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No. 35135-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

EBONY JOHNSON,

Appellant.

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STATE OF WASHINGTON
BY [Signature]

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable John R. Hickman, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant's rights to present a defense under the 6th and 14th Amendment and Article 1, § 22 were violated.
2. The prosecutor committed flagrant, prejudicial misconduct.
3. Appellant's 6th Amendment and Article 1, § 22 rights to effective assistance of counsel were violated.
4. Jury Instructions 12 and 13 misstated the applicable standard for self-defense and relieved the prosecution of the full weight of its burden of disproving that defense. CP 114, 115.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant admitted stabbing the victim in the back, but claimed self-defense. To support that claim, she sought to introduce evidence that the victim had abused and controlled her throughout their relationship, even to the extent that he had compelled her to commit shoplifting for something he desired. She also sought to introduce testimony from a roommate about bruises the victim had given her and the roommate's perception of the relationship. The court refused to allow that evidence and evidence of misconduct about which appellant was aware and which contributed to her fear of the victim.
 - a. Were appellant's rights to present a defense violated by the exclusion of this evidence which was relevant and material to her claim of self-defense?
 - b. Was it improper, prejudicial misconduct for the prosecutor to first move to exclude the evidence and then, in closing, fault appellant for failing to present it?

c. Was counsel prejudicially ineffective in 1) failing to provide the court with authority to support admission of evidence crucial to his client's entire defense, 2) failing to provide such authority or asking the court to reconsider when invited to do so, 3) failing to research his client's defense sufficiently to understand the basis for admission of crucial evidence, 4) failing to make an offer of proof to support admission of the evidence after the initial exclusion, and 5) failing to proffer expert testimony which was necessary to explain and support essential parts of his client's self-defense claim?

2. Was it flagrant, prejudicial misconduct when the prosecutor 1) told the jury it had to find the prosecution's witnesses were lying in order to acquit, 2) told the jury that the entire defense was to "trash" the victim and make the jury "hate" him so they would not care that he was stabbed, 3) argued that the defense had only called the victim as a witness in order to disparage him and incite the jury against him, and 4) argued that the jurors could not find for the defense without violating their oaths as jurors?

Further, was counsel ineffective in failing to object or make any attempt to mitigate the prejudice this misconduct caused his client?

3. Although appellant was not charged with a homicide, the jury instructions on self-defense told the jury to apply the far higher standard for self-defense required for "justifiable homicide," rather than the standard applicable to this assault case.

a. Were the instructions constitutionally deficient for relieving the prosecution of the full weight of its burden of disproving self-

defense?

b. Was counsel prejudicially ineffective in proposing the offensive instructions which told the jury his client did not have a legitimate self-defense claim unless she feared “great personal injury” when she only had to fear “injury?”

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Ebony Johnson was charged with first-degree assault, committed while armed with a deadly weapon as a “domestic violence” incident. CP 1-3; RCW 9A.36.011(1)(a); RCW 9.94A.510; RCW 10.99.020.

Pretrial and trial proceedings were held before the Honorable John R. Hickman on May 3, 4, 8-11, 15-17, 2006, after which a jury found appellant guilty of second-degree assault with a deadly weapon enhancement.¹ On June 16, 2006, Judge Hickman ordered Ms. Johnson to serve a standard range for the offense. SRP 1-19; CP 125-27.

Ms. Johnson appealed, and this pleading follows. See CP 146-56.

2. Relevant facts

On the night of April 9, 2005, Gloria Greenwood, Linda Bell and

¹The 10 volumes of the verbatim report of proceedings will be referred to as follows:
May 3, 2006, as “1RP;”
May 4, 2006, as “2RP;”
May 8, 2006, as “3RP;”
May 9, 2006, as “4RP;”
May 10, 2006, as “5RP;”
May 11, 2006, as “6RP;”
May 15, 2006, as “7RP;”
May 16, 2006, as “8RP;”
May 17, 2006, as “9RP;”
Sentencing on June 16, 2006, as “SRP.”

Kindra Bell were at Ms. Greenwood's house when they heard a noise like something hitting the chain link fence outside, saw a car up on the curb with its headlights on, and watched a lady get out of the car arguing with a man, later identified as Parrish Gale. 4RP 10-14, 60-69, 80-121, 6RP 5-44. According to the women, Mr. Gale was holding a purse and going through it, and the woman was begging the man to return her purse. 4RP 10-14, 60-69, 80-121, 6RP 5-44. After a moment, the man walked around the corner of the house and the women said they saw the lady, later identified as Ebony Johnson, get back in the car and follow. 4RP 10-14, 60-69, 80-121, 6RP 5-44.

According to the women, a minute later, Mr. Gale returned and started helping Kindra Bell pick up the things Mr. Gale had dropped from the purse. 4RP 10-14, 60-69, 80-121, 6RP 5-44. The women said Ms. Johnson then drove back up, got out of the car, reached back in and grabbed something, and walked over and appeared to hit Mr. Gale in the back. 4RP 14-59, 60-69, 80-121, 6RP 5-35. Actually, Mr. Gale had been stabbed with a knife. 4RP 10-14, 60-69, 80-121, 6RP 5-44.

Kjelsi Clark testified that she was driving down an alley that night, heard yelling, slowed down and saw a car "trying to hit a guy" and hitting a fence instead. 4RP 117-19. She saw the "guy" trying to pick up stuff as it was falling, and saw the lady get out of the car and stab the man. 4RP 117-20. Ms. Clark said that the woman then said, "[n]ow what?" 4RP 122. Ms. Johnson returned to the area a few minutes after police arrived, got out of her car and walked up to police and admitted she "did it." 4RP 75. Ms. Bell thought she heard, "I did it. How you like me now?" 4RP

75.

After first leaving the scene, Ms. Johnson returned a few moments later, walking up to police who had by then arrived and saying, "I did it." 6RP 20.

When Mr. Gale was later treated at the hospital, a "tox" screen test revealed the presence of amphetamines, cocaine, opiates, PCP and marijuana in his urine. 3RP 45. Even though the knife was still in his back when he was admitted, he was expected to have minimal, if any, scarring. 3RP 50-51. A state's expert admitted that Mr. Gale's injuries were "more likely than not not life threatening" unless something unusual happened like an infection. 3RP 50-51.

Parrish Gale's testimony painted a picture of himself as always being involved with so many women he could not keep track, with Ms. Johnson just one of them. 6RP 61-65. He said Ms. Johnson used to understand but then got too in love with him, calling him all the time, buying him a pager and a cell phone to keep track of him and getting mad at him because of his other women and when he did not call her as much as she wanted. 6RP 67-69. In fact, he said, she loved him so much that she gave him anything he wanted most of the time, put money on his "books" in jail and even those of his friends to make him happy, and would buy things for him despite knowing he was getting them to give to other girls. 6RP 66-75. According to Mr. Gale, he "never had to take nothing" from Ms. Johnson because if she did not give him what he wanted, he would "get mad" and get it. 6RP 66. He also got mad when she snooped through his things, like looking at his phone and pager to see

who had called. 6RP 87.

In short, to make him happy, Mr. Gale said, Ms. Johnson “did just basically what I tell her to do,” but he still liked “messing” with other girls and did so. 6RP 71-72.

Mr. Gale testified that he often took Ms. Johnson’s car with her permission but did not return it when he had promised. 6RP 90. He said he had permission to take Ms. Johnson’s car that night but, after he left, she kept calling him just to get “on” his nerves and ask how fast he was going and other “like retarded questions and such.” 6RP 90. Mr. Gale was sure that the real issue was not the car but some letters from other girls that Ms. Johnson had found that day, about which she was upset. 6RP 91, 93.

Mr. Gale said that he had decided he was “totally dumping” Ms. Johnson that night, and told her that when he returned to the apartment with her car. 6RP 99-103. He then packed up his stuff and had her drive him, his brother, and his brother’s girlfriend to a money mart to cash a check, then to drop off the passengers and his clothes. 6RP 98-101. Mr. Gale and Ms. Johnson were arguing about the letters as she drove, and at some point they were at a light when he just “hopped out” of the car and started walking up the street to get away. 6RP 106. According to Mr. Gale, Ms. Johnson then tried to run the car up on the curb to hit him. 6RP 106.

Inexplicably, Mr. Gale then got back into the car and continued arguing with Ms. Johnson. 6RP 107. He testified that he told her again he was leaving her, saying “I’m cool on you for real.” 6RP 107. She then

started apologizing and threw her purse at him, saying “[y]ou can have everything, whatever.” 6RP 109. He got out of the car, told her she was “retarded” and bent down to get her purse. 6RP 109, 116. It was then that she stabbed him. 6RP 109, 116.

Ms. Johnson had a very different memory of what happened in the relationship and that night. She testified that they had started dating when she was about 16 and everything was great until the end of 2003 when he started going in and out of jail and was always on drugs. 7RP 35-36, 41-42. She was by then in love with him, took care of him and tried to make him happy at all times but he still was not “satisfied” and things started to go bad. 7RP 34-38.

Ms. Johnson testified that she thought she could save him and get him “to this right path,” but he “just became more obsessive over me.” 7RP 55. When he was on drugs he would treat her “really bad,” acting “controlling” and being physically and verbally abusive. 7RP 56. She recounted an incident at his sister’s house when she asked him a question and he “smacked” her, and other times when he took her money including her rent money. 7RP 57-58. She told him she would call the police on him and he told her she would just be making things worse, that he did not care if he went to jail and he would “just come back out and find” her. 7RP 58.

