NO. 39186-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

RYNA RA,

Appellant.

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

The Honorable Thomas J. Felnagle, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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A. ASSIGNMENTS OF ERROR

1. Trial Court abused its discretion by allowing the complainant to identify Mr. Ra when the complainant had no personal knowledge of the identity of the shooter, but relied on information provided by a third party to form the basis of his identification.

2. Mr. Ra was denied a fair trial after the complainant had an emotional breakdown and keeled over after his testimony in front of the jury and said within hearing of the jury, "I'm having a flashback".

3. The trial court abused its discretion by refusing to grant a mistrial following the complainant's in court breakdown.

4. The trial court's denial of Mr. Ra's self-defense instruction denied his right to present his theory of the case.

5. The state failed to prove Mr. Ra's offender score.

6. Mr. Ra's act of shooting the complainant was an act of self-defense which negated the intent to kill.

7. Trial counsel was ineffective for failing to request a manslaughter jury instruction.

8. The prosecutor committed reversible error when during closing and rebuttal argument he expressed his "personal opinion that he firmly believed in Mr. Ra's guilt.

8. The prosecutor committed misconduct by offering a definition of the term "I'm gonna tap her ass"[1] when the trial court did not give a definition of the term and there was no evidence to support the prosecutor's interpretation.

9. The state failed to prove beyond a reasonable doubt the essential elements of drive by shooting.

10. The state failed to prove beyond a reasonable doubt the essential elements of unlawful possession of a firearm.

11. The state failed to prove beyond a reasonable doubt the essential elements of murder in the second degree.

12. The prosecutor committed prejudicial misconduct by arguing facts not in evidence to inflame the passions of the jury.

13. Cumulative error denied Ra his right to due process.

Issues Presented on Appeal

1. Did the trial court abuse its discretion by allowing the complainant to identify Mr. Ra when the complainant had no personal knowledge of the identity of the shooter, but relied on information provided by a third party to form the basis of his identification?

2. Was Mr. Ra denied a fair trial after the complainant had an

1 Counsel for appellant apologizes for the repetition of this vulgarity.

emotional breakdown and keeled over after his testimony in front of the jury and said within hearing of the jury, "I'm having a flashback"?

3. Did the trial court abuse its discretion by refusing to grant a mistrial following the complainant's in court breakdown?

4. Did the trial court's denial of Mr. Ra's self-defense instruction deny him his right to present his theory of the case?

5. Did the state fail to prove Mr. Ra's offender score?

6. Was Mr. Ra's act of shooting the complainant an act of self-defense which negated the intent to kill?.

7. Did the prosecutor commit reversible error when during closing and rebuttal argument he expressed his "personal opinion that he firmly believed in Mr. Ra's guilt?

8. Did the prosecutor commit misconduct by offering a definition of the term "I'm gonna tap her ass"2 when the trial court did not give a definition of the term and there was no evidence to support the prosecutor's interpretation?

9. Did the state fail to prove beyond a reasonable doubt the essential elements of drive by shooting?

10. Did the state fail to prove beyond a reasonable doubt the

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2 Counsel for appellant apologizes for the repetition of this vulgarity.

essential elements of unlawful possession of a firearm?

11. Did the state fail to prove beyond a reasonable doubt the essential elements of murder in the second degree?

12. Did the prosecutor committed prejudicial misconduct by arguing facts not in evidence to inflame the passions of the jury?

13. Did cumulative error deny Ra his right to due process?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Ra was charged with attempted first degree murder, drive-by shooting and unlawful possession of a firearm. CP 1-2. His convictions were reversed on appeal. Following a second trial he was convicted of attempted murder in the second degree, unlawful possession of a firearm in the second degree and drive-by shooting. CP 18, 57-60. This timely appeal follows. CP 87-102.

2. SUBSTANTIVE FACTS

Four friends, two men and two women went down to the Les Davis Pier to go for a walk on the evening of September 14, 2005. RP 407-410. Shortly after their arrival, the group heard catcalls coming from an SUV parked close by. RP 413-414, 515. The guys in the SUV never left their car. RP 417. One of the guys from the group, James Huff became very angry about the catcalls and engaged in a verbal argument with the guys in the

SUV. RP 417-418. Huff and the guys in the SUV exchanged taunts and profanities, while challenging each other to fight. RP 418, 421. Huff kept yelling at the guys in the SUV to get out and fight, and the guys in the SUV kept taunting Huff do something about their rude behavior. RP 519, 539, 542.

