

Original

NO. 35135-8-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EBONY MITCHELLE JOHNSON, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John R. Hickman

No. 05-1-01720-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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2. Was defense counsel deficient for failing ask the court to revisit its pretrial ruling excluding character evidence and the victim's prior bad acts when most of that evidence had been admitted despite the pretrial ruling?

3. Did the prosecutor commit misconduct by a) properly arguing bias and credibility of the witnesses in his closing arguments; b) characterizing the defense as slandering the victim after the defense attacked the victim's character in closing; c) properly telling the jurors to decide the case on the facts and evidence rather than their sympathies and prejudice in response to defense counsel's closing argument; and d) properly arguing that there was insufficient evidence to support the defendant's claim of self defense when the victim was stabbed in the back with an 8" butcher knife and there was no evidence that the victim had made

any threatening movements or gestures toward the defendant prior to her stabbing him?

4. Was the defense attorney deficient when he properly proposed self-defense jury instructions using the language “great personal injury” to avoid confusion with the “great bodily harm” language in the assault in the first degree instruction?

B. STATEMENT OF THE CASE.

1. Procedure

On April 11, 2005, Ebony Johnson, hereinafter “defendant,” was charged by information with assault in the first degree of Parrish Gale, hereinafter “Gale,” while armed with a deadly weapon. CP 1-3.

On May 3, 2005, both parties appeared for trial before the Honorable John R. Hickman. 1RP 4. Pretrial motions were held and the trial court made a tentative ruling that, until the defense presented evidence on self-defense, evidence of the victim’s prior domestic violence

history and prior bad acts would be excluded. 1RP 33-35<sup>1</sup>; CP 29-31. The court conducted a 3.5 hearing and ruled that the defendant's statements to police were admissible. 1RP 81-85; CP 25-28. Findings of fact and conclusions of law were entered. CP 25-28. On May 17, 2005, the jury convicted the defendant of assault in the second degree while armed with a deadly weapon. CP 126. The court imposed a standard range sentence of 4 months plus 12 months flat time on the deadly weapon enhancement to run consecutive, and 18 to 36 months of community custody. SRP 1-19; CP 130-41. This timely appeal follows. CP 146-56.

## 2. Facts

On April 9, 2005, at approximately 8:40 p.m. Linda Bell and her daughter, Kindra, were at Gloria Greenwood's residence on S. "L" Street in Tacoma. 4RP 11, 60; 6RP 6. The women were sitting on the living room couch getting ready to watch a movie when they heard the chain

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<sup>1</sup> The 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"

rattle on Ms. Greenwood's fence. 4RP 12, 14, 30-31, 60, 61, 77, 79; 6RP 6. When she looked out her window, Mrs. Greenwood saw a red Ford Taurus pulled up on the curb in front of her house. 4RP 12, 14, 23, 31, 37, 61, 62, 77, 96; 6RP 7, 23, 25, 42. She saw Gale standing with his back up against her fence. 4RP 37, 38, 53, 62, 77; 6RP 7, 24.

The defendant exited the red Taurus and was arguing with Gale. 4RP 12, 63, 79; 6RP 26, 27. The defendant was angry and yelled at Gale about money; she demanded he return her purse. 4RP 14, 63, 80, 81, 92; 6RP 9. Gale refused to return the purse. 4RP 63. He dropped the purse on the ground and the contents scattered. 4RP 64, 65, 94. Gale walked quickly down the street and around the corner away from the defendant. 4RP 14, 45; 6RP 28, 42. The defendant returned to her car and followed him. 4RP 14, 39, 45, 64, 65, 93; 6RP 10, 28, 42. Kindra Bell went outside to pick up the papers that had fallen out of the defendant's purse. 4RP 66, 94, 100; 6RP 11, 30, 31.

Not long after Kindra Bell went outside to pick up the papers, Gale returned and assisted her. 4RP 14, 49, 100. Shortly thereafter the defendant also returned in her car. 4RP 14, 49, 100. Gale told Kindra Bell to put the papers she picked up in the purse. 4RP 55; 6RP 14, 31. Ms. Greenwood said Gale did not yell. 4RP 55. Instead, he was spoke in a regular tone of voice. 4RP 55.

When the defendant returned she drove up on the curb again. 4RP 15, 24, 136. The defendant leaned over in her car and picked up

something. 4RP 16, 67. Ms. Greenwood testified that she did not know what the defendant was going to do, but knew that she was going to do something because the defendant had been angry and cussing at Gale. 4RP 16. Linda Bell testified that she thought the defendant was reaching for a gun because the defendant was so angry. 4RP 68. Ms. Greenwood went inside her house and called 911. 4RP 16.

The defendant exited her vehicle, walked passed Kindra Bell, and stabbed Gale in the back while he picked up items off the ground. 4RP 17, 22, 68, 70 101, 102; 6RP 15. The serrated knife blade was eight inches long and stuck in the right side of his lower back. 4RP 21, 54; 5RP 58, 60. After she stabbed Gale, the defendant returned to her vehicle and drove away. 4RP 18, 60; 6RP 18.

Neither Linda Bell nor Ms. Greenwood heard Gale say anything to the defendant prior to the stabbing. 4RP 55. They did not see Gale make any motions or gestures towards the defendant nor did they see him spit at her. 4RP 55, 70.

Kjelsi Clark also testified for the state. Ms. Clark testified that she was driving past S. 15<sup>th</sup> St. and S. "L" St. when she heard yelling and saw a car try to hit Gale while he picked things up by a fence. 4RP 116, 117-18, 133, 135, 140. Ms. Clark testified that she saw Gale run and things fall out of his arms. 4RP 119. Ms. Clark testified that the defendant stabbed Gale when he was bent over to pick things up off the ground. 4RP 120-121. Ms. Clark testified the defendant said "Now what?" right before

the defendant stabbed Gale. 4RP 122. Ms. Clark did not hear Gale say anything to the defendant nor did she see him spit on the defendant prior to the stabbing. 4RP 122-123. Ms. Clark testified that the defendant left in her car, but later returned to the scene. 4RP 126-127, 145, 184, 195. Ms. Clark testified that the defendant stepped out of her car and loudly said "I did it. It was me." 4RP 127, 145-146, 185.