She had tried to end the relationship several times, but he would not let her go. 7RP 129-30. She knew he would “come back” for her, and, although she could show “no wounds” he caused her he had “messed with” her, always finding her. 7RP 112. He was not afraid of having the

police called on him and would not leave her alone. 7RP 112.

Ms. Johnson "had to call" Mr. Gale at certain times, because he would threaten to come to her job if she did not call him on time to "check in." 7RP 50. He "did so much" to her that she wanted to get away. 7RP 112. She was in a bad situation and wanted out. 7RP 83.

That night, he had taken her car without permission, finding the keys she had hidden before falling asleep. 7RP 33-34, 60-63. She needed her car to get to work but he refused to answer his cell phone at first. 7RP 64. When he finally answered, he acted put upon, as if she was just harassing him. 7RP 65. She ultimately told him she would have to call police if he did not come back with her car, but it still took him an hour and a half to return. 7RP 65. By that time, she had decided she would try again to make a break from him and had packed up his clothes in garbage bags. 7RP 67-68.

When he arrived and saw his clothes were packed, he got very angry. 7RP 66-70. He made threats against her and her mother and refused to give her back her car keys. 7RP 66-70. Ms. Johnson knew then that he was never going to leave her alone. 7RP 69-70.

At that point, she was in a panic but trying to act calm because she did not want to get him more upset which would make things worse. 7RP 70. She went with him as he drove to the check-cashing place, all the while still trying to get her keys back. 7RP 71. When his brother could not cash the check because of identification problems, Mr. Gale told Ms. Johnson to do it and she agreed on the condition that he would give back her keys. 7RP 72. She got them back for a moment but, when she could

not cash the check, he snatched them back. 7RP 72-73.

Mr. Gale then drove to drop off their passengers and his clothes, but at some point Ms. Johnson finally managed to gain control of the keys. 7RP 73-74. Mr. Gale still would not let her leave, but did let her drive. 7RP 75. She was driving where he told her to go when suddenly, at a light, he jumped out, taking the keys and her purse with him. 7RP 77-78. She was stuck there with cars behind her, honking, and got out of the car, crying. 7RP 77.

When he came back a few minutes later, he thought it was funny she was upset. 7RP 77-9. He was acting irritated and aggressive, like he “don’t care” about anything. 7RP 79. He gave her the car keys and she drove off. 7RP 78-79. He still had her purse and was doing abusive things, changing the gears while she was driving, covering her eyes so she could not see to drive, and threatening her. 7RP 79-81. He told her she could never leave him, that if she tried she could not hide forever, that he had a copy of all of her keys hidden somewhere, and that he knew where her mom lived. 7RP 124. Throughout this time he was spitting in her face. 7RP 79-81, 124.

After a few moments, he put the gear in park while she was still driving. 7RP 81-82. He then grabbed the keys and got out of the car, again holding her purse and the keys. 7RP 81-82. He started emptying her purse out and would not give either it or the keys back. 7RP 81-82. All the while, Mr. Gale was threatening her and her mom. 7RP 84, 108. It was not just calling her names or belittling her; it was clear to her he was out of control. 7RP 108-109.

Ms. Johnson had a knife in the car, underneath the back seat carpet, for protection from Mr. Gale and his lifestyle. 7RP 83-84. She thought at that point it was either going to be him or her, and she grabbed the knife. 7RP 84-85, 93. She wanted to get out of there and again asked for her keys back. 7RP 84-85, 93. He did not even look at her, still “messaging around” with her stuff and continuing with his threats against her and her mom. 7RP 84-85. She believed she and her mother were in danger from him, and was afraid for their safety based on his threats. 7RP 129. She also knew he was not afraid of the police and did not care if they were called against him. 7RP 129.

Ms. Johnson made it clear that she did not stab Mr. Gale just to get her keys back but that she did so because of the danger she perceived to herself and her mother. 7RP 127-29. She was not planning on killing Mr. Gale but just did not see any other way to get away from him and the control he had over her life. 7RP 85, 100. After the stabbing, she took her keys and left, but came back pretty quickly, feeling she had to admit what she did in order to keep things from getting even worse. 7RP 86, 94, 133.

Ms. Johnson testified that she did not park on the grass or have the car up on the curb that night, and never tried to run over Mr. Gale with the car. 7RP 104, 122. She also said she did not leave and come back but stayed with the car when he initially walked away. RP 103-106. She was pretty close to Mr. Gale when he threatened her but thought the other people around might have heard the threats. 7RP 107.

Ms. Clark first testified that she had not heard the man say anything during the incident. 4RP 123. She admitted she could not hear

everything being said and could hear them yelling but not what was being said. 4RP 123, 140. Kindra Bell testified that she had, in fact, heard Mr. Gale yelling at Ms. Johnson when Ms. Johnson first got out of the car, but Kindra could not recall if she heard Mr. Gale make any threats. 6RP 23-24, 27. Linda Bell did not hear Mr. Gale call Ms. Johnson any names or anything like that. 4RP 71. Ms. Greenwood heard something said but did not hear what it was. 4RP 55, 57. She admitted her recollection is "vague in times," and that much of her testimony at trial was based on talking to her sister, comparing stories and rereading her statement. 4RP 29-30.

Ms. Johnson knew nothing about any letters from other girls, and testified that she never said, "[n]ow what," before stabbing Mr. Gale. 7RP 109. She said she felt threatened by his actions, not just his words, and wanted him to leave her alone. 7RP 109. If she had been trying to kill him she would have stabbed him multiple times, or somewhere else. 7RP 111. She knew he was not going to die from the stabbing when she walked away. 7RP 112.

At the scene, Mr. Gales' brother approached and started threatening her, so police restrained him. 7RP 95. Ms. Bell corroborated that the police were at one point trying to "keep the brother from attacking" Ms. Johnson. 4RP 83.

Iesha Wood lived with Ms. Johnson for a time during her relationship with Mr. Gale, who lived with them for a few months. 7RP 10-12. When they lived together, Ms. Johnson was paying all the bills for everyone. 7RP 17. Ms. Wood was allowed to confirm some of what Ms. Johnson said about their relationship, including that Mr. Gale was on

drugs nearly all the time, never “acted normal,” always acted “angry,” and would get angry for “no reason,” including with Ms. Johnson, especially when he was on drugs. 7RP 19, 27-31. Ms. Wood was allowed to say that Ms. Johnson had a concern about her health and safety when Mr. Gale was on drugs. 7RP 18.

Several times, Ms. Wood saw Ms. Johnson try to get Mr. Gale to move out, but she was not successful. 7RP 21. Ms. Wood saw Ms. Johnson try to avoid contact with Ms. Gale and prayed to God, “[t]ake this man away from me. He’s not right for me.” 7RP 22.

At one point, Ms. Johnson had to change the locks, because Mr. Gale stole a key. 7RP 11-12. Mr. Gale had stolen from both Ms. Johnson and Ms. Wood and Ms. Wood said they knew that if they gave him Mr. Gale a key he would have stolen “everything.” 7RP 31. Mr. Gale would steal Ms. Johnson’s car from time to time so that Ms. Johnson would wake up and cry that the car was not there and she needed to get to work. 7RP 23.

Ms. Johnson also had to change her phone number because of harassing phone calls. 7RP 14. Ms. Wood also testified that Mr. Gale would call Ms. Johnson at work a lot, sometimes three times an hour or more. 7RP 28, 30, 42. Nevertheless, Ms. Johnson would “go running” whenever Mr. Gale said he needed help. 7RP 24.

Ms. Wood said that Ms. Johnson had her concerns about the things Mr. Gale was doing that “he should have no business doing,” but that she loved him even though she did not support his “habits or anything like that.” 7RP 16-17. Ms. Johnson would also sometimes try to break up

with Mr. Gale but would ultimately get back with him. 7RP 26. If he wanted to come by, there was “no way she could stop him.” 7RP 27.

Ms. Wood admitted that Ms. Johnson was fearful of Mr. Gale about 75% of the time Ms. Wood was there. 7RP 25. .

Even as of the day of trial, Mr. Gale was still harassing Ms. Johnson. 7RP 112. He kept having people “forward” the phone from jail, where he was, to her house to get around her efforts to avoid him. 7RP 94-97. He would call on average about seven times a day three times a week. 7RP 96. When he was out of custody, he stood outside her house several times, “dancing” and “bumping his music,” with an attitude of “I got you.” 7RP 94-95. He wanted to get back together with her and tried to contact her through his brother’s baby’s mother, an old friend of hers. 7RP 97.

Mr. Gale claimed that he had only called Ms. Johnson to try to find out why she stabbed him, and also to talk to his brother who was there at the time. 6RP 127. Ms. Wood was with Ms. Johnson several times since the incident when Mr. Gale tried to contact Ms. Johnson since the incident. 7RP 20. Ms. Wood was aware that Ms. Johnson had put “blocks” on the phone so that Mr. Gale would not be able to call but he would still do so, using a “three way” and getting someone else to call for him and link the phones. 7RP 20-21, 50-54. If Mr. Gale could not contact Ms. Johnson, Mr. Gale’s twin brother would try, and it was “a nonstop thing.” 7RP 20. Ms. Wood said Mr. Gale would stand outside Ms. Johnson’s place, “dancing, carrying on, wanting her to see him.” 7RP 20.

Ms. Wood was pretty sure that Mr. Gale was not contacting Ms. Johnson to find out why Ms. Johnson had stabbed him but instead was

contacting her just "because he wanted to bother her." 7RP 26.