The women in the group unsuccessfully tried to get Huff to ignore the guys in the SUV. RP 419. None of the women or men felt threatened by the guys in the SUV, but all felt that they were rude and disrespectful. RP 536, 579, 621. Huff however became very angry and screamed at the group of guys in the SUV that he was going to "kick their ass" as he ran towards the SUV and jump-kicked the car. 543-552, 765.

Ryna Ra who was in the front passenger seat did not engage in the verbal argument with Huff and did not cat-call. RP 761. Ra was embarrassed by the back seat passenger Mr. Bun who was the most offensive of the cat callers. RP 762. Huff shined a flashlight into the SUV which was very disrespectful. Huff then charged the car scaring Ra. RP 765-66. Ra fired a warning shot into the air from a loaded gun, but Huff kept charging. Ra fired a second warning shot and after Huff grabbed Ra's arm and jump kicked the car, Ra fired another shot which hit Huff in the upper abdomen. RP 765-770. Ra did not intend to hurt Huff, he just wanted to scare him off. When the warning shots did not to stop Huff, Ra shot to protect himself from being

attacked by Huff, who by all definitions was very angry and aggressive. RP 639, 640, 644, 645, 770-771,

C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING A WITNESS TO TESTIFY TO MATTERS BEYOND HIS PERSONAL EXPIERIENCE THAT RELATED TO THE ULTIMATE ISSUE IN THE CASE: IDENTIFICATION OF THE SHOOTER

Over defense objection, the court allowed Huff to identify Ra as the shooter even though he admitted that he never saw the shooter and could not identify the shooter, but was later told that Ra was the shooter. RP 516-18.

Under ER 602, a witness may only testify concerning facts within his personal knowledge: facts he has personally observed. Id. Testimony should be excluded when, as a matter of law, no trier of fact could reasonably find that the witness had firsthand knowledge. State v. Vaughn, 101 Wn.2d 604, 611-12, 682 P.2d 878 (1984); see also State v. Gosby, 85 Wn.2d 758, 760-61, 539 P.2d 680 (1975).

ER 602 provides:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own

> testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

In this case, there is no dispute that Huff did not have any personal knowledge of the identification of the shooter, but rather he relied on what was told to him. RP 516-518. The trial court's ruling permitting Huff to identify Ra based on third hand information was error and prejudicial to Ra's right to a fair trial.

Opinion testimony is that "based on one's belief or idea rather than on direct knowledge of the facts at issue." State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001) (quoting Black's Law Dictionary 1486 (7th ed.1999)). '{A}n opinion is not improper merely because it involves ultimate factual issues.' City of Seattle v. Heatley, 70 Wn.App. 573, 578, 854 P.2d 658 (1993) (citing ER 704), review denied, 123 Wash.2d 1011, 869 P.2d 1085 (1994). But a witness may not testify to their opinion regarding the defendant's guilt, either by direct or inferential statement. State v. Jones, 71 Wn.App. 798, 813, 863 P.2d 85 (1993), review denied, 124 Wash.2d 1018, 881 P.2d 254 (1994).

ER 704 provides: 'Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.' However, improper opinion testimony

violates the defendant's right to a jury trial and invades the jury's fact-finding province. State v. Dolan, 118 Wn.App. 323, 329, 73 P.3d 1011 (2003).

When determining whether testimony constitutes an impermissible opinion as to guilt or a permissible opinion embracing an ' ultimate issue,' Washington courts consider: (1) the particular circumstances of the case, (2) the type of witness involved, (3) the nature of the testimony and charges, (4) the types of defenses, and (5) the other evidence before the trier of fact. Heatley, 70 Wn.App. at 579, 854 P.2d 658. Regardless of who is making the statement, it is improper for any lay witnesses to state a direct or inferential opinion as to the defendant's guilt. State v. Black, 109 Wash.2d 336, 348, 745 P.2d 12 (1987).

In Ra's case, Huff impermissibly stated that Ra shot him even though he did not know it to be true. Stating that Ra was the shooter expressly informed the jury that Ra was guilty. With this testimony, Huff invaded the province of the jury, denying Ra's right to a fair trial. As a result, the admission of this improper opinion testimony constituted a manifest error of constitutional magnitude. Huff's improper opinion testimony violated Ra's constitutional right to a jury trial State v. Saunders, 120 Wn.App. 800, 811, 86 P.3d 1194 (2004). For this reason, his convictions should be reversed and the matters remanded for a new trial.