When the defendant returned, she parked her car on the opposite side of the street. 4RP 75; 6RP 19. She got out of her car and walked back across the street. 4RP 75. As she did that, the defendant said in a loud voice, "I did it. How you like me now?" 4RP 75; 6RP 20.

None of the eye-witnesses, Ms. Greenwood, Ms. Linda Bell, Kindra Bell, or Kjelsi Clark, knew the defendant or Gale. 4RP 28-29, 76, 128; 6RP 14.

Officer Sugai detained the defendant. 4RP 157. She was advised of her Miranda rights. 4RP 158. Officer Grant interviewed her. 4RP 158. The defendant told Officer Grant that she and Gale had dated for about five years. 4RP 158. She said that Gale uses drugs: PCP, embalming fluid and powder cocaine. 4RP 158. She told Officer Grant that Gale took her car that day without her permission to go buy drugs. 4RP 159. She said that Gale was high at the time. 4RP 159. The defendant said that before the incident, when she and Gale were in her car, he called her a bitch and played with the transmission. 4RP 159. The defendant told Officer Grant that Gale took her car keys and refused to give them back to

her. 4RP 159. She told said that Gale called her a bitch and spat on her. 4RP 159. The defendant said Gale took her purse and dumped the contents on the ground. 4RP 159. The defendant told Officer Grant that she stabbed Gale with a knife she keeps in her car for protection. Gale was picking up the contents of her purse when she stabbed him. 4RP 159. She told Officer Grant that she wasn't trying to kill Gale. 4RP 171-72. The defendant said she left after she stabbed Gale, but came back because she figured she was going to go to jail and didn't want the situation to get worse. 4RP 159-60. The defendant never told Officer Grant that she was concerned for her safety or that she feared for her life when she stabbed Gale. 4RP 175, 177.

Police and medical aid arrived on the scene pretty quickly. 4RP 74. Gale was laying face down with a large kitchen knife sticking out of his back when they arrived. 4RP 107; 5RP 12. The medical aid team transported Gale to St. Joseph's hospital where he was treated by Dr. Teresa Bell for a stab wound in his right posterior flank. 3RP 16; 4RP 108; 5RP 15.

Dr. Bell testified that she has treated many stab wounds and they can be fatal. 3RP 14-15. The knife was still in Gale's back when he was admitted to the hospital for treatment. 3RP 16.

Gale told Dr. Bell that he had been stabbed by his girlfriend with whom he had just broken up. 3RP 19.

Dr. Bell testified that when a patient, like Gale, presents with a knife protruding from his body there is a danger in removing the knife because it may release a previously plugged hole in a major vessel. 3RP 20. If that were to occur, then the patient could die as a result of blood loss. 3RP 20.

Dr. Bell removed the knife from Gale's back. 3RP 20. She testified that the knife was more difficult to remove than she anticipated because it had cut into a rib bone. 3RP 39. She estimated the knife went into Gale's body three to four inches. 3RP 29. As a result of being stabbed, Gale had a small to moderate size posterior liver injury. 3RP 21. He had some blood in this chest cavity that was evacuated with a chest tube that was inserted into his chest to drain the blood. 3RP 21-22. Gale's diaphragm was also injured as a result of being stabbed. 3RP 22.

Dr. Bell testified that if the knife had a different trajectory, but the same entrance wound, then the knife could have caused more life-threatening injuries. 3RP 36.

A toxicology report from a urine sample taken at the hospital showed the presence of cocaine, amphetamines, marijuana, and opiates in Gale's system. 3RP 58-59. The opiates were given to him by the hospital for pain. 3RP 63. The amphetamines and cocaine could have been ingested between two and four days before the urine sample was taken. 3RP 59. The marijuana could have been ingested one to four weeks before the urine sample was taken. 3RP 59.

As a result of being stabbed, Gale remained in the hospital for six days. 3RP 19.

The defense called Gale who testified on direct that he and the defendant had been dating off and on for approximately six years. 6RP 63. He said it was normal for him to date the defendant as well as up to five other women at the same time. 6RP 65. He testified that dating other women, not returning the defendant's phone calls, and borrowing her car, but not returning it when he said he would, were all sources of conflict within their relationship. 6RP 66. He said:

I do what I want and either – I told her either accept it or reject it. If she don't want to mess with me, don't mess with me. She'll be mad and she'll leave me alone or I'll walk out, and then she'll come and get me like an hour or two later. Something like that.

6RP 66-67.

The defendant would buy things, like cell phones, for Gale who never had a job. 6RP 69, 89. When Gale was in jail, the defendant put money on his books and visited him. 6RP 70. Gale testified that the defendant had bailed him out of jail one week before she stabbed him. 6RP 89.

On April 9, the defendant told Gale that she needed to go to work the next day. 6RP 89. Gale said he borrowed the defendant's car and intended to have it until 2 or 3 a.m. 6RP 90. Gale brought her car back early, however, because the defendant called him repeatedly, making back

to back phone calls, to get on his nerves. 6RP 90, 92. Gale testified that the defendant frequently called him when he borrowed her car, but this was more than normal. 6RP 92, 93.

Gale testified on direct that he had smoked some marijuana earlier that day, but had not consumed any "sherm" because the day had not gone as he planned. 6RP 96, 97. Gale testified that he often smokes "sherm," which he described as cigarettes dipped in embalming fluid, cocaine, and marijuana. 6RP 97. He told the jury "[s]ince I do drugs almost every day...there's probably any drug in my system because it don't go out your system overnight. Nothing does." 6RP 97.

Gale testified that while the defendant was driving, he hopped out of the car because he didn't want her to know where he was going. 6RP 106. "She was gone for a minute but then she came back and tried run up on the curb and hit me." 6RP 106, 108. Gale testified that he and the defendant argued. 6RP 107.