Mr. Gale admitted that, while he was involved with Ms. Johnson, he was always high, usually on marijuana, cocaine and "sherm," embalming fluid which was smoked by dipping a cigarette into it. 6RP 93-97. He said that day of the incident had not gone as he had hoped, however, and he had only gotten a chance to smoke marijuana. 6RP 93-97.

Mr. Gale admitted that, in fact, some of his clothes were already packed, by Ms. Johnson, when he returned to the apartment that night, and that, at the money mart, he had Ms. Johnson's keys, but said she "made" him give them to her before she would try to cash the check. 6RP 98-99, 7RP 84. He also said that, after they drove away from the money mart, he stopped to buy cigarettes, and she "snatched" the keys from the ignition. 6RP 101.

Mr. Gale maintained that he had never broken into Ms. Johnson's apartment, but then admitted going in through the window once with his brother and brother's girlfriend, and that Ms. Johnson was mad about it. 6RP 80. He claimed she was only mad because she did not like his brother's girlfriend and also because he had given away a chocolate he had found in the apartment. 6RP 80.

An officer testified that Ms. Johnson told him that she and Mr. Gale had been dating for about five years and he used PCP, embalming fluid and powder cocaine on a regular basis. 4RP 158-59. She told the officer Mr. Gale was "high" that day and had taken her car without her permission to go buy drugs. 4RP 158-59. The officer also confirmed that

Ms. Johnson had told the officer about how Mr. Gale was acting while she drove, including the spitting, and that he took the keys and her purse, refusing to give them back. 4RP 158-59.

The officer never asked Ms. Johnson who she was planning on protecting herself from with the knife or why she was carrying a knife in her car, nor did the officers ask what led up to the incident. 4RP 177, 7RP 94.

The women who were there that night were all handed pieces of paper to fill out and told to write down what happened, after which the officers left them alone together in the room to write it all down. 4RP 87, 92. They claimed they did not have time to discuss what they were writing, however. 4RP 87, 92.

Despite their beliefs about the car being up on the grass and the curb, there was no evidence of any tire marks in the grass. 5RP 39-40. There was no damage to the fence Ms. Johnson was supposed to have hit with the car. 5RP 39-40. Ms. Greenwood admitted she saw no tire marks near the fence or dents from a car hitting it, and saw no other marks on the grass. 4RP 32, 43-44.

D. ARGUMENT

1. APPELLANT'S RIGHTS TO PRESENT A DEFENSE WERE VIOLATED, THE PROSECUTOR COMMITTED MISCONDUCT AND COUNSEL WAS INEFFECTIVE

Both the state and federal due process clauses guarantee the accused the right to present a defense. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 51 (1983), limited in part and on other grounds by, State v.

Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002); 6th Amend.; 14th Amend.; Art. I, § 22. These rights guarantee that the defendant has the opportunity to “present the defendant’s version of the facts” to the jury, not just the prosecution’s version, so that the jury “may decide where the truth lies.” State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004).

In this case, this Court should reverse, because the trial court refused to allow Ms. Johnson to present evidence relevant and material to her defense and thus deprived her of her rights to present a defense. Further, the prosecutor committed misconduct by first moving to exclude the evidence and then faulting Ms. Johnson for not presenting it. Finally, counsel was ineffective.

a. Relevant facts

Prior to trial, the prosecutor moved to exclude evidence regarding Mr. Gale’s criminal history, history of domestic violence against Ms. Johnson and other “prior bad acts,” arguing the evidence was not admissible until after Ms. Johnson had testified and claimed self-defense. 1RP 13, 19. Mr. Gale had an adult criminal history which included two domestic violence assaults, a domestic violence theft, and a conviction for violation of a domestic violence no contact order. CP 21.

Counsel objected that Ms. Johnson had suffered emotional trauma and physical abuse from Mr. Gale for a period of years which “came to a head” the night of the incident, that Mr. Gale had “essentially controlled” Ms. Johnson’s life, and that all the evidence was relevant and admissible to her claim of self-defense. 1RP 14. He also argued that the evidence was admissible under ER 405, and that Ms. Johnson’s knowledge of Mr.

Gale's prior criminal history was relevant to her perception of his dangerousness and to her knowledge that Mr. Gale had gotten off with little or no punishment in the past so she had to take matters into her own hands because she would not be safe from him even if she went to police. 1RP 16.

In granting the prosecutor's motion, the court initially focused on whether the evidence was admissible as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," or the prior crimes involved "dishonesty or false statements." 1RP 23-24. The court reserved ruling on the ER 405 issue but held that Ms. Johnson could not testify about her awareness of Mr. Gale's prior convictions. 1RP 25. The court said that it was willing to reconsider these decisions later and would welcome some authority from the defense. 1RP 32-35. The court's written order excluding the evidence provided that Mr. Gale's criminal history was "excluded pursuant to ER 609(a)," that Mr. Gale's prior assaults or threats against Ms. Johnson were "not relevant and . . . unduly prejudicial," and not admissible under ER 404(b) or ER 405(b), and that evidence of "any other prior bad acts" of Mr. Gale was inadmissible under ER 404(b). *Id.* The evidence was inadmissible "until such time as the court rules it admissible in a hearing outside the presence of the jury," and the evidence of prior assaults or threats was inadmissible until "an offer of proof or testimony establishes its relevance and probative value." *Id.*

At trial, after counsel tried to ask Mr. Gale about having stolen from and gotten into "physical altercations" with Ms. Johnson, the jury

was excused and counsel was cautioned about violating the court's rulings. 6RP 80-82. After further discussion, the court ruled that Ms. Johnson had the right to "testify if she's claiming self-defense as to the fact that she had a reasonable apprehension or fear regarding this individual," but would not be allowed to present any evidence on that point until she had so testified. 6RP 85.

During the defense case, the prosecutor objected that the proposed defense witnesses would only testify about Mr. Gale verbally abusing Ms. Johnson and that it was only relevant to "smear Mr. Gale's character." 6RP 135. The court then ruled that the former roommate, Ms. Wood, could only testify about the "very narrow area" of whether she was aware that Ms. Johnson feared Mr. Gale "either at the time this incident occurred or around that general time frame." 6RP 138-39. The court excluded evidence of anything from earlier in the relationship or about the "nature" of the relationship, holding such evidence was not relevant and was "so far removed in time. . . it would only be prejudicial." 6RP 138-39. When counsel asked if he could impeach Mr. Gale's characterization of the relationship and provide evidence of Ms. Johnson's being manipulated and controlled by Mr. Gale, the court held that such evidence was "not relevant to self-defense," although it would be if the case involved domestic violence. 6RP 144. Although counsel then noted that Ms. Johnson was charged with committing a domestic violence offense, the court refused to reconsider, stating "we're not going to get into any specific acts or discussion of the nature of their relationship or the character." 6RP 145-46.

When Ms. Wood testified, counsel was precluded from asking whether she had ever seen any “marks” or bruises on Ms. Johnson. 7RP 17. Counsel was also prevented from establishing whether Ms. Wood noticed any changes in Ms. Johnson’s “attitude” as a result of Mr. Gale’s treatment of Ms. Johnson and whether Ms. Wood knew anything about Mr. Gale having broken into Ms. Johnson’s apartment when she had finally asked him to leave. 7RP 23-24.

Ms. Johnson’s testimony was also limited by objection and ruling, as follows:

-she was allowed to say Mr. Gale contacted her a lot at work, but not the nature of the contacts or whether she was concerned about losing her job because of him (7RP 42-45, 50)

-she was not allowed to answer whether she had gotten into any “difficult situations” while dating Mr. Gale, or anything about such situations and how they arose (7RP 43-45)

-when asked why she decided to grab the knife that night, she was not allowed to say what the threats were (7RP 84)

-she was not allowed to tell the jury about how she had been so controlled by Mr. Gale that she had actually gone to Sears and stolen something he had been demanding that she get him (7RP 43-44).

In the discussion on the Sears issue, although recognizing that self-defense was being raised, the court addressed it as if it were simply “impeachment by a prior conviction,” limited to eliciting the “nature of the charge and the date of conviction.” 7RP 46-47. The court did not discuss counsel’s argument that the information was relevant to the relationship and the claim of self-defense. 7RP 44-47.

b. Appellant’s rights to present a defense were violated

The court erred and appellant’s rights were violated by the

exclusion of all this evidence. A defendant has the right to “put before a jury evidence that might influence the determination of guilt.” See Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). Further, a defendant has “a fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 29 297 (1973); see State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993).

Here, Ms. Johnson was deprived of that opportunity. In general, admissibility of evidence is within the discretion of the trial court and reviewed for abuse of discretion. See State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). However, “[t]he exclusion of evidence which a defendant has a constitutional right to elicit is an unreasonable exercise of discretion.” State v. Reed, 101 Wn. App. 704, 709, 6 P.3d 43 (2000), limited in part on other grounds by, Darden, supra.

Thus, if the trial court excluded evidence which was relevant and material to the defense, reversal is required for the violation of the defendant’s right to present a defense unless the prosecution can prove the constitutional error harmless. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

In this case, the prosecution cannot meet that burden. First, the evidence was all clearly relevant and material to the defense. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The threshold

for proof of “relevancy” to support admission of evidence is extremely low and “[e]ven minimally relevant is admissible.” Darden, 145 Wn.2d at 621.

Here, the excluded evidence was more than minimally relevant - it was *necessary* for the defense. Ms. Johnson conceded that she stabbed Mr. Gale. The only question was whether she did so in self-defense. It is well-settled that self-defense involves both objective and subjective elements. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). As a result, evidence of self-defense is evaluated “from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” 121 Wn.2d at 238.