2. THE TRIAL COURT DENIED APPELLANT HIS RIGHT TO PRESENT HIS THEORY OF THE CASE BY REFUSING TO GIVE A SELF-DEFENSE INSTRUCTION.

The trial court essentially ruled that no person could have a legitimate fear of imminent great bodily harm when the attacker is unarmed, thus Ra could not have had a legitimate fear of imminent great bodily injury because Huff was unarmed. RP 5 (2-24-09).

The standard of review applied to the trial court's refusal to grant the self defense jury instructions is reviewable de novo for the trial court's legal conclusion that in any situation where the person charging is armed only with fists, cannot support the use of a self defense instruction. RP 5 (2-24-09). The factual determination regarding the trial court's perceived lack of evidence to support the instruction is reviewed for abuse of discretion. RP 5 (2-24-09); State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997).

A defendant is entitled to present a self-defense instruction to the jury if he produces "some evidence which tends to prove that the" shooting occurred in circumstances amounting to self-defense. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495, 22 A.L.R.5th 921 (1993) (citing State v. Acosta, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984). One of the elements of

self-defense is the person relying on the self-defense claim must have had a reasonable apprehension of great bodily harm. Janes, 121 Wn.2d at 237, 850 P.2d 495 (citing RCW 9A.16.050).

In determining whether a defendant has produced sufficient evidence to show reasonable apprehension of harm, the trial court must apply a mixed subjective and objective analysis. The subjective aspect of the inquiry requires the trial court to place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances known to the defendant. Janes, 121 Wn.2d at 238, 850 P.2d 495. The objective aspect requires the court to determine what a reasonable person in the defendant's situation would have done. Id. The imminent threat of great bodily harm does not actually have to be present, so long as a reasonable person in the defendant's situation could have believed that such threat was present. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998); State v. LeFaber, 128 Wn.2d 896, 900-01, 913 P.2d 369 (1996).

The judge must determine whether the defendant produced any evidence to support his belief that deadly force was necessary and that this belief, viewed objectively, was reasonable. State v. Bell, 60 Wn.App. 561, 567, 805 P.2d 815 (1991). If the defendant produces sufficient evidence of his subjective belief and a reasonable person in the defendant's shoes could have

perceived a threat of great bodily harm, then the court must instruct the jury on self-defense. Walker, 136 Wn2d at 772; Bell, 60 Wn.App. at 567-68.

In State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997), the defendant was pushed off his bicycle by three teenagers with whom the defendant had been involved in an altercation on at least one previous occasion. Walden, 131 Wn.2d at 472, 932 P.2d 1237. After being pushed off the bike, Walden pulled out a knife and either brandished it or actually attempted to use it against the three teens, who were apparently unarmed. Walden was charged with second degree assault. The State Supreme Court reversed based on an erroneous self defense jury instruction that misstated the law by informing the jurors that they were not allowed to consider "the defendant's subjective impressions of all the facts and circumstances, i.e., whether the defendant reasonably believed the battery at issue would result in great personal injury." Walden, 131 Wn.2d at 477, 932 P.2d 1237. The instruction stated that:

> One has the right to use force only to the extent of what appears to be the apparent imminent danger at the time. However, when there is no reasonable ground for the person attacked or apparently under attack to believe that his person is in imminent danger of death or great bodily harm, and it appears to him that only an ordinary battery is all that is intended, he has no right to repel a threatened assault by the use of a deadly weapon in a deadly manner.

> Great bodily injury as used in this instruction means injury of a graver and more serious nature than an ordinary battery with a fist or pounding with the hand; it is an injury of such nature as to produce severe pain, suffering and injury.

Walden, 131 Wash.2d at 472.

The Court in Walden held that where the facts of a particular case show a reasonable person in the defendant's shoes could have reasonably believed that great bodily harm would result from the battery, then the use of deadly force may have been reasonable despite the victim's being unarmed. Walden, 131 Wn.2d at 477. In Ra's case, the trial judge made a proclamation similar to the erroneous instruction in Walden declaring that no one in Ra's shoes could have reasonably believed that great bodily injury would result from the battery. RP 5 (2-24-09).