Defense witness Iesha Woods testified that on one occasion Gale had taken a spare key to the house she shared with the defendant and that the defendant changed the locks because she did not want Gale alone in the house. 7RP 12, 13, 31. She testified that Gale had previously broken into the defendant's apartment. 7RP 22-23. Ms. Woods told the jury that Gale had stolen from both her and the defendant in the past. 7RP 31. Even though Gale was "doing things that he had no business doing," Ms. Woods testified that the defendant supported Gale, but was concerned for

her safety when he was on drugs, which was about 85 percent of the time. 7RP 16, 18. Ms. Woods testified that when Gale was on drugs, he was angry and the defendant was concerned about her life, her safety, and her health. 7RP 18.

The defendant testified that she and Gale dated for approximately four and one half years. 7RP 35. The defendant testified that things were fine for the first two years, but things changed at the end of 2003. 7RP 35. Gale started going in and out of jail. 7RP 36. The defendant testified that at the end of 2003, Gale went to jail for assault “or something.” 7RP 36. She told the jury that she put money on Gale’s books while he was in jail. 7RP 53. She testified that she took care of Gale from the beginning of their relationship, but that he got greedy. 7RP 38. The defendant said she purchased items like a pager and cell phone for Gale. 7RP 48, 49, 52. She loaned her car to Gale on one occasion, but he took it on five other times. 7RP 51. The defendant testified that she tried to save Gale. 7RP 55.

The defendant testified that Gale used drugs and that he treated her differently when he was on drugs. 7RP 40, 56. During the last few years the defendant said she was sometimes afraid of Gale because he was always on drugs. 7RP 41-42. The defendant testified that on one occasion, when Gale was on the phone at his sister’s house, the defendant asked him when they were going to leave and “he just smacked me.” 7RP 57. She testified that they had a bit of a fight that Gale’s sister broke up.

7RP 57. The defendant said she had never been afraid of Gale like she was on April 9, 2005. 7RP 42.

The defendant testified that on April 9<sup>th</sup> she came home from working the night shift and took a nap from 8:00 a.m. to 2 or 2:30 p.m. 7RP 61. She testified that when she woke up, she discovered that Gale had taken her keys and car. 7RP 63. The defendant said she called Gale's cell phone approximately fifteen times and, after an hour or so, Gale returned her car. 7RP 64; 66. Gale's brother and his girlfriend were also in the car. 7RP 66. The defendant said she told Gale that she wanted to end the relationship and had Gale's clothes packed and ready by the door. 7RP 68. They dropped the clothes off at another residence and dropped Gale's brother and girlfriend off at the girlfriend's mother's house. 7RP 73, 74.

The defendant testified that she was driving and Gale hopped out of the car when she stopped at a light. 7RP 76, 77. The defendant testified that Gale took her keys and her purse. 7RP 76, 77. She said that Gale got back into the car and gave her back the car keys, but not her purse. 7RP 77, 79. The defendant said that Gale acted irritated. 7RP 79. She testified that he changed the gears, covered her eyes for a minute, and spat in her face. 7RP 79, 80, 81. The defendant testified that Gale put the car in park and took her purse and keys a second time. 7RP 81. The defendant said that Gale threatened her while they were in the car. 7RP 81, 84.

On direct examination the defendant testified:

Q. Now, were you worried that [Gale] was going to harm you?

A. Yes. I – I mean, I was in a bad situation, and I just wanted to get out of it.

7RP 82-83.

Later, when asked why she kept a butcher knife in her car, the defendant testified that she needed it for protection.

From just him, his lifestyle, you know. Like I said, I – I got myself in a bad situation, so it was protection from his lifestyle. You know, his so-called, you know – I guess his girlfriends, I guess you can say.

7RP 84.

The defendant testified that she hadn't meant to hurt Gale when she stabbed him in the back. 7RP 85. She testified that she saw no other way to get her keys back from Gale. 7RP 85. The defendant testified that after she stabbed Gale, she left in her vehicle, but came back "and just told them that I did it, because I didn't want anything to get worser [sic]." 7RP 86.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF GALE'S CHARACTER AND PRIOR BAD ACTS IN ITS TENTATIVE PRETRIAL RULING AND, ALTERNATIVELY, THE DEFENDANT WAIVED ANY ERROR THAT RESULTED FROM THAT RULING WHEN SHE FAILED TO SEEK A FINAL RULING.

A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990) (citing Taylor v. Illinois, 484 U.S. 400, 406-09, 108 S. Ct. 646, 651-53, 98 L. Ed. 2d 798 (1988)). Nonetheless, the admission or refusal of evidence lies largely within the sound discretion of the trial court; its decision will not be reversed on appeal absent an abuse of discretion. State v. Stubsjoen, 48 Wn. App. 139, 147, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987). A ruling on a motion in limine is reviewed for abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court. State v. Huelett, 92 Wn.2d 967, 969, 603 P.2d 1258 (1979).

In general, character evidence is not admissible to prove a person acted in conformity therewith on a particular occasion. ER 404(a). “[E]vidence of specific acts of conduct is inadmissible if it is offered to prove the character of the person, and that the person acted in conformity

with that character.” State v. Bell, 60 Wn. App. 561, 564, 805 P.2d 815 (1991); ER 404(b); ER 405(a).

To raise self-defense before a jury, a defendant bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense, i.e., the statutory elements of reasonable apprehension of great bodily harm and imminent danger. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495, 22 A.L.R.5th 921 (1993). In order to establish self-defense, a finding of actual danger is not necessary. The jury instead must find only that the defendant reasonably believed that he or she was in danger of imminent harm. State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). The evidence of self-defense must be assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees. Janes, 121 Wn.2d at 238.