Thus, to properly evaluate a self-defense claim, the jury is required to stand in the shoes of the defendant and “consider all the facts and circumstances known to the defendant” at the time of the incident. 121 Wn.2d at 238. And the degree of force permissible depends upon what a “reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

To decide whether Ms. Johnson truly acted in self-defense, the jury was required to know all she knew and “experienced with the victim” up to that time. State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984). Indeed, the jury could not possibly evaluate whether a “reasonably prudent person” would have reacted as Ms. Johnson did to Mr. Gale’s threats without knowing all that she knew and had experienced with Mr. Gale. As the Supreme Court has held, “[i]n no other way could the jury safely say what a reasonably prudent [person] . . . similarly situated would have

done.” State v. Warrow, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977); see also State v. Painter, 27 Wn. App. 708, 709-710, 620 P.2d 1001 (1980), review denied, 95 Wn.2d 1008 (1981) (a defendant shot her unarmed stepson; her state of mind was relevant to whether a reasonable person in her situation would have feared imminent danger based upon prior threats and animosity in their relationship).

The court’s rulings here appear to have been based in part upon the mistaken assumption that circumstances which occurred before the incident, during the relationship, were too “remote” to be relevant to what happened that night. 6RP 138-39. But where, as here, there is an allegation of an abusive relationship, evidence of history of that relationship often forms the entire foundation for the self-defense claim. Allery, 101 Wn.2d at 594-95.

Indeed, when a defendant claims self-defense, it is not proper to limit the jury to considering only the acts and circumstances occurring at or immediately before the specific incident. See State v. Crigler, 23 Wn. App. 716, 598 P.2d 739, review denied, 92 Wn.2d 1038 (1979).

Thus, in Allery, the defendant suffered physical and mental abuse and, after filing for divorce from the perpetrator, found him in her house in violation of a restraining order. 101 Wn.2d at 592-93. He threatened to kill her and she left the room to try to escape out a window. She then heard a noise from the kitchen and thought he was getting a knife. 101 Wn.2d at 593. She loaded her shotgun, went into the kitchen and fired a shot, killing him while he lay on the couch. 101 Wn.2d at 593.

On appeal, the defendant argued that evidence of the “battered

woman syndrome” was admissible not only to explain why she would have remained in the relationship but also “to provide a basis from which the jury could understand why” she “perceived herself in imminent danger” at the time of the shooting. 101 Wn.2d at 595-96. The Supreme Court agreed. Where there was evidence that a woman has suffered from abuse, the Court held, evidence of it “may have a substantial bearing on the woman’s perceptions and behavior at the time” of the incident and is, in fact, “central to her claim of self-defense.” 101 Wn.2d at 597. In such cases, “to effectively present the situation as perceived by the defendant, and the reasonableness of her fear,” it is necessary for the defense to be able to present such evidence. 101 Wn.2d at 597.

Here, Ms. Johnson’s claim of self-defense depended upon the jury understanding her past relationship with Mr. Gale. The excluded evidence included evidence of his past abuse, control and manipulation of her, as well as how the relationship impacted her and her knowledge of his criminal past and how that increased her fear. All that evidence was relevant to both the determination of whether she actually feared him that night and whether that fear was objectively reasonable. It was only with that evidence that the jury could fully, properly evaluate her claim of self-defense. The trial court erred in excluding it.

The trial court’s exclusion of the evidence seemed also to be based on the court’s conclusion that it was all “character” evidence, inadmissible under ER 404(b). 1RP 14-25; 6RP 138-46. That conclusion was wrong. It is absolutely true that ER 404(b) prohibits introduction of character evidence in order to prove that someone acted “in conformity therewith.”

Further, under ER 405, only reputation evidence may be used to prove character for other purposes, and specific acts may only be used to prove character if character is an essential element of a claim or defense. ER 405; State v. Alexander, 52 Wn. App. 897, 901, 765 P.2d 321 (1988). And “specific acts” character evidence regarding a victim’s “alleged propensity for violence is not an essential element of self-defense.” State v. Hutchinson, 135 Wn.2d 863, 886-87, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157 (1999).

Here, however, Ms. Johnson was not trying to introduce the evidence to prove Mr. Gale’s “propensity” or “character” to prove how he acted that night. She was trying to introduce it to support her claim of self-defense. In such situations, the issue is not controlled by ER 404 or 405. Instead, “the evidence is not offered to show that the victim acted in conformity with the prior misconduct” but is instead “simply circumstantial evidence of the defendant’s state of mind,” relevant to the claim of self-defense. 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence* at 238 (2005); see United States v. Saenz, 179 F.3d 686 (9th Cir. 1999).

Thus, where a defendant claims self-defense, “prior misconduct by the victim may be admissible to show that the defendant had a reasonable apprehension of danger,” if the defendant was aware of the misconduct. Tegland, supra. Saenz, supra, is instructive. In Saenz, the defendant was charged with assault with a dangerous weapon and was precluded from introducing evidence of the victim’s prior misconduct about which he knew. 179 F.3d at 687. The prosecution argued the evidence was

inadmissible “character” evidence under FRE 404(b). On appeal, the Court reversed, declaring:

By its plain language, Rule 404(b) only prohibits evidence of other acts to prove the character of the person who committed the other acts and to prove that person’s actions in conformity with that character. Rule 404(b) does *not* apply when a defendant seeks to introduce evidence *that he knew of* a victim’s other acts to show the *defendant’s state of mind*.

179 F.3d at 688 (emphasis in original).² A defendant’s “reasonable belief that his use of force was necessary” is an essential part of self-defense, so evidence on that issue was relevant and admissible. 179 F.3d at 688-89.

Washington courts have similarly held that evidence of the victim’s past misconduct is relevant to the defendant’s state of mind when a defendant claims self-defense. See State v. Birnel, 89 Wn. App. 459, 469, 945 P.2d 433 (1998), review denied, 138 Wn.2d 1008 (1999); State v. Fondren, 41 Wn. App. 17, 25, 701 P.2d 810, review denied, 104 Wn.2d 1015 (1985).

The court erred and violated Ms. Johnson’s rights to present a defense in excluding the evidence. Indeed, even if ER 404 and ER 405 had actually applied to exclude it, that would still not end the inquiry. Evidentiary rules are not always identical to constitutional requirements. See State v. Heib, 107 Wn.2d 97, 105-106, 727 P.2d 239 (1986). Further, “the rules of evidence do not circumscribe the limits of constitutional rights.” State v. Anderson, 107 Wn.2d 745, 749-50, 733 P.2d 517 (1987), review denied, 97 Wn.2d 1020 (1988). Where the defendant’s right to present a defense is involved, exclusion of evidence based on an

²FRE 404(b) is identical in language to our state’s ER 404(b).

evidentiary rule or statute will only be permitted if the defendant's interests under that right are outweighed by the interests furthered by the rule or statute. State v. Baird, 83 Wn. App. 477, 482-83, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997); see also, Holmes v. South Carolina, ___ U.S. ___, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (rules excluding evidence may violate the right to present a defense if the rules are arbitrary or disproportionate to the purposes they are designed to serve).

Further, where evidence has high probative value to the defense, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. Art. 1, § 22." Hudlow, 99 Wn.2d at 16.

The evidence excluded by the court in this case was more than of "high probative value." It was crucial. Without the evidence, Ms. Johnson was left with little to support her claim of self-defense. And the prosecutor so noted, repeatedly, in closing argument, belittling Ms. Johnson's claim of self-defense as one that "really just doesn't exist." 8RP 26. Indeed, the prosecutor's entire theory was that there was no evidence that Mr. Gale posed a threat of any kind to Ms. Johnson, that he "never tried to hurt her," "never threatened her with bodily harm," and that it could not possibly be self-defense to stab someone in the back. 8RP 28-29, 76.

Reversal is required. Exclusion of relevant defense evidence is constitutional error because it "deprives the defendant of the basic right to have the prosecutor's case encounter and survive the crucible of

meaningful adversarial testing.” Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quotations omitted). The prosecution bears the burden of proving any such constitutional error harmless, and can only meet that burden by proving beyond a reasonable doubt that the jury would have reached the same result if the evidence had been admitted. State v. Maupin, 128 Wn.2d 918, 929, 913 P.2d 808 (1996).

It cannot meet this burden here. The only issue was whether Ms. Johnson acted in self-defense, and the excluded evidence was directly relevant to that determination. Further, it is irrelevant whether this Court finds the excluded evidence would be credible, or persuasive. It was the *jury's* duty to decide whether to believe Ms. Johnson's claim that she was mentally and physically abused by Mr. Gale and whether that abuse explained her actions as self-defense, even though at the specific time of the incident he was not physically attacking. See State v. Dietrich, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969). It was also the jury's duty to decide whether the knowledge Ms. Johnson had of Mr. Gale's domestic violence history with others, including disregard for a no-contact order and several domestic violence assault convictions, supported Ms. Johnson's fear and rendered it objectively reasonable. While it is possible that the evidence would be “so incredible that its exclusion is harmless error,” the Court is not the “arbiter[] of credibility” and “must take the testimony to be true” and evaluate the likely effect of its exclusion “on the outcome of the trial.” State v. R.H.S., 94 Wn. App. 844, 849, 974 P.2d 1253 (1999). Where the testimony, “if believed, would establish a defense,” a reviewing

court cannot “declare that the error” in excluding it “is harmless beyond a reasonable doubt.” Id.