> Mr. Huff was provoked, he was made, he breaks free from his girlfriend, he's running at the vehicle, the SUV. He's been involved in an exchange of unpleasantries with the occupants of the vehicle. He isn't deterred by a warning shot. He kicks at the SUV and grabs Mr. Ra by the arm. Those are the factors most favorable to Mr. Ra.
>
> Quite frankly, I come to the same conclusion Judge Fleming did in the first trial, and that is that that's insufficient to support a self-defense instruction where the standard is the use of deadly force based on fear of death or great bodily injury.
>
> If you were to be able to use deadly force in this circumstance, you would almost always be able to use deadly force. And the distinction between the use of deadly force and

> fear of battery, and the general use of force would be a meaningless distinction. I can't see any way there is sufficient evidence to support a self-defense instruction under there circumstances, and I 'm going to decline to give it.

This was error contrary to Walden and State v. Painter, 27 Wn.App. 708, 620 P.2d 1001 (1980).

In Painter, the defendant shot and killed her stepson, Ted, during an altercation in the home. Ted, her stepson was unarmed at the time of the altercation. The jury instructions used by the trial court defined great bodily injury in terms of the legitimacy of the defendant's fear as "an injury of a more serious nature than an ordinary striking with the hands or fists. It must be an injury of such nature as to produce severe pain and suffering." Painter, 27 Wn.App. at 711, 620 P.2d 1001. The Court of Appeals held this definition impermissibly prevented the jury from considering the defendant's subjective state of mind during the altercation.

Painter was terrified of her stepson based on his repeated threats to harm her, thus she could have reasonably apprehended great bodily harm and/or death based upon her past dealings with him, despite his being unarmed. "Painter illustrates that the "simple" use of bare hands by an assailant could, under certain circumstances, reasonably be expected to cause great bodily harm." Walker, 136 Wn2d at 776.

Walker is distinguishable. In Walker, the trial court made a thorough decision based on the facts and applied both an objective and subjective analysis to its decision to deny giving a self-defense instruction. Walker, 136 Wn2d at 779.

The trial court's ruling in Ra's case denying the self-defense instruction rested upon the trial court's misunderstanding and misapplication of the law: that a person can never fear great bodily injury when faced with an unarmed batterer. This ruling was based upon a mixed legal and factual finding. Walker, 136 Wn2d at 777. Moreover, the trial court in Ra's case failed to apply the subjective inquiry into Ra's claimed fear of great bodily harm. As in Walden this was error.

In Ra's case, the trial court did recite the facts set forth in the Court of Appeals opinion rejecting the self-defense instruction, but followed the recitation by nullifying those facts with the blanket assertion that "[i]f you were able to use deadly force in this circumstance, you would almost always be able to use deadly force. And the distinction between the use of deadly force and fear of battery, and the general use of force would be a meaningless distinction.". RP 5 (2-24-09). The trial court ruled that the use of the gun was unjustifiable without discussing Ra's subjective state of mind.

Pursuant to Walden and Painter this was error. Ra could have

reasonably feared great bodily harm or death from Huff's charge. This Court should reverse and remand for a new trial with a self-defense instruction.

3. APPELLANT WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL TRIAL WHEN THE STATE'S COMPLAINING WITNESS COLLAPSED IN THE COURT ROOM AND STATED WITHIN HEARING OF THE JURY THAT HE WAS HAVING A FLASHBACK.

Huff collapsed in the court room after part of his testimony and stated that he was having a flash back. The jury saw and heard everything. RP 527-529. Counsel moved for a mistrial on grounds that Ra could not receive a fair trial after the emotional scene. Id. The trial court denied the motion stating that while the incident was "dramatic" it was not "prolonged". RP 529. On a related issue, the defense had unsuccessfully sought to suppress Huff's prior military experience and a shoeing of his abdominal military injury. RP 507-509. Judge Felnagle ruled that he was not bound by Judge Fleming's ruling during the prior trial prohibiting Huff from showing his scars on grounds that it would be too prejudicial. RP 11-15, 529.

In State v. Swenson, 62 Wn.2d 259, 271, 382 P.2d 614 (1963)3, a murder case, a critical witness for the State, was pregnant at the time of the trial and "collapsed" several times during the defense's cross-examination. Id. The trial court granted recesses when these incidents occurred and also

showed considerable concern before the jury for the witness's condition. Under these circumstances, the trial court held that the defendant was denied due process. Swenson, 62 Wn.2d at 281.