In the present case, the State made a motion in limine to exclude a portion of Gale’s prior criminal history, evidence of the Gale’s past drug use, and prior bad acts towards the defendant. The State had no objection to the use of two crimes of dishonesty for impeachment purposed if Gale testified. 1RP 13. The State argued, however, that the balance of Gale’s criminal history, which consisted of two felony drug convictions and

several domestic violence convictions<sup>2</sup>, should be excluded as they were not relevant and would be unduly prejudicial. 1RP 13.

The State conceded that if the defendant presented facts that would justify a self-defense instruction, then any evidence of alleged abuse at the hands of Gale would become relevant and admissible in the defendant's case. But until that time, the evidence is not relevant and should be excluded. 1RP 19-20.

The defendant argued that the Gale's history was relevant and admissible under both 404(b) and ER 405 as specific instances of misconduct of which the defendant was aware that led her to develop a reasonable apprehension of danger to herself and her mother. 1RP 15.

The court granted the State's motion to exclude Gale's criminal history in part. The Court ordered that :

Witness Gale's prior convictions for Possessing Stolen Property Second Degree (2002) and Theft in the Third Degree (2004) are admissible for impeachment pursuant to ER 609(a)(2) if witness Gale is called as a witness.

Witness Gale's prior juvenile adjudications are excluded pursuant to ER 609(d).

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<sup>2</sup> The defendant was not the victim in Gale's prior domestic violence convictions. 1RP 13, 18.

The remainder of witness Gale's criminal history is excluded pursuant to ER 609(a) until such time as the court rules any other criminal history admissible in a hearing outside the presence of the jury.

CP 29-30; RP 25.

The court also granted the State's motion to exclude evidence and argument concerning alleged prior bad acts of witness Parrish Gale in part:

Evidence of witness Gale's drug/alcohol usage on or about April 9, 2005, is admissible for the jury to consider Gale's ability to accurately perceive and recall the events of that evening.

Evidence of Gale's past drug usage is inadmissible until such time as the court rules it admissible in a hearing outside the presence of the jury. Absent a further offer of proof demonstrating relevance, such evidence is not relevant and is unduly prejudicial. ER404(b); ER 403.

Evidence or argument that Gale has assaulted or threatened the defendant in the past is excluded until such time as the court rules it admissible in a hearing outside the presence of the jury. Such evidence is not relevant and is unduly prejudicial given the record presented. Such evidence is not admissible under ER 404(b) or ER 405(b) until such time as an offer of proof or testimony establishes its relevance and probative value.

Evidence of any other prior bad acts on the part of witness Gale is excluded until such time as the court rules it admissible in a hearing outside the presence of the jury. ER 404(b)

CP 30; RP 25.

Finally, the court granted the State's motion to exclude evidence that witness Gale is currently incarcerated in the Puyallup City Jail finding

that such evidence has no relevance to these proceedings and would be unduly prejudicial. ER 403; 1RP 26; CP 31.

In essence, the court ruled that until the defendant laid a proper foundation by presenting evidence of self-defense, Gale's domestic violence convictions and any of Gale's prior bad acts involving the defendant in this case, were excluded. 1RP 24-25; 6RP 85-86. Once evidence of self-defense was presented, then the defendant could ask the court to reconsider its ruling outside the presence of the jury. 1RP 24-25.

Despite the court's order, much of the evidence the state sought to exclude by its motion in limine came in prior to Gale presenting any evidence of self-defense. Gale testified that he routinely used marijuana, "sherm" (cigarettes dipped in embalming fluid) and cocaine. 6RP 96, 97. He testified that he had been in and out of jail on numerous occasions. 6RP 70, 72, 74, 78. Gale also testified that when he was in jail, the defendant would put money on his books and that she had bailed him out of jail the week before the stabbing. 6RP 70, 73, 89.

Defense witness Iesha Woods told the jury that on one occasion Gale had taken a spare key to the house she shared with the defendant and that the defendant changed the locks because she did not want Gale alone in the house. 7RP 12, 13, 31. She testified that Gale had previously broken into the defendant's apartment. 7RP 22-23. Ms. Woods told the

jury that Gale had stolen from both her and the defendant in the past. 7RP 31. Even though Gale was “doing things that he had no business doing,” Ms. Woods told the jury that the defendant was supportive of Gale, but was concerned for her safety when he was on drugs, which was about 85 percent of the time. 7RP 16,18. When Gale was on drugs, he was angry and the defendant was concerned about her life, her safety, and her health. 7RP 18.

Finally, the defendant testified that her relationship with Gale was fine for the first couple of years, but that things changed in 2003 when he started going in and out of jail. 7RP 35. That Gale went to jail for assault “or something” at the end of 2003. 7RP 36. The defendant testified that she was sometimes afraid of Gale because he was always on drugs, but that he didn’t do the “heavy drugs” around her. 7RP 41-42. She said she kicked Gale out of her apartment because he stole from her. 7RP 41. The defendant told the jurors Gale “smacked me” in a prior incident when she and the defendant were at his sister’s house. 7RP 57.

The court did not abuse its discretion in granting the State’s motion in limine to limit evidence until the defendant had presented evidence that she acted in self-defense. However, without asking the court to review its pretrial order, evidence of Gale’s significant prior drug use, criminal history, and prior bad acts towards the defendant was admitted.

- a. Error, if any, resulting from the trial court's tentative ruling on the State's motion in limine is not preserved for appeal because the defendant never sought a final ruling.

A trial court's tentative ruling on a motion in limine is not preserved for appeal unless the defendant renewed its motion and a final decision was made. State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991). "When a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider it's ruling." Id.

In the present case, the court ruled that evidence of Gale's prior bad acts and domestic violence convictions were not admissible until such time as the defendant presented evidence of self-defense. The trial court's ruling was a tentative ruling subject to self-defense evidence being presented at trial. Because the defendant never sought a final ruling, this issue was not preserved for appeal and any error that resulted from the ruling is waived.

- b. The trial court's pretrial ruling did not infringe on the defendant's right to present a defense because the ruling was tentative and most of the evidence was admitted despite the court's ruling.