Because Ms. Johnson’s constitutional rights to present a defense were violated by exclusion of the evidence and the error cannot be deemed harmless, reversal is required.

c. The prosecutor committed misconduct in flagrantly exploiting the effect of the exclusion of evidence

The violations of appellant’s rights which occurred here were not caused by the court’s rulings alone. In addition, her due process rights to a fair trial were violated by the prosecutor’s comments in closing argument, faulting her for failing to present any evidence to support her claim of self-defense after successfully moving to exclude just such evidence.

i. Relevant facts

In closing argument, the prosecutor repeatedly told the jury that the evidence did not support Ms. Johnson’s claim of self-defense, because although Mr. Gale was clearly a “worthless boyfriend,” that did not “justify” the assault. 8RP 17-18. The prosecutor declared that the self-defense claim of Ms. Johnson “really just doesn’t exist,” that it did not fit with what the jury had heard, that Ms. Johnson’s testimony that she had to stab Mr. Gale to get away from the relationship was unbelievable, that “there just isn’t any evidence that would support self-defense,” that Ms. Johnson was not in “legitimate” fear for her life, that all that had happened that night was a verbal argument which did not support use of any force in response, and that it was unreasonable for Ms. Johnson to bring the knife into the argument and stab Mr. Gale simply because she was “angry or

disappointed.” 8RP 25-26. In rebuttal closing argument, the prosecutor described Ms. Johnson as having stabbed Mr. Gale just because their relationship did not “work out.” and argued that there was no evidence to support a claim of self-defense, that Ms. Johnson was in “no fear” of bodily harm because Mr. Gale was not attacking her, that Ms. Johnson was only in danger of being “annoyed further” by Mr. Gale rather than of any harm, that this “is not a case of self-defense,” that “[t]here is no self-defense,” that evidence of self-defense “just doesn’t exist,” and that stabbing a man in the back is “not self-defense.” 8RP 66-79.

ii The arguments were serious misconduct

The prosecutor’s arguments were misconduct. It is improper for a prosecutor to denigrate the defendant for failing to present evidence when that “failure” was based upon the court’s exclusion of evidence on the prosecutor’s motion. State v. Kassahun, 78 Wn. App. 938, 952, 900 P.2d 1109 (1995). In Kassahun, the prosecutor moved to prevent the defense from introducing evidence that the victim and witnesses were gang members and involved in gang activity outside the defendant’s store. 78 Wn. App. at 946-47. The defendant was then belittled by the prosecutor in closing argument for his claim that he felt threatened by gang activity at the store, with the prosecutor declaring, “where was the evidence of that?” 78 Wn. App. at 946-47.

On appeal, the Court held the prosecutor’s arguments were misconduct. 78 Wn. App. at 952. It was clearly improper for the prosecutor first to thwart the defense efforts to produce specific evidence and then exploit the exclusion of the evidence against the defendant. 78

Wn. App. at 952. Having prevailed upon its motion, the prosecution committed misconduct in insinuating that the defendant's testimony was unbelievable because he failed to present evidence excluded by that motion. 78 Wn. App. at 952.

Here, the prosecutor committed just such misconduct. After first moving to exclude all of the evidence which would have supported Ms. Johnson's claim of self-defense, the prosecutor then repeatedly told the jury that Ms. Johnson's claim was not supported by the evidence, that her use of force was simply unreasonable as a response to a mere argument. But had the jury had heard the evidence the prosecutor successfully prevented Ms. Johnson from presenting, Ms. Johnson's claim *would* have had evidentiary support, not only from her own testimony but testimony of her roommate and of Mr. Gale himself. The prosecutor committed serious misconduct in exploiting the fruits of his own motion and objections. This Court should so hold and should reverse.

d. Counsel was ineffective

In the event this Court finds that counsel's failures below contributed to the trial court's refusal to admit the evidence, reversal should be ordered based upon counsel's ineffectiveness. Both the state and federal constitutions guarantee the accused the right to effective assistance. Strickland v. Washington, 366 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d

794, 808, 802 P.2d 116 (1990).

Here, counsel was repeatedly ineffective in relation to the admission of the crucial evidence to support Ms. Johnson's defense.³ Counsel has a duty to inform himself of the applicable law and research available defenses. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). This includes not only investigation into factual matters but also legal matters, in order to be prepared. Id.

Here, given the facts of the case, it must have been clear, in preparing for trial, that Ms. Johnson's self-defense claim was not "typical." Given that Ms. Johnson's fear was grounded in her relationship and experience with Mr. Gale in the past rather than a contemporaneous physical attack, counsel could reasonably have expected to have to cite some authority in support of the evidence he was going to seek to admit. But counsel cited no authority, save for ER 404 and 405. 1RP 16. That reliance, however, was misplaced - something counsel could have discovered with minimal research. See Alexander, 52 Wn. App. at 765.

Even if the need to research the issue and provide authority to support introduction of the crucial evidence was not obvious prior to the court's pretrial rulings, it certainly was so after. At that point, it was clear that the court was laboring under the misimpression that the evidence was inadmissible "character" evidence, rather than relevant evidence of Ms. Johnson's reasonable fear. And by that time the court specifically

³Counsel's other acts of ineffectiveness are discussed in other arguments, *infra*.

encouraged counsel to provide some authority. 1RP 32-35.

Such authority clearly exists. See, e.g., Allery, 101 Wn.2d at 593-95. Yet counsel failed to provide it. Indeed, counsel failed to present *any* relevant caselaw establishing that the victim's prior conduct *is* admissible and relevant to prove a defendant's claim of self-defense, or to even ask the court to reconsider. Yet the court had clearly indicated its willingness to do so. Given that invitation, and that the weight of authority supported introducing the evidence, it is inexplicable that counsel failed to make any efforts to have the court reconsider its decision, especially because such reconsideration would most likely have resulted in admission of the crucial evidence to support Ms. Johnson's claim of self-defense.

Finally, counsel was ineffective in failing to even attempt to present testimony of an expert on battered women syndrome. Such testimony is admissible to explain why a woman would not leave a man who abused her, why she would not tell police about being abused, why she could have perceived verbal threats as a prelude to serious violence, and other facts which are not usually within the common understanding of lay persons. See Allery, 101 Wn.2d at 592-95; see also Janes, 121 Wn.2d at 239 (expert testimony on nearly identical defense aids the jury in understanding the perception of imminence of danger and the need to use force to repel it). Indeed, in Janes, the Court suggested that such testimony was not only helpful but was in fact *necessary* for the jury to be able to evaluate the reasonableness of the defendant's acts of self-defense in this kind of case. 121 Wn.2d at 239.

Ms. Johnson's entire defense was based upon the jury

understanding the impact that the alleged abuse and prior misconduct of Mr. Gale had wrought upon her perception of imminence of danger, and the reasonableness of that perception. Evidence from an expert would have explained that a person suffering from such a relationship is often “hypervigilant” for signs that they are going to suffer abuse, signs which are not usually obvious to others. Janes, 121 Wn.2d at 230. Such evidence would have explained how victims are usually “acutely aware” of their environment and even subtle changes in the abuser’s expressions or mannerisms can be correctly perceived as a signal that abuse is about to occur. Janes, 121 Wn.2d at 234, quoting, Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 L. & Psychol. Rev. 103-104 (1987).

Indeed, such evidence could have explained many of the “facts” the prosecutor relied on in closing as proving that Ms. Johnson did not have a viable claim of self-defense - the fact that she “chose” to stay with Mr. Gale, that she did not tell police about the prior abuse the night of the incident, and that Mr. Gale was not physically advancing but Ms. Johnson was claiming self-defense. See 8RP 17-18, 26-28, 68, 70-76.

Counsel’s failure to proffer this evidence is unfathomable. Ms. Johnson’s entire defense was based upon the jury understanding the unique effect the abusive relationship had on her perception of danger, as opposed to how a person not suffering such abuse might react. And the evidence was essential in order to explain to a lay jury the very foundation of his client’s defense, a defense counsel tried to argue without the support expert testimony could easily have provided. See 8RP 49.

It is Ms. Johnson's position that the trial court's rulings depriving her of her rights to present a defense compel reversal on their own. But counsel's troubling ineffectiveness in handling the rulings and the evidence should also give the Court pause. To the extent that the ineffectiveness contributed to the court's errors in excluding the evidence, that ineffectiveness clearly prejudiced Ms. Johnson. It went directly to the heart of Ms. Johnson's only defense. Even if this Court chooses not to reverse based upon the violation of Ms. Johnson's constitutional rights to present a defense, this Court should nevertheless reverse based upon counsel's ineffectiveness.

2. THE PROSECUTOR COMMITTED FLAGRANT,
PREJUDICIAL MISCONDUCT AND COUNSEL WAS
AGAIN INEFFECTIVE

Unlike any other attorney, a prosecutor has a duty and responsibility to work only in the public interest, which requires ensuring a fair trial by acting "impartially and in the interests of justice and not as a 'heated partisan.'" See State v. Huson, 73 Wn.2d 660, 662, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969); State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). When a prosecutor fails in these duties and commits misconduct, he risks not only depriving the defendant of a fair trial but also denying the public its right to have our system work honorably, as it should. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

In this case, this Court should reverse, based upon the prosecutor's repeated acts of misconduct. In the alternative, reversal is required based upon counsel's ineffectiveness in handling the misconduct.

a. Misconduct in telling the jury it had to find the state's witnesses were lying in order to acquit

i. Relevant facts

In closing, the prosecutor told the jury it had to “decide what the true facts of this case are” and whether they proved Ms. Johnson was guilty. 8RP 11. The prosecutor emphasized the testimony from Ms. Greenwood, Ms. Bell, Kindra Bell and Ms. Clark because it supported the prosecution’s theory while Ms. Johnson version of events, obviously, did not. 8RP 18. The prosecutor told the jury that it had the duty to “decide the credibility of the witnesses,” then went on:

. . . and one of the main things you are going to have to do in this case is decide do you believe [Ms. Johnson] . . . when she testified. *Who told you the truth?* Gloria Greenwood, Linda Bell, Kindra Bell, Kjelsi Clark, Dr. Bell or the defendant?