Similarly, in Ra's case, after Huff resumed the stand following his collapse, the trial court allowed him to show and identify his abdominal military injuries. The combination of Huff collapsing, saying that he was having a flashback and showing his military injuries to the jury created too great a risk that the jury would be swayed by emotion rather than the evidence presented at trial. . RP 529-534. The Court in Swenson, held that notwithstanding the courts "discretionary powers to take remedial action in neutralizing the effect of incidents and irregularities at trial", the discretion is limited by the defendant's right to affair trial. Swenson, 62 Wn.2d at 279-81. (citations omitted).

Cases country wide have held that emotional displays by critical witnesses create too great a risk of jury decisions based on emotional sway. For example, in Collum v. State, 21 Ala.App. 220, 107 So. 35 (1926), the plaintiff fainted at the end of her testimony, cried and exclaimed 'Lord have mercy on us.' And rescuers came to her aid. The Court held that the incident was too prejudicial and granted a new trial.

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3 Reversed on other grounds in State v. Land, 121 Wn.2d 494 P.2d 851 678 (1993)

Similarly in State v. Gevrez, 61 Ariz. 296, 148 P.2d 829 (1944), a first-degree murder trial, where the state had a strong case, the mother of the victim had an outburst during the state's opening argument and the daughter of the deceased victim had a dialogue with the prosecutor about her doll, given to her by her mother. In that case, the appellate court held the two incidents created prejudicial and reversible error. Id.

While lengthy, it is worth quoting from Swenson the passage describing the importance of preserving the court room in a manner that ensures due process.

> While so-called laboratory conditions can never be realized, it is, nevertheless, the burden of the courts to strive for them and to try all cases in an atmosphere of complete impartiality, not only without any reservation whatever but devoid of appearance by any such reservation. If the trial has been shorn of any of the ingredients from which substantive due process is made, it is of small moment that the mechanism which does this falls within the recognized classifications of judicial error, or, on the contrary, arises from a combination of circumstances and events either partially or wholly beyond the court's control. In either case, the decision must be the same. Any rule to the contrary will sacrifice our bill of rights and our concepts of substantive due process upon the altar of expediency.

Swenson, 62 Wn.2d at 280-281.

In Swenson and the cased cited herein, the prejudice to the defendants and opposing parties in the cases cited herein was very similar to that in the

instant case. Ra was denied his substantive right to due process by the incident with Huff. To protect Ra's right to due process, the trial court's denial of the motion for a mistrial must be reversed.

4. THE STATE FALED TO PROVE RA'S OFFENDER SCORE BY A PREPONDERANCE OF EVIDENCE

Ra objected to the state's failure to prove his offender score by as preponderance of the evidence. RP 12 (4-10-2009). The state did not produce certified copies of Ra's priors, but rather relied on the fact that "[w]e did this before Judge Fleming, who found the priors". RP 12 (4-10-09). In the prior case which was reversed on appeal, this Court did not address or affirm the sentence. State v. Ra, 144 Wn. App. 688, 175 P.3d 609 (2008). The Court "review[s] de novo the sentencing court's calculation of the offender score." State v. Rivers, 130 Wn.App. 689, 699, 128 P.3d 608 (2005), review denied, 158 Wn.2d 1008, 143 P.3d 829 (2006), cert. denied, 549 U.S. 1308, 127 S.Ct. 1882, 167 L.Ed.2d 370 (2007).

In State v. Mendoza, 139 Wn. App. 693, 699, 162 P.3d 439 (2007), this Court held that the prosecutor's presentation of a written statement containing a table listing Mendoza's prior convictions, including, the crimes, sentencing courts, dates of crimes, and types of crime, was no more than the prosecutor's unsupported statement which did not meet the preponderance of

evidence standard. The State did not provide a certified copy of the judgment and sentence for any of Mendoza's convictions and did not offer any reason for failing to do so. Id. Citing, Rivers, this Court in Mendoza held that:

> To establish the existence of a [previous] conviction, a certified copy of the judgment and sentence is the best evidence. The State may introduce other comparable evidence only if it shows that the writing is unavailable for some reason other than the serious fault of the proponent. In that case, comparable documents of record or trial transcripts may suffice.

Mendoza, 139 Wn. App. at 702, quoting, Rivers, 130 Wn.App. at 698-99, 128 P.3d 608 (citations omitted).

In Ra's case, the state did not provide a reason for its failure to provide certified copies of Ra's priors. Additionally, the prosecutor's statement reciting Ra's priors amounted to no more than his "bare assertions". ." State v. Ford, 137 Wn.2d 472, 482, 973 P.2d 452 (1999).