If the court finds that the trial court erred in its tentative ruling and that the defendant did not waive that error when failed to seek a final ruling from the trial court, the tentative ruling did not infringe on the defendant's right to present a defense. The defendant relies on State v. Guloy, 104 Wn.2d. 412, 705 P.2d 1182 (1985) to support its argument that the exclusion of relevant, material evidence violates the defendant's right to present a defense and requires reversal unless the prosecution can prove the constitutional error harmless. Brief of Appellant (BOA) 20. The defendant's reliance on Guloy is misplaced.

In Guloy, the co-defendants claimed they were denied their Sixth Amendment right to confront witnesses at trial. 104 Wn.2d at 424. At trial, the state put on a witness who testified to statements made by another. Id. At the time both individuals were available to testify. Id. Subsequent to the first witness testifying, the second witness was charged in the case and invoked his Fifth Amendment right not to testify. Id. at 424-425. The defendants claimed that because the second witness invoked his right not to testify, their right to cross-examine was infringed upon. Id. at 425. The court agreed, but said the error was harmless

because evidence of the defendants' guilt was overwhelming. Id. The court went on to say that it is well known that even constitutional errors may be so insignificant as to be harmless. Id.

Unlike Guloy, the defendant in this case was not prevented from cross examining witnesses by the court's pretrial ruling. Instead, the court's ruling merely structured the order of testimony by properly requiring the defendant to present evidence that she acted in self-defense before presenting evidence of Gale's prior domestic violence criminal history or any alleged incidents between Gale and this defendant. Because the defendant was able to present her defense and was given a self-defense jury instruction, her claim that her right to present a defense was violated must fail.

If the court were to find the trial court's pretrial ruling violated the defendant's right to present a defense, any error would be harmless because the defendant's witnesses testified to Gale's significant prior drug use, criminal history including incarceration for assault, and domestic violence incidents between the defendant and Gale.

2. DEFENSE COUNSEL WAS NOT DEFICIENT WHEN HE MADE A TACTICAL DECISION NOT TO RENEW HIS MOTION TO ADMIT EVIDENCE EXCLUDED IN THE TRIAL COURT'S TENTATIVE RULING BECAUSE MOST OF THAT EVIDENCE HAD BEEN ADMITTED DESPITE THE COURT'S RULING.

A criminal defendant claiming ineffective assistance of counsel must show that counsel's performance fell below an objective standard of reasonableness and prejudice resulting from that performance. State v. Sherwood, 71 Wn. App 481, 483, 860 P.2d 407 (1993). Prejudice is established where there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable probability is "a probability sufficient to undermine confidence in the outcome." In re Pers. Restraint of Davis, 152 Wn.2d 647, 273, 672, 101 P.3d 1 (2004) (quoting Strickland v. Washington, 466 U.S. 668, 694, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The reviewing court begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. State v. Israel, 113 Wn. App. 243, 270 54 P.3d 1218 (2002).

In the present case, the defendant asked the court to admit evidence of Gale's prior drug use, prior domestic violence history (which did not involve the defendant as the victim), and unreported domestic violence

incidents between the defendant and Gale in this case. 1RP 14-16, 20-22. The court's pretrial ruling excluded this evidence until such time as the court ruled it admissible in a hearing outside the presence of the jury. 1RP 24, CP 29-31. Despite this ruling, the defendant's witnesses testified extensively on these issues. It is apparent that the defense attorney made a tactical decision not to ask the court to review its ruling outside the present of the jury because most of the evidence had already been admitted. Because most of the evidence the defendant asserts was critical to her defense was admitted despite the pretrial ruling, the defendant cannot show that she was prejudiced by her attorney's tactical decision not to ask the judge to review his ruling outside the presence of the jury. The defendant's claim of ineffective assistance of counsel must fail.

3. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN CLOSING ARGUMENTS WHEN HE PRESENTED PROPER ARGUMENT AND DEFENSE COUNSEL WAS NOT DEFICIENT FOR FAILING TO OBJECT TO THE PROSECUTOR'S PROPER CLOSING ARGUMENT.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Improper comments are not deemed prejudicial unless "there is a

*substantial likelihood* the misconduct affected the jury's verdict." State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. Binkin, at 293-94. Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id.

In the present case, the defendant argues that the State committed prosecutorial misconduct in its closing arguments. The defendant did not object to the State's closing arguments. By failing to object, the defendant waived any error unless the alleged improper remarks are deemed so flagrant and ill-intentioned that they evince an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. Binkin, at 293-94.

- a. The prosecutor properly argued the credibility and bias of the witnesses and did not require the jury to find the state's witnesses had lied in order to acquit the defendant.

In closing argument, a prosecutor may properly draw inferences “from the evidence as to why the jury would want to believe one witness over another.” State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995); see also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). Furthermore, “where a jury must necessarily resolve a conflict in witness testimony to reach a verdict, a prosecutor may properly argue that, in order to believe a defendant, the jury must find that the State’s witnesses are mistaken.” State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995) (emphasis omitted). It is not misconduct for a prosecutor to make arguments regarding a witness’ veracity that are based on inferences from the evidence. See State v. Rivers, 96 Wn. App. 672, 674-675, 981 P.2d 16 (1999).

A prosecutor may not, however, argue that to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken. State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996). It is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying. State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). In Fleming, a second degree rape trial, the prosecution stated in closing argument: “for you to find the

defendants . . . not guilty of the crime of rape . . . you would have to find either that [the victim] has lied about what occurred . . . or that she was confused; essentially that she fantasized what occurred.” Fleming, 83 Wn. App. at 213 (emphasis omitted). The Fleming court held that the prosecution’s argument constituted misconduct, finding it both flagrant and ill-intentioned because two years earlier the court had held such arguments improper in State v. Casteneda-Perez . Fleming at 213-14.