8RP 23 (emphasis added).

The prosecutor then detailed all the ways in which the state’s witnesses gave a different version of events than Ms. Johnson, then went on to argue that the prosecution’s witnesses, unlike the defendant, had no motive to lie:

Does [Ms. Johnson] have a motive to be untruthful? *Do the State’s witnesses have a motive to be untruthful to you?*

Gloria Greenwood. She doesn’t know Parrish Gale, she doesn’t know Ebony Johnson. She doesn’t really care about either one of them. She has no stake in this fight. She’s just here to tell you what she saw this night.

Same thing goes for Linda Bell. Same thing goes for Kindra Bell. Same thing goes for Kjelsi Clark, and the same thing goes for Dr. Bell.

None of them have an interest in this case. They are just here to tell you what they saw that night, and contrast that with the defendant who is very angry with Parrish Gale and who has been

charged with a crime in this case

The State's witnesses had no motive to lie to you. They came in here. They told you the truth. They told you what they saw[.]

8RP 24-26 (emphasis added).

In closing argument, counsel focused on what “weight” to give witness statements, arguing about the weaknesses in memory, problems in the delay and circumstances of the statements and noting there was an opportunity for the witnesses to compare notes, however benignly. 8RP 32.

In rebuttal closing argument, the prosecutor described the defense as

there was a grand conspiracy in place here where Linda Bell, Kindra Bell, Gloria Greenwood, Kjelsi Clark, all these people who were eyewitnesses to this event somehow had it in for the defendant and were trying to slant their handwritten statements to the police and their testimony here in court to make it look like she did something bad.

8RP 59 (emphasis added). He also characterized the defense as that the prosecution witnesses had “colluded” together and had some motive to frame Ms. Johnson, then declared that the state’s witnesses had testified as they had “[n]ot because they got it out for the defendant who they never met in their life. They told you that because it’s what they saw. *It’s the truth.*” 8RP 60 (emphasis added).

The prosecutor also told the jury that counsel had suggested that all the prosecutor witnesses were “somehow fabricating or embellishing their testimony,” then stated his confidence that they did not have any possible motive to do that and the jury would find the witnesses “don’t have any

reason *to make this up*.” 8RP 65 (emphasis added). A moment later, the prosecutor repeated that the witnesses “came in here, told you what they saw and what they remembered because it was *the truth*.” 8RP 66 (emphasis added).

Continuing on with this theme, the prosecutor accused counsel of claiming that Ms. Clark was lying when counsel simply argued about inconsistencies in her testimony. 8RP 67. The prosecutor declared that counsel was suggesting Ms. Clark had a “motive to lie” about that evening, then ridiculed that supposed suggestion, declaring, “to say that she’s *not telling you the truth* because she didn’t have her radio on doesn’t make sense.” 8RP 67 (emphasis added).

ii. The arguments were serious misconduct

These arguments were clearly flagrant, prejudicial misconduct. It is “misleading and unfair to make it appear that an acquittal requires the conclusion” that the prosecution’s witnesses are lying. State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991); United States v. Richter, 826 F.2d 206, 209 (2nd Cir. 1987). The argument is improper and misstates the law, the prosecution’s burden of proof and the jury’s role, because the jury is not required to determine who is telling the truth and who is lying. State v. Wright, 76 Wn. App. 811, 824-26, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). Instead, it is only required to determine if the prosecution has proven its case beyond a reasonable doubt. Wright, 76 Wn. App. at 824-26.

In addition, the arguments incorrectly give the jury the “false choice” between believing the witnesses are lying or telling the truth.

Wright, 76 Wn. App. at 824-26. But the “testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.” Wright, 76 Wn. App. at 824-26; see State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). Indeed, the jury need only be unsure whether witnesses accurately perceived or recalled what happened on the night in question - it need not find that prosecution witnesses were *lying*. Fleming, 83 Wn. App. at 213-14.

Here, by telling the jury that it had to figure out whether the defendant or the prosecution’s witnesses was telling the truth, the prosecutor misstated the jury’s role. Further, by declaring that the prosecution’s witnesses had no “motive to be untruthful,” no reason to lie, and no interest in the outcome of the case which would make them want to lie, the prosecutor clearly told the jury that it had to find the state’s witnesses were lying in order to believe the defense. And by describing the defense as depending upon the jurors finding a “grand conspiracy” between the witnesses, who “colluded” together to try to make it look like Ms. Johnson “did something bad” because they had “got it out” for her for some reason, the prosecutor cemented the improper idea in the juror’s minds that they were required to find that the state’s witnesses were lying and conspiring together in order to acquit Ms. Johnson. 8RP 23-26, 59-60, 65-67. The obvious import of all of the prosecutor’s arguments was to lead the jury to believe that it had to find some intentional misconduct and deception on the part of the state’s witnesses to find Ms. Johnson not guilty, not just that they were lying.

Reversal is required. It is so well-established that arguments of this kind are misconduct that fully ten years ago the Fleming Court held that the mere making of them was “a flagrant and ill-intentioned violation of the rules governing a prosecutor’s conduct at trial.” Fleming, 83 Wn. App. at 213-14. The passage of years since Fleming has only increased the flagrancy of a prosecutor making such clearly improper arguments about what is required for the jury to acquit.

In response, the prosecution may argue that the comments were either a permissible comment on how the jury should resolve a conflict in witness testimony, or were somehow “invited” by counsel. This Court should summarily reject any such arguments. Under Wright, where there is a conflict in witness testimony which must be resolved in order to decide a case, the prosecutor may argue that, in order to believe the defendant, the jury must find the state’s witnesses were *mistaken*. Wright, 76 Wn. App. at 826. The argument “is not objectionable because it does no more than state the obvious and is based on permissible inferences from the evidence.” Id.

Here, however, the prosecutor did not argue that the jury had to find that the prosecution’s witnesses were *mistaken*. He told the jury that they would have to find they were *lying*, that they had a motive to do so, and further, indirectly, that they were effectively committing the uncharged crime of perjury, before the jury could acquit. Such argument is still misconduct under Wright. Wright, 76 Wn. App. at 826 n.13.

Similarly unconvincing would be any claim that counsel somehow “invited” the prosecutor’s highly prejudicial, improper argument.

Improper remarks of a prosecutor may not be grounds for reversal if they were provoked by defense counsel and are in reply to counsel's arguments, unless the remarks are not "a pertinent reply" or so prejudicial no curative instruction could have been effective. See State v. Russell, 125 Wn.2d 24, 38, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). But here, the bulk of the improper comments were made in *initial* closing argument, before counsel's argument on Ms Johnson's behalf. Before counsel even spoke, the prosecutor had already committed himself to the course of misconduct his rebuttal closing argument only continued. This Court should not be swayed by any efforts of the prosecution to minimize or dismiss the very serious, improper, flagrant and prejudicial misconduct the trial prosecutor repeatedly committed. This Court should reverse.

b. Misconduct in inciting the jury's passions and prejudices against Ms. Johnson and counsel and arguing that the jurors would violate their oaths if they did not convict

The prosecutor also committed flagrant, prejudicial misconduct by 1) describing the defense as only calling Mr. Gale as a witness in order to "distract" the jury, "trash" Mr. Gale and convince the jurors to violate their oaths, and 2) claiming that the defense was improperly asking the jury to base their decision on emotion while at the same time the prosecutor was himself trying to incite the jury's emotions against the defense.

i. Relevant facts

In closing argument, counsel tried to cast doubt on the thoroughness of the investigation and said the prosecution would have called Mr. Gale as a witness if the prosecution was "interested in the

truth,” arguing that the prosecution wanted to prove their case but there was a difference between that and seeking the truth. 8RP 45. Counsel then told the jurors it was their job to determine “what the truth of the matter is,” then argued about facts that Mr. Gale testified about posed “problems” for the state’s theory of the case. 8RP 45-53. In rebuttal closing argument, the prosecutor then said

[c]ertainly the State could have called him, but *there’s one reason and one reason only that the defense called Parrish Gale.* That wasn’t to shed any more light on what happened on April 9th, 2005. It really doesn’t add anything to the case.

They called him for one reason and one reason only, and that’s to put him up there, trash his character and get out all the bad things about him to distract you from what actually happened on April 9th, 2005.

He was up there for more than an hour before a question was ever asked of him about what happened on April 9th, 2005.

He has the worst memory of all of the witnesses who were there. He was using drugs. He got stabbed that night. He was on all kinds of medications afterwards. He never had the opportunity to fill out a handwritten statement. He’s got the worst memory of anybody out there.

He was not called in this case to help you decide whether Ebony Johnson . . .stabbed in self-defense or whether it was with intent to cause great bodily harm. He was called so they could put him up there for hours and get out all the horrible things he’s done in his life to distract you from determining what the real truth in this case is.

8RP 70-71 (emphasis added).

A few moments later, the prosecutor again described the defense as based solely on slandering the victim, then went further:

This is not self-defense, the real defense is “Parrish Gale is a crappy boyfriend, a lame person, an undesirable person *and why should you care that he got stabbed?* That’s the real defense in this case. That’s why he was called. That’s why counsel spent so many hours examining his client and Iesha and Parrish Gale about

everything except for April 9th, 2005.

