 339. And DeRyke held that the failure to specify the degree of rape attempted in the "to convict" instruction was error, but the error was harmless because a separate instruction defining the completed crime of first-degree rape supplied the necessary information. DeRyke, 149 Wn.2d at 912-14.

In sum, Relfe has provided no authority that calls into question the validity of the instructions given in this case. To the contrary, the trial court's instructions correctly stated the law, clearly allocated the burden of proof, and informed the jury of all of the essential elements of the crime charged. Relfe's claim is without merit, and this Court should affirm.

**2. THE TRIAL COURT EXERCISED SOUND DISCRETION IN REJECTING RELFE'S PROPOSED INSTRUCTIONS ON ASSAULT IN THE THIRD DEGREE BECAUSE THE FACTS DID NOT SUPPORT THESE INSTRUCTIONS.**

Relfe next claims that the trial court erred in refusing to give his proposed instructions on the lesser degree crime of assault in

the third degree, and that reversal is required on this basis as well. Brief of Appellant, at 15-23. This claim should also be rejected. The trial court exercised sound discretion in ruling that the evidence did not support an inference that Relfe committed third-degree assault instead of either first- or second-degree assault. In addition, because the jury convicted Relfe of first-degree assault as charged despite being instructed on second-degree assault, any possible error in failing to instruct the jury on third-degree assault is clearly harmless. Accordingly, this Court should affirm.

A lesser included offense instruction should be given if both prongs of the well-established, two-part test are met: 1) all of the elements of the lesser offense are included in the greater offense (the legal prong); and 2) the evidence supports a reasonable inference that only the lesser offense was committed (the factual prong). State v. Workman, 90 Wn.2d 443, 548 P.2d 382 (1978). When a lesser degree crime is at issue, the legal prong of Workman is automatically satisfied. RCW 10.61.003. Therefore, as the trial court recognized, the only issue in this case is whether the factual prong was met.

The purpose of the factual prong of the Workman test "is to ensure that there is evidence to support the giving of the requested

instruction." State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). This test requires "a factual showing more particularized than that required for other jury instructions." Id. Specifically, "the evidence must raise an inference that *only* the lesser . . . offense was committed to the exclusion of the charged offense." Id. (citing State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990)) (emphasis in original).

In making this determination, the evidence should be examined in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. However, "the evidence must affirmatively establish the defendant's theory of the case -- it is not enough that the jury might disbelieve the evidence pointing to guilt." Id. at 456. Put another way, the evidence must establish a basis that "would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)). Although the evidence supporting a lesser offense need not be offered by the defendant, there still must be some evidence in the record to support a finding

that only the lesser crime was committed. State v. McClam, 69 Wn. App. 885, 850 P.2d 1377, rev. denied, 122 Wn.2d 1021 (1993).

A trial court's refusal to give an instruction on factual grounds is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999).

In this case, Relfe proposed instructions on the lesser degree crimes of assault in the second degree<sup>3</sup> and assault in the third degree. CP 46-52. As proposed by Relfe, "[a] person commits the crime of assault in the third degree when he or she with criminal negligence, causes bodily harm to another person by means of a weapon." CP 50. "Criminal negligence" is merely the failure to appreciate a substantial risk of harm, and such failure is a "gross deviation" from the standard of care that a reasonable person would exercise in the same circumstances. RCW 9A.08.010(1)(d).

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<sup>3</sup> In accordance with this Court's ruling in response to Relfe's personal restraint petition, the jury was instructed on second-degree assault, committed by either an intentional assault that recklessly inflicted substantial bodily harm or an assault with a deadly weapon. CP 79-82.

Here, the trial court correctly observed that Relfe had told the detectives that he intentionally shot Lee, and then later told them that he intended to scare Lee when he fired his gun, and that both of these statements were inconsistent with mere criminal negligence. RP (10/20/08) 2; Ex. 41, p. 3, 7. Relfe's counsel argued that the jurors could find third-degree assault if they concluded that it was lawful to brandish the gun and fire it, but that Relfe was negligent in "shoot[ing] wildly" and hitting Lee. RP (10/20/08) 5. Ultimately, the trial court ruled that even interpreting the evidence in the light most favorable to Relfe, Relfe intended to cause fear by firing the gun, which would be a second-degree assault if the jury concluded that Relfe did not act in self-defense. Therefore, the court found that there was not a sufficient factual basis from which the jury could find that Relfe committed only a third-degree assault. RP (10/20/08) 7.