> The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.

Ford, 137 Wn.2d at 482. The Supreme Court in Ford held the State had the burden of proving out-of-state convictions and that its total failure to do so violated due process. Ford, 137 Wn.2d at 481.

Long standing State Supreme Court precedent has made clear that "[t]he best evidence of a prior conviction is a certified copy of the judgment" and that "[t]he State may introduce other comparable evidence only if it is shown that the [certified copy] is unavailable for some reason other than the serious fault of the proponent." State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). In Mendoza and Ford, the Courts reversed the sentences where the state failed to provide certified copies of priors and failed to establish why certified copies were unavailable. Mendoza, 139 Wn. App at 704-705; Ford, 137 Wn.2d at 497- 482. The instant case is indistinguishable from Ford and Mendoza on this issue and should be reversed on the same grounds.

5. THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENT OF A PRIOR FELONY I N THE CHARGE OF UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE.

The state did not present any evidence of Ra's prior felonies, but rather simply stated that they existed. RP 112 (4-10-09); Supp CP Exhibit list 2-26-09). The state filed a "stipulation to the offender score", but it was not signed by the defense and not agreed to, thus it has no value because it was not a stipulation, but rather a document prepared by the prosecutor. It is well established that the prosecutor's remarks are not evidence. Ford, 137 Wn.2d

at 482.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences that may be drawn in favor of the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). On review, circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The Court reviews the evidence to determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

To convict Ra of second degree unlawful possession of a firearm, the State had to prove beyond a reasonable doubt that Ra knowingly possessed a firearm and that he had previously been convicted of a felony in Washington. RCW 9.41.040(2)(a)(i). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Summers, 107 Wn.App. 373, 388, 28 P.3d 780, 43 P.3d 526 (2001). Substantial evidence is evidence that would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. State v. Hutton, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). The existence of a fact cannot rest on guess, speculation, or

conjecture. Hutton, 7 Wn.App. at 728. Insufficiency of evidence mandates dismissal with prejudice. State v. Turner, 103 Wn.App. 515, 520, 13 P.3d 234 (2000).

The lack of proof of prior felonies in Ra's case renders the evidence insufficient. Principles of double jeopardy bar retrial when evidence insufficiently supports a conviction. Burks v. U.S., 437 U.S. 1, 10-11, 98 S.Ct. 2141, 57 L.Ed.2d 1, remanded to 579 F.2d 1013 (1978); State v. Stanton, 68 Wn.App. 855, 867, 845 P.2d 1365 (1993). Because there was no verifiable evidence of Ra's priors, this was insufficient to establish this element beyond a reasonable doubt. For this reason, this Court should reverse and dismiss with prejudice Ra's conviction for second degree unlawful possession of a firearm. Stanton, 68 Wn.App. at 867.

6 THE STATE TO PROVE THE ESSENTIAL ELEMENTS OF DRIVE-BY SHOOTING.

Ra acted in self-defense but was denied the opportunity to argue this to the jury. Had he been able t o argue self-defense he likely would have sufficiently undermined the state's case against him in the drive-by shooting charge. A person commits drive by shooting under RCW 9A. 36. 045 as follows:

> (1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010

> in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

Had Ra been able top present a self-defense theory, he could have negated the element of reckless discharge of a weapon thereby making it unlikely that the state could have met its burden of proof beyond a reasonable doubt.

Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. U.S. CONST. amend. XIV; see Wash. Const. art I, § 22; Jackson v. Virginia, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); In re Winship, 397 U.S. 358, 365-66, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Self-defense negates the mens rea of drive-by shooting because self-defense is defined as a lawful act, RCW 9A.16.020(3), and the crime of drive-by shooting requires "recklessly discharges" a weapon. Reckless is defined as:

> RECKLESSNESS. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(c). Whether an act is reckless depends on both what the

defendant knew and how a reasonable person would have acted knowing these facts. State v. Keend (2007) 140 Wn.App. 858, 166 P.3d 1268, review denied 163 Wn.2d 1041, 187 P.3d 270.

The requirement of reckless is thus held to be inconsistent with a lawful act of self-defense. State v. Hanton, 94 Wn.2d 129, 614 P.2d 1280, certiorari denied 101 S.Ct. 611, 449 U.S. 1035, 66 L.Ed.2d 497 (1980).