8RP 73-74 (emphasis added). After exhorting the jury not to decide the case based upon Ms. Johnson's having cried when she testified or on not liking Mr. Gale, the prosecutor then turned to denigrating counsel and the defense, telling the jury:

You must reach your decision based on the facts and the law, not on sympathy, prejudice or personal preference, and that's the true defense in this case. There is no self-defense. It just doesn't exist. The real defense in this case is make the jury hate Parrish Gale, feel sorry for my client and excuse her conduct.

You took an oath as jurors and you all promised in voir dire that you would follow the law and that's all the State is asking you to do in this case is return a verdict that represents the truth.

8RP 74-75 (emphasis added). The prosecutor then repeated that the state was asking the jurors to follow their oath and the law rather than decide the case on emotion, in contrast with what he said the defense was doing, i.e., asking the jury to "excuse her conduct or water down the verdict with assault in the second degree because you don't like Parrish Gale or you feel sorry for her[.]" 8RP 76.

ii. The arguments were flagrant, prejudicial misconduct

These arguments of the prosecutor were misconduct, in several ways. First, it was wholly improper and misconduct for the prosecutor to repeatedly characterize the defense as merely based upon slandering the victim. It is improper and misconduct for a prosecutor to try to incite the jury to decide the case on an emotional basis. Belgarde, 110 Wn.2d at 507-508; State v. Powell, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992). Such argument invites the jury to

decide the case not based upon the evidence properly before it but rather on the improper basis of how the jury *feels*. See State v. Echevarria, 71 Wn. App. 595, 598-99, 860 P.2d 420 (1993).

In addition, it is completely improper for a prosecutor to tell the jury that the defense attorney is somehow trying to “pull the wool” over the jury’s eyes in order to distract the jurors from their sworn duty. See U.S. v. Friedman, 909 F.2d 705, 707 (2nd Cir. 1990); see State v. Negrete, 72 Wn. App. 62, 863 P.2d 137 (1993), review denied, 123 Wn.2d 1030 (1994) (argument that defense counsel was being “paid to twist the words of the witnesses” by the defendant was misconduct). Comments indicating that counsel is retained to “lie and distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to their client’s involvement with the alleged crimes” are serious misconduct. Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983), cert. denied, 469 U.S. 920 (1984). As the Bruno Court noted:

Even though such prosecutorial expressions of belief are only intended ultimately to impute guilt to the accused, not only are they invalid for that purpose, they also severely damage an accused’s opportunity to present his case before the jury. It therefore is an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system or criminal justice. Furthermore, such tactics unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice[.]

721 F.2d at 1194.

Here, the prosecutor’s arguments were clearly designed to incite the jurors emotionally against Ms. Johnson and denigrate her and her attorney. There could be no other reason for telling the jury that counsel

only called the victim to the stand to “trash his character” and “distract” the jurors from “what actually happened.” Nor could there be any other reason to argue that Mr. Gale was only called as a witness for the completely improper purpose of making the jury not care whether the victim got stabbed by making them “hate” him, feel sorry for Ms. Gale and ignore the law and their oath by not finding her guilty of first-degree assault.

Nor was the misconduct somehow erased by the prosecutor’s declaration that the jury should not decide the case on “sympathy, prejudice or personal preference.” That comment was made only *after* the prosecutor had already repeatedly inflamed the jury emotionally against counsel and Ms. Johnson for the corrupt acts of trying to convince the jury to decide the case based upon hating Mr. Gale and not caring why he got stabbed, what the prosecutor said was the “real defense in this case.” 8RP 70-74. Further, at the same time the prosecutor made the declaration, the prosecutor again reiterated the theme of the defense as trying to seduce the jury into deciding the case improperly, in violation of their oaths. 8RP 74-75. The prosecutor was not correctly telling the jury that emotion should play no part in their decision - he was trying to ensure that the emotion upon which they relied was that which *he* had incited, against the defense.

Second, and even more egregious, the prosecutor committed serious misconduct in arguing that the prosecution (as opposed to the defense) was asking the jurors to follow their oaths and the law and in suggesting that acquitting would mean violating those oaths. It is not misconduct for a prosecutor to tell the jury they would have to ignore the

evidence in order to acquit and ignoring the evidence would be a violation of their oath. State v. Coleman, 74 Wn. App. 835, 838-39, 876 P.2d 458 (1994), review denied, 125 Wn.2d 1017 (1995). It is, however, misconduct to tell the jury “it would violate its oath if it disagreed with the state’s theory of the evidence.” Id. Indeed, comments which have the “clear import” of telling the jurors they would violate their oaths if they failed to convict are “considered to be among the most egregious forms of prosecutorial misconduct.” State v. Acker, 265 N.J. Super. 351, 627 A.2d 170, cert. denied, 134 N.J. 485, 634 A.2d 530 (1993), quoted in, Coleman, 74 Wn. App. at 839-40. Even standing alone such argument has “the clear capacity to deprive a defendant of his constitutional right to a fair trial.” Acker, 827 A.2d at 173.

Here, with his comments, the prosecutor clearly told the jurors that they would be violating their oaths if they found for the defense. Coleman, supra, is directly on point. In Coleman, the defendant took a man’s wallet from him without his knowing it, and when the man noticed, tried to grab it back. 74 Wn. App. at 836-37. This caused the defendant and the victim to fall to the ground, where the defendant then threw the wallet to another man. Id. When the defendant and his friend started to walk away, the victim grabbed the defendant and tried to reach into his pocket. Id. At that point, the defendant pushed the victim’s hand away, “tensed up” and said, “don’t touch me. I have a gun.” Id.

The question at trial was whether the crime was a theft or had become a robbery with the mention of the gun. 74 Wn. App. at 837-38. The prosecution’s theory was that there was a implied use of force because

“in today’s world, the mention of a gun is perceived as a serious threat of force.” 74 Wn. App. at 838. The defense theory was that the victim had grabbed the defendant and the mention of the gun was the defendant’s way of protecting himself from the victim’s advances, “not as a means of retaining the wallet.” 74 Wn. App. at 838.

In rebuttal closing argument, the prosecutor said:

It is your job to apply the facts to the law, and we cannot second guess you, and will not second guess you, and if you determine that the only thing that happened here was a theft then that is your judgment. And you are entitled to make it, but I would suggest to you that to do so you have to do two things. And one is to ignore the actual evidence in front of you, and the second is thereby to violate your oath as jurors.

74 Wn. App. at 838.

In finding the argument misconduct, the Court noted that the comments could be construed either as a permissible argument that ignoring the evidence would violate the juror’s oath, or the impermissible argument that disagreeing with the prosecution’s theory of the evidence would amount to such a violation. 74 Wn. App. at 838. Because there was a “substantial risk” the argument could have been construed by the jury as the latter, the Court found the comments improper. 74 Wn. App. at 839.

The Coleman Court decided not to reverse, however, because the misconduct was an isolated incident, and because the improper portion of the argument was “tempered” by the comments stating that the jury’s verdict would be “honored” and not second-guessed, which the Coleman

majority felt “outweighed” the improper comments.⁴ 74 Wn. App. at 841.

In reaching this conclusion, however, the Court gave prosecutor’s throughout the state a strong warning:

We trust that prosecutors will take these decisions to heart and will, in the future, refrain from making argument to the jury that it would violate its oath by accepting the defense theory of the case. *We cannot emphasize enough the unnecessary risk of reversal that such argument creates.*

74 Wn.App. at 840-41 (emphasis added).

The prosecutor in this case did not heed that warning. Here, unlike in Coleman, the argument was not isolated. It was repeated. And it was not the only misconduct the prosecutor committed. Instead, it was part of an argument permeated with misconduct, beginning with telling the jurors they had to find the state’s witnesses were lying in order to acquit, to inciting the jurors against the defense.

Further, there was nothing in the argument that in any way “tempered” the prejudicial comments. There was no indication that the independent judgment of the jurors would be honored. There was only the repeated exhortation that the jurors promised to follow their oath and that finding for the defense would be violating it, while finding for the state would not. Thus, unlike in Coleman, here, there was nothing blunting the impact of the prosecutor’s flagrant, prejudicial misconduct.

c. Reversal is required

This Court should reverse. Even where, as here, counsel failed to

⁴The dissenting judge, Acting Chief Judge Pekelis, found the comments so egregious under the circumstances that she would have reversed. 74 Wn. App. at 841-43 (Pekelis, A. C. J., dissenting).

object to the misconduct below, reversal is required where misconduct is so flagrant and prejudicial it could not have been cured by instruction. Belgarde, 110 Wn.2d at 507.⁵ As noted above, under Fleming, the prosecutor's arguments misstating the law on what was required to acquit is flagrant, prejudicial misconduct. 83 Wn. App. at 213-14. Further, it is recognized that "prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case." Fleming, 83 Wn. App. at 215. Here, it is clear the jury did not completely believe the prosecution's version of events, because it did not find Ms. Johnson guilty of the charged crime - only a lesser offense. There can be no question that the misconduct in this case had a direct, prejudicial impact on the jury's verdict.

In addition, no instruction could have cured the enduring prejudice caused by the prosecution's repeated acts of misconduct. The prosecutor did not simply tell the jury that it had to find that the prosecution's witnesses were lying in order to acquit. He also told them, effectively, that they had to find that people who were strangers to Ms. Johnson were somehow so corrupt that they were deliberately conspiring together against her without any motive. Next, the prosecutor accused the defense of the grave impropriety of trying to convince the jury to violate their oaths and acquit based upon dislike and devaluing the victim.