The trial court's ruling was correct, and thus not an abuse of discretion. What Relfe's counsel was essentially arguing as justification for a third-degree assault instruction was that the jury could conclude that Relfe was criminally negligent because he acted lawfully up to the point where he used excessive force in self-defense. This is not a valid factual basis for a third-degree

assault instruction. Rather, it is a factual basis to reject self-defense entirely and, as the trial court observed, find that Relfe committed at least a second-degree assault when he fired his gun.

The trial court's ruling is factually correct for another reason as well. Relfe admitted in his statements to the 911 operator and to the detectives that he fired the gun intentionally; he never claimed that he had fired it accidentally. Ex. 41, p. 3, 5, 7-8, 14; Ex. 44, p. 7, 9. Relfe also admitted that he pointed the gun in Lee's direction before he fired. Ex. 41, p. 7-8. Given these facts, it is simply not possible to characterize pointing a loaded gun at another person and pulling the trigger as only a criminally negligent act. Put another way, no reasonable person "fails to be aware of a substantial risk that a wrongful act may occur" when firing a loaded gun in another person's direction. RCW 9A.08.010(1)(d). Indeed, given Relfe's 20 years of military service, Relfe would have been even more aware of the risks involved in shooting at someone than the average person would have been. Ex. 41, p. 9, 14; CP 122-47.<sup>4</sup>

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<sup>4</sup> Relfe's military records, which were filed as an appendix to his sentencing memorandum, reflect that Relfe earned his "marksmanship badge." CP 127.

In sum, there is no factual basis to support the proposition that Relfe's actions were only criminally negligent rather than reckless or intentional. Therefore, the trial court exercised sound discretion in rejecting Relfe's proposed instructions on assault in the third degree, and this Court should affirm.

Finally, even if this Court were to conclude that Relfe's proposed third-degree assault instructions were somehow supported by the evidence, the failure to give those instructions in this case is clearly harmless. The jury was instructed on the lesser degree offense of second-degree assault, but found beyond a reasonable doubt that Relfe committed the charged crime of first-degree assault. Because the jury was not forced into an all-or-nothing choice, any possible error in not further instructing on an additional lesser degree offense was harmless.

Under Washington law, the jury is instructed that it is to first consider the crime charged and, if after full and careful consideration of the evidence, it cannot agree on a verdict as to that crime, it may then consider a verdict on a lesser crime. State v. Labanowski, 117 Wn.2d 405, 414, 816 P.2d 26 (1991). The jury was so instructed in this case. CP 78, 89. The jury found Relfe guilty of the charged offense of assault in the first degree.

Assuming the jurors followed their instructions, as the court must presume,<sup>5</sup> they never would have considered any lesser offense.

Nonetheless, a body of case law recognizes that a defendant may be entitled to reversal when the trial court fails to instruct on a lesser offense. Most of these cases are bereft of any analysis as to why reversal is required due to the failure to give a lesser when the jury returns a verdict on the charged offense. See, e.g., State v. Parker, 102 Wn.2d 1, 683 P.2d 189 (1984); State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981). The United States Supreme Court has explained that the reason for reversal is because the jury has been improperly forced into an all-or-nothing choice:

The Court in Beck<sup>[6]</sup> recognized that the jury's role in the criminal process is essentially unreviewable and not always rational. The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free. In Beck, the Court found that risk unacceptable and inconsistent with the reliability this Court has demanded in capital proceedings. Id., at 643. The goal of the Beck rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is

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<sup>5</sup> State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

<sup>6</sup> Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

forced into an all-or-nothing choice between capital murder and innocence.

Spaziano v. Florida, 468 U.S. 447, 455, 104 S. Ct. 3154, 82

L. Ed. 2d 340 (1984).

Here, the jury was not faced with an "all-or-nothing" choice. They were instructed on a lesser offense. If one juror had a reasonable doubt as to whether Relfe was guilty of first-degree assault as charged, the jury would then have considered the lesser crime of second-degree assault. That did not happen. Accordingly, Relfe cannot show that he suffered any prejudice due to the failure to instruct on third-degree assault.