In State v. Wright the defendant was convicted at trial on one count of unlawful possession of a firearm. The defendant testified at trial. His version of events differed from the version offered by the officers. On appeal, Wright alleged that the prosecutor committed misconduct when he elicited the testimony during cross examination and then argued to the jury that in order to believe Wright, the jury would have to believe that the officers “got it wrong.” 76 Wn. App 820. The court found that neither the prosecutor’s cross examination nor his closing arguments were misconduct. With respect to closing argument, the court stated that the prosecutor’s argument was not misleading because it did not present the jury with a false choice between believing the State’s witnesses or acquitting the defendant. 76 Wn. App. 825.

In the present case, the prosecutor properly argued the credibility of the witnesses and the potential bias that the witnesses may have brought with them to court. The prosecutor’s argument contrasted the testimony of the state’s witnesses to the testimony of the defendant and then asked the

jury to evaluate the testimony to see if it made sense. The prosecutor stated:

What did the State's witnesses tell you? [T]hey said that the defendant tried to run over Parrish Gale with a car right before the stabbing. The defendant told you, "Never did that."

The State's witnesses told you that the purse was on the sidewalk. Kindra Bell came out of her house and was actually putting things into the purse when Parrish Gale came back. The defendant says, "No, Parrish Gale had the purse."

8RP 23

The State's witnesses described a violent stabbing where she comes up behind him with the butcher knife and stabs him in the back. The defendant says, "I wasn't trying to hurt him. I just did it gentle. I was purposely just going in three to four inches." You have to decide did you believe her when she gave that testimony.

8RP 24.

The prosecutor then highlighted the fact that the state's witnesses knew neither Gale nor the defendant and had no motive to lie. The prosecutor told the jury:

"...when you compare [the defendant's] testimony with what you know the facts are, you will find that her testimony was not credible and that she didn't tell you the truth about trying to run over Gale. She didn't tell you the truth about driving back to the street corner before the stabbing. She didn't tell you the truth about her keys."

8RP 25.

Like Wright, the prosecutor's argument in this case did not present the jury with a false choice between believing the State's witnesses or acquitting the defendant. The prosecutor's argument was intended to assist the jury in determining the credibility of the witnesses and evaluating the conflicting testimony. The prosecutor did no more than emphasize the substantial conflicting testimony, point out the aspects of the testimony that were inconsistent or irreconcilable and argue that the jury would have to examine the testimony to determine which testimony was most credible.

The defendant's argument that the prosecutor "told the jury that they would have to find [the state's witnesses] 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" is unsupported by the record. BOA at 39. The defendant bears the burden of showing the impropriety of the argument as well as its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). In the present case, the defendant cannot meet her burden. Her assertion is not supported by the record and her claim of prosecutorial misconduct must fail.

- b. The prosecutor's statement that the defense in this case was to slander the victim was a fair response to the defense argument and was not an attempt to incite the jury's passions and prejudices against the defendant and her attorney.

“It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory.” As an advocate, the prosecuting attorney is entitled to make a fair response to the argument of defense counsel. State v. Russell, 125 Wn.2d at 87.

At trial, “counsel are permitted latitude to argue the facts in evidence and reasonable inferences” in their closing arguments. State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985); see also State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281 (1983). Further, a prosecutor may make inferences in closing argument, so long as they are supported by the evidence. State v. McKenzie, 157 Wn.2d at 57 (not misconduct in child rape case for prosecutor to call defendant a “rapist” where use of the word was a reasonable inference from the evidence) (citing State v. Buttry, 199 Wash. 228, 250 90 P.2d 1026 (1939) (not prejudicial to designate defendant as a murderer or killer where evidence indicates that he is)).

Comments calculated to appeal to the jury's passion and prejudice and encourage it to render a verdict on facts not in evidence are improper. State v. Pastrana, 94 Wn. App. 463, 478, 972 P.2d 557 (1999) (citing State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993)).

The defendant cites State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988), State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992), and State v. Echevarria, 71 Wn. App 595, 860 P.2d 420 (1993) in support of her argument that the prosecutor's statements were designed to incite the jury's passions against the defendant and the defense attorney. Rather than supporting the defendant's argument, these cases clearly show that the prosecutor's arguments in this case were proper.

In State v. Belgarde in closing argument the prosecutor compared the American Indian Movement (AIM), a movement with which the defendant was affiliated, with Sean Finn of the Irish Republican Army. The prosecutor stated "What is AIM? AIM is to the English what the Sean Finn is to the Irish. It is a deadly group of madmen." Belgarde at 508. He later went on to compare AIM with Kadafi. Id. The prosecutor's statements in Belgarde were inflammatory. They encouraged the jury to return a verdict on the defendant's association with AIM rather than properly admitted evidence. Id. at 507-508.

In State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), the defendant was charged with one count of child molestation in the first degree. At the end of the prosecutor's rebuttal argument, she told the jury that a not guilty verdict would send a message that children who reported sexual abuse would not be believed, thereby "declaring open season on

children.” Powell at 918. The court found that these comments were misconduct.

In the present case, the prosecutor’s comments regarding the defendant’s case theory and his arguments regarding Gale were made in response to the defense attorney’s closing argument.

In defense counsel’s closing argument he stated:

What is the truth over here? Why did the State not want to call Parrish Gale as their main witness? After all, Parrish Gale is the quote, unquote, victim over here. Oh, sure, I can feel sorry for Parrish Gale because he got stabbed in the back. I mean, it must have been a big inconvenience for him to have a girlfriend that’s supporting him, that he can take advantage of and then have her kick him out of her house.

Oh, it can be an inconvenience for him to have a girlfriend put up with everything that he’s put her through, only to be told that, “Well, you know, this is it. You need to bring my car back. It’s over.”

Is it an inconvenience to Parrish Gale? Is Parrish Gale truly an innocent person who appeared over here to testify as to how he didn’t need Ebony Johnson?

8RP 46.

...[Parrish Gale] doesn’t care about the fact that he was stabbed. He doesn’t care.