The effect of these arguments went far beyond just misstating the

⁵Counsel's ineffectiveness in failing to object to the misconduct is discussed, infra.

law, the jury's role and the burden of proof. They clearly invoked the jury's strong passions against Ms. Johnson and counsel to an extent that mere instruction could not have cured the prejudice.

It is important to remember that Ms. Johnson did not deny having stabbed Mr. Gale. The only question was whether she was acting in self-defense. The prosecutor's misconduct struck directly at the heart of that issue. The result was that Ms. Johnson was deprived of her state and federal constitutional rights to a fair trial. This Court should reverse.

In the alternative, in the unlikely event that the Court believes that the enduring prejudice caused by the misconduct could have been erased by a proper instruction, this Court should reverse based on counsel's ineffectiveness in failing to object and request such an instruction. If Ms. Johnson can show that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, supra, 466 U.S. at 694.

Here, Ms. Johnson can meet that standard. The misconduct went to the heart of her defense. It misstated the jury's role, relieved the prosecution of the full weight of its burden of proof, and invoked very strong prejudice against Ms. Johnson. And it told the jury that failing to convict would be a violation of their oaths as jurors, thereby ensuring that the jury would convict the defendant of a crime, whether in the first or second degree. Yet counsel sat mute, making no effort to mitigate the very clear prejudice to his client.

Ms. Johnson submits that the enduring prejudice caused by the repeated flagrant, prejudicial misconduct of the prosecutor could not have

been erased by even the most strongly worded instruction. If, however, such erasure was even possible, reasonably competent counsel would have made the attempt to do so on his client's behalf. The failure was unprofessional, and it clearly prejudiced Ms. Johnson in this case, because it went to the very heart of the only issue - whether she acted in self-defense. The result was that the jury was completely unable to fairly and impartially evaluate the evidence. Based upon the prosecutor's repeated flagrant acts of misconduct, or counsel's ineffectiveness in failing to object, this Court should reverse.

3. THE JURY INSTRUCTIONS MISSTATED THE STANDARD FOR SELF-DEFENSE AND WERE A COMMENT ON THE EVIDENCE AND COUNSEL WAS INEFFECTIVE IN PROPOSING THEM

Under the state and federal constitutions, the prosecution shoulders the burden of proving every element of the charged crime, beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of self-defense, when raised, negates an element of the charged crime. See State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). Thus, when self-defense is raised, it is part of the prosecution's constitutionally mandated burden to disprove that the defendant acted in self-defense. See State v. McCullum, 98 Wn.2d 484, 493, 656 P.2d 1064 (1983).

As a result, to be constitutionally sufficient, jury instructions must more than just "adequately convey the law of self-defense." State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Instead, they must,

when read as a whole, “make the relevant legal standard ‘manifestly apparent to the average juror,’” and make the prosecution’s burden clear. 128 Wn.2d at 900 (quotations omitted).

The jury instructions on self-defense did not meet that standard here, and counsel was utterly ineffective in proposing them.

a. Relevant facts

After jury instructions were first discussed off the record, the court indicated that the parties disputed which instructions should be given, if any, on self-defense. 7RP 8. The prosecution wanted the court to give an instruction based on WPIC 17.04, which the defense said was not “on the mark.” 7RP 8, 144-55. The court deferred ruling on the issue until the following day, by which time the prosecution had withdrawn its objection to giving self-defense instructions. 7RP 150-51, 8RP 4.

Instructions 12 and 13, given by the court, were proposed by the defense. CP 63-66, 114-15.

b. The self-defense instructions relieved the prosecution of the full weight of its burden of proof and counsel was ineffective

Because the prosecution bears the constitutionally mandated burden of disproving self-defense, the failure of jury instructions to properly set forth the prosecution’s burden is error of constitutional magnitude which may be raised for the first time on appeal even if counsel failed to object to them below. Walden, 131 Wn.2d at 473. Where, as here, however, counsel actually *proposed* the offensive instructions, the error is said to be “invited” by counsel. See State v. Studd, 137 Wn.2d 533, 538, 973 P.2d 1049 (1999). Thus, here, the question is not only

whether the instructions were improper but also whether counsel was ineffective in proposing them. See State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) (the “invited error” doctrine does not apply to preclude review “where the invited error is the result of ineffectiveness of counsel).

The answer to both of those questions “yes.” First, the instructions were improper. Jury Instruction 12 was based on WPIC 17.02, and provided:

It is a defense to a charge of Assault in the First Degree and Assault in the Second Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he or she is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

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 114. Instruction 13, the instruction based on WPIC 17.04, provided:

A person is entitled to act on appearances in defending herself, if that person believes in good faith and on reasonable grounds that she is in actual danger of great personal injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 115.

Thus, the jury was told both that the use of force in self-defense was proper if Ms. Johnson reasonably believed she was about to be “injured,” *and* that she had to believe she was “in actual danger of great personal injury.” While there was no instruction defining “great personal injury,” Instruction 9 defined “great bodily harm” as bodily injury creating a “probability of death,” or “significant, serious permanent disfigurement,” or “significant permanent loss or impairment of the function of any bodily part or organ.” CP 111. This was in contrast with “substantial bodily harm,” defined as injury involving a “temporary but substantial disfigurement,” or “temporary but substantial loss or impairment of the function of any bodily part or organ,” or “temporary but substantial loss or impairment of the function” of a bodily part or organ, or one that “causes a fracture of any bodily part.” CP 113.

The instructions misstated the proper standard for self-defense in this case. Where a defendant raises self-defense in a case involving the use of “non-deadly force,” self-defense is proper if she reasonably feared *injury*, not great personal injury. See RCW 9A.16.020(3); State v. Bland, 128 Wn. App. 511, 116 P.3d 428 (2005). Indeed, “for use of non-deadly force, WPIC 17.04 is not an accurate statement of the law because it impermissibly restricts the jury from considering whether the defendant reasonably believed the battery at issue would result in mere injury.” State v. L.B., 132 Wn. App. 948, 953, 135 P.2d 508 (2006).

Ms. Johnson was not charged with homicide, or even attempted homicide. She was charged with first-degree assault, committed while armed with a deadly weapon. CP 1-2. The proper standard for self-

defense was not the standard required for justifiable *homicide*, it was the standard required for use of non-deadly force. State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004).

Rodriguez is instructive. In Rodriguez, as here, the defendant stabbed someone with a knife and was charged with first degree assault while armed with a deadly weapon. 121 Wn. App. at 183. The Rodriguez jury was given an “act on appearances” instruction which required the defendant to believe he was in actual danger of “great bodily harm.” 121 Wn. App. at 186. Because, as here, the defendant in Rodriguez was charged with first-degree assault, the jury was also given an instruction on “great bodily harm,” identical to the one given here. 121 Wn. App. at 186; CP 111.

In reversing, the Rodriguez Court noted that, because the jury had also been given the definition of “great bodily harm,” it “could easily (indeed may have been required to) find that in order to act in self-defense,” the defendant had to believe he was “in actual danger of probable death, or serious permanent disfigurement, or loss of a body part or function.” 121 Wn. App. at 186. Because the instructions given effectively excluded the idea that the defendant could fear only ordinary batteries, “the jury was required to find that [the defendant] was scared of death or at least permanent injury” in order to have an effective claim of self-defense, “[a]nd that is not the test.” 121 Wn. App. at 187. Because the jury instructions decreased the prosecution’s burden of disproving self-defense, they were erroneous. Id.

Just as in Rodriguez, here the jury was told that it had to find that,

in order to act in self-defense, Ms. Johnson had to believe she was in actual danger of something far greater than required - "great personal injury" instead of "injury." And just as in Rodriguez, here, the instructions given relieved the prosecution of the full weight of its burden of disproving self-defense.

Counsel was ineffective in proposing these instructions. Counsel is ineffective if his performance fell below an objective standard of reasonableness despite a strong presumption of competence and that performance prejudiced the defendant. Strickland, 466 U.S. at 687-88. Counsel's performance prejudiced the defendant if there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Here, counsel's performance fell below an objective standard of reasonableness. There cannot be a legitimate tactic or strategy which would support proposing instructions which relieve the prosecution of the full weight of its burden of proof against a client. Indeed, the Rodriguez Court specifically so held, finding it impossible to "conceive" of any reason that proposing such instructions could possibly "advance Mr. Rodriguez's position at trial." 121 Wn.App. at 187.

Further, this ineffectiveness clearly prejudiced Ms. Johnson. The only question in this case was whether Ms. Johnson's acts were reasonable acts of self-defense. Counsel's unprofessional errors ensured that the jury was given the wrong standard in evaluating that defense - a far more stringent standard for the defense than actually applied. And those errors

resulted in the prosecution being relieved of the full weight of the burden it was required to shoulder. Indeed, the prosecutor specifically exploited the erroneous instruction in closing, arguing that Ms. Johnson had to be “in fear for her life” to claim self-defense. 8RP 13, 26, 73.

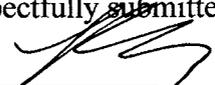
Counsel’s error in proposing the erroneous instruction “struck at the heart” of the “defense,” and counsel’s ineffectiveness prejudiced Ms. Johnson. See Rodriguez, 121 Wn. App. at 187. Reversal is required.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new, fair trial, free of prosecutorial misconduct, at which Ms. Johnson should be permitted to introduce the evidence relevant and material to her claim of self-defense, and the jury should be given proper instructions on the prosecution’s constitutional burden of disproving that defense.

DATED this 28th day of October, 2006.

Respectfully submitted,


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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Ms. Ebony Johnson, DOC # 895724, 3420 NE Sand Hill Road,
Belfair, WA. 98528.

DATED this 28th day of December, 2006.


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