Anticipating this argument, Relfe argues that his defense at trial was "imperfect self-defense," i.e., that "his use of force was lawful but excessive," and, therefore, the second-degree assault instruction did him no good. Brief of Appellant, at 20-22. As a preliminary matter, as noted above, if the force used in self-defense is excessive, this does not justify instructing on a lesser offense. Rather, this defeats self-defense entirely. See State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) ("the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary" under the circumstances). In other words,

"imperfect self-defense" is not a basis to find a lesser offense, but a basis to reject self-defense and find the defendant guilty.<sup>7</sup>

Moreover, a very similar argument was made and rejected in Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991). In Schad, the defendant was charged with first-degree murder and the court instructed the jury on the lesser offense of second-degree murder. On appeal, the defendant claimed the court erred in not instructing on the lesser offense of robbery. Like Relfe, the defendant argued that his theory of the case was not reflected in the intermediate lesser offense instruction given to the jury: "[p]etitioner contends that if the jurors had accepted his theory, they would have thought him guilty of robbery and innocent of murder, but would have been unable to return a verdict that expressed that view." 501 U.S. at 647. The United States Supreme Court soundly rejected this argument:

The argument is unavailing, because the fact that the jury's "third option" was second-degree murder rather than robbery does not diminish the reliability of the jury's capital murder verdict. To accept the contention advanced by petitioner and the dissent, we would have to assume that a jury unconvinced that petitioner was guilty of either capital or second-degree murder, but loath to acquit him completely (because it was

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<sup>7</sup> As Relfe argued to the trial court, however, "imperfect self-defense" *can* be a mitigating factor for sentencing purposes. RCW 9.94A.535(1)(c); CP 109.

convinced he was guilty of robbery), might choose capital murder rather than second-degree murder as its means of keeping him off the streets. Because we can see no basis to assume such irrationality, we are satisfied that the second-degree murder instruction in this case sufficed to ensure the verdict's reliability.

Schad, 501 U.S. at 647-48.

Schad is consistent with a number of Washington decisions finding that the failure to instruct on a lesser offense is harmless where the jury was given a third choice -- another lesser offense which they rejected. See State v. Guilliot, 106 Wn. App. 355, 368-69, 22 P.3d 1266 (2001); State v. Hansen, 46 Wn. App. 292, 297-98, 730 P.2d 706 (1986).

Relfe suffered no harm from the failure to instruct the jury on third-degree assault. If the jury had any doubt that he committed first-degree assault, they had the option of convicting him of second-degree assault. They clearly had no such doubts, and found him guilty as charged. CP 60. This Court should reject Relfe's claim, and affirm.

**3. THE PROSECUTOR'S REMARKS IN CLOSING ARGUMENT WERE PROPER, HARMLESS, OR BOTH.**

Lastly, Relfe claims that he was deprived of a fair trial due to prosecutorial misconduct in closing argument. Specifically, Relfe claims that the prosecutor misstated the law of self-defense by arguing that Relfe had to be in actual danger before acting in self-defense, and by arguing that Relfe had a duty to retreat. Brief of Appellant, at 23-26. These arguments should be rejected. None of the remarks Relfe claims were improper drew an objection from Relfe at trial, and none of them were so "flagrant and ill-intentioned" that a curative instruction, if requested, would not have sufficed to ameliorate any possible prejudice. Relfe cannot meet his burden of demonstrating flagrant misconduct and prejudice, and thus, this Court should affirm.

A defendant who claims on appeal that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Moreover, a defendant such as Relfe who did not object to an argument at trial has waived any claim on appeal unless the argument in question is "so flagrant

and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

Furthermore, arguments that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). In addition, the prosecutor's remarks must not be viewed in isolation, but "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." Brown, 132 Wn.2d at 561. In light of these standards and the record, Relfe's prosecutorial misconduct claims fail.