All he cares about is who is going to take care of him? Who is going to buy him his next outfit? Who is going to buy him his next pair of shoes that he wants? Who is going to provide a house for him? A roof for him when he needs to go to sleep? Who is going to let him come over to their apartment so he can shower up? Basically, all Parrish cares

about is who he can leach off of. Who he can use and abuse.

8RP 47.

You know, this is one of those cases where it's hard to stay – it's hard to feel sorry for Parrish. I have a really hard time feeling sorry – any sympathy whatsoever for Parrish.

8RP 54.

In his rebuttal argument, the prosecutor stated:

[Defense] counsel says, "Why didn't the State call Parrish Gale?" Certainly 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.

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 the witnesses who were there. He was using drugs. He got stabbed that night... 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 69-70

It is clear that the prosecutor's statements characterizing the defense case theory as "trashing the victim" was based upon inferences drawn from the evidence and responded to the defense counsel's closing argument in which he attacked Gale's character.

The defendant has failed to meet her burden of showing the prosecutor's arguments regarding Gale were misconduct nor has she established that the misconduct, if any, it was flagrant and ill-intentioned.

- c. The prosecutor properly argued in closing that the jurors should abide by their oaths and let neither sympathy nor prejudice influence them in reaching their verdict.

The prosecutor has a duty to "seek a verdict free of prejudice and based on reason." State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1984). It is improper to present an argument that is not based on the evidence and that appeals to the jury's passion and prejudice. State v. Echevarria, 71 Wn. App. at 598. "A prosecutor's comments must be viewed in context and only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 9-10, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

A prosecutor may not argue that jurors violate their oath if they disagree with the State's theory. State v. Coleman, 74 Wn. App. 835, 876 P.2d 458 (1994). In Coleman, the defendant was charged with robbery and the defense argued that the defendant should be convicted of the lesser included charge of theft. In closing the prosecutor argued:

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

State v. Coleman, 74 Wn. App. 835, 841.

The Coleman court found the above argument to be improper because it implied that the jury would violate its oath if it disagreed with the State's theory of the case. In affirming the defendant's conviction, the court did not find that there was a substantial likelihood that the misconduct affected the verdict. Coleman 74 Wn. App. at 841.

In United States v. Young, the defense attorney argued in closing that not even the government believed in its case. Young, 470 U.S. at 18. The prosecutor responded in rebuttal by saying that, having been asked his opinion, he would give it and told the jury he believed the defendant was guilty. The prosecutor also told the jury to "do its job." Id. The defense did not object. The Court found that the prosecutor's statements were error, but not "plain error" such that it required reversal. Id. The Court said "[g]iven the context of the prosecutor's remarks and the defense counsel's broadside attack, however, we conclude that the jury was not influenced to stray from its responsibility to be fair and unbiased." Id.

In the present case, the prosecutor properly responded to the defense attorney's closing argument quoted supra by reminding the jury that they took an oath to follow the law and to not let emotions overcome their rational thought process.

The prosecutor's argued in rebuttal:

When you took your oath as jurors you all took a promise to follow the law, and the law in this case set forth in Instruction No. 1 – this is page 3 of Instruction No. 1 – says you are officers of the court. You must not let your emotions overcome your rational thought process.

Reach your decision based on the facts proved to you, not the defendant crying or the fact that you may not like Parrish Gale or you maybe feel sorry for her that she stabbed him in the back. 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.

There may be reasons to feel sorry the defendant, but that doesn't excuse what she did. Those are things the judge takes into consideration at sentencing. Not a reason to excuse what she did when she stabbed Parrish Gale.

When we first started this case at the very beginning I asked all of you would it be important for you to return a verdict that represents the truth, and you all said yes.

When you took your oath as jurors you all promised to return a true verdict. You all promised that you would follow the law, which includes deciding the case on the facts, not sympathy and prejudice and emotion. That's all that the State is asking you to do in this case.

8RP 74-75

When looked at in context it is clear that the prosecutor is responding in rebuttal to the defense attorney's improper appeal to the jurors' sympathies. The prosecutor does not argue, as the defense alleges, that the jurors would violate their oath if they acquitted the defendant. BOA at 37, 40, 44. The defendant's claim that the prosecutor committed misconduct is unsupported by the record and must fail.

It is important to recall that the jury returned a verdict for the lesser included charge of assault in the second degree, which clearly indicates that the jury's passions were not inflamed by the prosecutor's arguments.

- d. The prosecutor properly argued in closing that there were insufficient facts to support the defendant's self-defense claim.

It is the State's burden to prove the absence of self-defense beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984). "It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory." Russell at 87. However, a prosecutor may not make statements unsupported by the evidence and prejudicial to the defendant. State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993).

In the present case, the defendant testified that she acted in self-defense. She told the jury that Gale had threatened her and her mother and that she felt that it was him or me. She testified about a prior incident in

which Gale had “smacked” her at his sister’s house. Iesha Woods testified for the defense. She told the jury that Gale did drugs about 85 percent of the time and that he was frequently angry when he was on drugs. Ms. Woods also testified that the defendant was afraid of Gale when he was on drugs.

The defendant’s proposed jury instruction on self-defense was given to the jury. Because the defendant offered a defense of self-defense, the prosecutor properly argued in closing that the defendant’s claim was not supported by the evidence. In fact, the state had a duty to do so because it is the state’s burden to prove the absence of self-defense beyond a reasonable doubt.

The defendant cites State v. Kassahun in support of her argument that it is misconduct for the prosecution to successfully suppress evidence and then argue the lack of that evidence in closing argument. 78 Wn. App. 938, 900 P.2d 1109 (1995). In Kasshun, the defendant attempted to obtain evidence from the police of the victim’s gang membership and gang activity. 78 Wn. App. 938, 946. The State successfully opposed the defendant’s discovery efforts and at trial the defendant was only allowed to testify to his subjective belief that the victim was a gang member. Id. On appeal the court held that:

[h]aving prevailed by motion in limine in its effort to preclude Kassahun from discovering objective evidence of [the defendant's] gang membership and gang activities...it was misconduct for the prosecutor to imply in argument to the jury that Kassahun was being untruthful because he failed to offer objective evidence to support his belief that his business was being overrun by gangs.

Id. at 952.

The court did not analyze whether the prosecutor's misconduct prejudiced Kassahun's right to a fair trial because it reversed on other grounds. Id.

Kassahun is distinguishable from the present case. In Kassahun, the prosecutor's closing argument faulted the defendant for failing to produce evidence he prevented the defendant from obtaining in discovery. In contrast, in the present case: 1) the court's ruling only excluded the evidence until the defendant had offered evidence that she acted in self-defense; 2) most of the evidence was admitted despite the court's order; and 3) the state has the burden of proving the absence of self-defense beyond a reasonable doubt.

The defendant's claim that it was improper for the prosecutor to argue that there was insufficient evidence of self-defense is without merit.

- e. Defense counsel was not deficient for failing to object to the prosecutor's closing arguments because the prosecutor's arguments were proper.

A criminal defendant claiming ineffective assistance of counsel must show that counsel's performance fell below an objective standard of reasonableness and prejudice resulting therefrom. State v. Sherwood, 71 Wn. App 481, 483, 860 P.2d 407 (1993). Prejudice is established where there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable probability is "a probability sufficient to undermine confidence in the outcome" In re Pers. Restraint of Davis, 152 Wn.2d 647, 273, 672, 101 P.3d 1 (2004) (quoting Strickland v. Washington, 466 U.S. 668, 694, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The reviewing court begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. State v. Israel, 113 Wn. App. 243, 270 54 P.3d 1218 (2002).

In the present case the defendant asserts that her attorney was deficient for his failure to object to the prosecutor's statements in closing argument and/or for failing to request a curative instruction. As discussed above, the record does not support the defendant's assertions that the

prosecutor committed misconduct during his closing argument and the defendant can show no prejudice as a result.

4. THE DEFENSE ATTORNEY WAS NOT INEFFECTIVE WHEN HE PROPERLY PROPOSED SELF-DEFENSE INSTRUCTIONS USING THE LANGUAGE “GREAT PERSONAL INJURY” TO AVOID CONFUSION WITH THE “GREAT BODILY HARM” LANGUAGE IN THE ASSAULT IN THE FIRST DEGREE INSTRUCTION.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). “Self defense jury instructions, however, must make the relevant legal standard manifestly apparent to the average juror.” State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (quoting State v. Painter, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980)).

Self-defense requires only a “subjective, reasonable belief of imminent harm from the victim.” State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). The jury need not find actual imminent harm. Id. at 900.

In State v. Rodriguez, the defendant was convicted of assault in the first degree while armed with a deadly weapon. 121 Wn. App. 180, 183, 87 P.2d 1201 (2004). Rodriguez argued that he had armed himself

because he was afraid of the victim. Rodriguez's defense attorney proposed the standard lawful force jury instruction out of Washington Practice Pattern Jury Instructions Criminal. WPIC 17.04, at 203 (2d ed. 1994). This jury instruction included language that a person is entitled to defend himself if the person "believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm." Rodriguez at 185. The court also instructed the jury on assault in the first degree, and gave a definitional instruction on great bodily harm.

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

Rodriguez at 186.

Because the phrase "great bodily harm" was used in 1) the lawful force instruction, 2) the assault in the first degree instruction, and 3) was defined in a definitional instruction, the Rodriguez court found that the jury could have concluded that in order to find that Mr. Rodriguez acted in self-defense they would have to find that he believed he was in actual danger of probable death, or serious permanent disfigurement, or loss of a body part or function. Rodriguez at 187. The Rodriguez court further noted this issue was addressed in the 1988 WPIC Supplement which revised the instruction for "great personal injury" to accommodate cases involving the use of deadly force in self-defense. Id. at 186.

In the present case, defense counsel proposed the following lawful force instruction:

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. Emphasis added

Defense counsel properly substituted the language “great personal injury” for “great bodily harm” in the lawful force instruction to eliminate danger articulated in Rodriguez. There was no definitional instruction offered to define “great personal injury,” however, failing to define an individual term does not fall within the scope of RAP 2.5(a)(3). State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988). The defendant may not raise the absence of a definitional instruction for the first time on appeal. Scott, 110 Wn.2d at 691.

Defendant incorrectly argues that the instructions misstated the proper standard for self-defense in this case. BOA 53. She asserts that the standard should have been the standard used in “non-deadly force.” In support of her argument she cites State v. L.B., 132 Wn. App. 948, 135 P.2d 508 (2006). In State v. L.B. there was a verbal confrontation between two juveniles that ended when L.B. struck the victim in the face with his fist. Because L.B. used non-deadly force, the court held that WPIC 17.02 was appropriate, not WPIC 17.04 because L.B. need only

fear injury, not great bodily harm, to use non-deadly force. Id. at 953. Despite finding that the incorrect standard was used, the court upheld the conviction because there was substantial evidence to support the verdict. Id. at 955. In the present case, the jury was correctly instructed with WPIC 17.02 and 17.04 because the defendant stabbed Gale in the back with an 8” butcher knife and there was testimony that such an assault could be fatal depending upon where the knife entered the body and what organs it struck. 3RP 6, 7.

The defense attorney was not deficient in proposing the self-defense jury instructions used in this case. As discussed above, because the defendant was charged with first degree assault, the defense attorney correctly used “great personal injury” in the lawful force instruction. Because the correct self-defense instruction with the appropriate standard was given in this case, defense counsel was not deficient and there was no prejudice to the defendant.

D. CONCLUSION.

For the above mentioned reason, the State respectfully requests that this court affirm the defendant's convictions below.

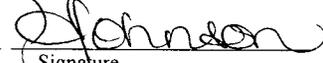
DATED: March 7, 2007

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
KAREN A. WATSON  
Deputy Prosecuting Attorney  
WSB # 24259

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/8/07   
Date Signature

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