The first remark Relfe claims deprived him of a fair trial occurred at the beginning of the prosecutor's closing argument, where the transcript reflects that the prosecutor stated that Relfe had to be "in actual danger" in order to act in self-defense. RP (10/20/08) 52. As Relfe correctly observes, this statement is

erroneous. Rather, as the jury was correctly instructed in this case, the defendant "is entitled to act on appearances in defending himself," if he "believes in good faith and on reasonable grounds that he is in actual danger of injury," even if it turns out that the defendant "was mistaken as to the extent of the danger." CP 87; RP (10/20/08) 47-48.

But the prosecutor's remark regarding "actual danger," although incorrect, does not constitute flagrant and ill-intentioned misconduct that could not have been cured by an instruction to the jury. Indeed, this remark was cured by the trial court's instructions, all of which accurately stated the law of self-defense. CP 84-87; RP (10/20/08) 46-48. Moreover, the prosecutor's misstatement was an isolated remark in a lengthy closing argument; the misstatement was not repeated. RP (10/20/08) 51-76. Furthermore, Relfe's trial counsel emphasized during her closing argument that Relfe was entitled to act on appearances in defending himself, and argued to the jury why Relfe had reasonable grounds to believe he was in danger. RP (10/20/08) 81-82. In sum, the record as a whole demonstrates neither flagrant misconduct nor incurable prejudice based on this isolated misstatement regarding "actual danger."

In addition, Relfe claims that the prosecutor committed misconduct because he "repeatedly urged the jurors to conclude Relfe had a duty to retreat[.]" Brief of Appellant, at 24. As support for this claim, Relfe cites to three pages in the transcript where the prosecutor argued that Relfe had alternatives to pursuing, confronting, and ultimately shooting James Lee. RP (10/20/08) 73-74, 113. But viewing these remarks in context, as this Court must, the record demonstrates that these remarks were entirely proper because they were arguments based on the legal definition of "necessary," and not arguments that Relfe had a duty to retreat.

As the jury was correctly instructed in this case, a person acting in self-defense has the right to "stand his ground," and has no "duty to retreat." CP 86; RP (10/20/08) 47. However, the use of force in self-defense must be "necessary," which was correctly defined for the jury as follows:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 85; RP (10/20/08) 47.

During his closing argument, the prosecutor highlighted the fact that Relfe continued to pursue James Lee through the streets of Auburn, despite Relfe's claim that Lee got out of his truck three times in order to assault Relfe. RP (10/20/08) 73-74. In light of the definition of "necessary," these remarks were entirely proper. Although Relfe is correct that he did not have a duty to retreat, standing one's ground is a far different thing from actively pursuing another person in a speeding vehicle. Put another way, highlighting the fact that Relfe chased Lee in his car was an appropriate way of asking the jury to question whether Relfe's actions were necessary under the circumstances. This argument in no way suggested that Relfe had a duty to retreat, and Relfe's claim that this was flagrant misconduct is wholly without merit.

During his rebuttal argument, the prosecutor stated that at the moment of the shooting, "all the defendant had to do was sit and wait a moment longer (inaudible) and no one would've been shot." RP (10/20/08) 113. Again, this argument in rebuttal was entirely proper based on the definition of "necessary," and did not

suggest that Relfe had a duty to retreat. The prosecutor did not suggest that Relfe should have retreated; rather, the prosecutor argued that it was not necessary for Relfe to pull the trigger. Again, Relfe cannot show that flagrant misconduct occurred.

Lastly, even assuming for the sake of argument that any of these remarks constituted flagrant and ill-intentioned misconduct, Relfe cannot show that any resulting prejudice was so enduring that a curative instruction would not have sufficed to ensure Relfe's right to a fair trial. Therefore, having shown neither flagrant misconduct nor incurable prejudice, this Court should reject Relfe's claims and affirm.

**D. CONCLUSION**

The trial court correctly instructed the jury on the law of self-defense and the State's burden of proof, the trial court exercised sound discretion in rejecting Relfe's proposed instructions on assault in the third degree, and Relfe has not demonstrated that prosecutorial misconduct deprived him of a fair trial. For all of the reasons stated above, this Court should affirm

Relfe's conviction for assault in the first degree with a firearm enhancement.

DATED this 12<sup>th</sup> day of October, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MICHAEL RELFE, Cause No. 62696-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

10/12/09

Date