With a self-defense instruction, the state would not likely have been able to prove reckless discharge of a weapon, thus this court should remand for a new trial with the self-defense instruction.

7. THE STATE FAILED TO PROVE THTE ESSENTIAL ELEMENTS OF MURDER IN THE SECOND DEGREE.

Ra acted in self-defense but was denied the opportunity to argue this to the jury. Had Ra been able to present his self-defense theory he would have negated the element of intent in the attempted murder charge. A person commits murder in the second degree under RCW 9A.32.050 as follows:

> (1) A person is guilty of murder in the second degree when:
>
> (a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

Attempt, RCW 9A.28.020 is defined as:

> (1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.

Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. U.S. CONST. amend. XIV; *see* Wash. Const. art I, § 22; Jackson v. Virginia, 443 U.S. at 311; In re Winship, 397 U.S. at 365-66.

Self-defense negates the mens rea of second degree murder because self-defense is defined as a lawful act, RCW 9A.16.020(3), and the crime of first degree murder requires "intent", which is defined as acting "with the objective or purpose to . . . accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

The requirement of intent is thus held to be inconsistent with a lawful act. State v. Brown, 94 Wn.App. 327, 972 P.2d 112, review granted 138 Wn.2d 1008, 989 P.2d 1141, (1999), affirmed 140 Wash.2d 456, 998 P.2d 321 (Person acting in self defense is acting lawfully, and thus lacks requisite criminal intent to support assault conviction.). Because the state would not likely have been able to prove intent if the court had given the self-defense instruction, this Court should remand for a new trial with the self-defense instruction.

8. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT BY ARGUING HIS PERSONAL BELIEF ABOUT RA'S GUILT, AND BY TELLING THE JURY THAT IF THEY CONSIDERED RA'S TESTIMONY THEY WOULD NOT BE DOING THEIR JOB.

The prosecutor engaged in deliberate misconduct when he repeatedly expressed his personal opinion regarding Ra's guilt. "The prosecutor argued, "[t]he state believes firmly that the evidence in this case has proven that the defendant acted with premeditated intent" RP 785. Following an objection from the defense the trial court admonished the prosecutor. "Counsel should refrain from indicating any personal opinion. I'm not sure you did or didn't, but it was close". Id.

The prosecutor proceeded to tell the jury that "[t]his is not a self-defense case", and the only issue is intent and the jury should only discuss intent. "Any discussion ...should resolve, excuse me, around the defendant's intent." ..... RP 793. The prosecutor continued with a statement that if you listen to the defendant's testimony that he shot Huff because he was afraid because was coming at him, then "you might start thinking that's reasonable, ...But if you're doing that, you are forgetting something that's very, very important to consider, and that is what Mr. Huff was doing was

perfectly legal. There's nothing wrong with what Mr. Huff did." RP 793-94.

The prosecutor, in an attempt to inflame the passion and prejudice of the jury was not content to argue the facts of the case, so he argued to the jury that if Huff was married to Vianna, then certainly it would be reasonable for a husband walking down the street with his wife to respond with anger to catcalls. "There is only one response to that kind of activity, and that is anger in the other side". RP 795.

Again without any evidence in the record, the prosecutor injected his personal understanding of the definition of ,"'I'm gonna tap that ass', which, as I understand it, means, I'm gonna have sex with her, I'm gonna take it." RP 795. In the same vein, without any evidence in the record, the prosecutor argued, "[i]n fact, I think the testimony is they thought they killed him". RP 780.

Continuing with the misconduct into rebuttal argument, the prosecutor again offered his personal belief about the meaning of "tapping ass" RP 823. The prosecutor proceeded to personally attack defense counsel's performance and RA. "Defense counsel says poor, poor Mr. Ra. You know his buddy is the one saying it" RP 824. The prosecutor again claimed that the defense examination of witness Serdar using prior sworn testimony was inaccurate as opposed to other portions of the state's evidence. RP 828- 829.

However the record supported the defense cross examination results. RP 648, 637, 765-77. In short, the prosecutor misrepresented the evidence.

Finally, in closing rebuttal, the prosecutor again stated his personal belief in Ra's guilt. "The state believes, again, firmly, based on the evidence that the defendant is guilty". The defense objected and the court ruled, "[t]he same admonition from before. The state should not indicate their personal belief". RP 835. The defense moved for a mistrial which was denied. RP 839-840. The trial court ruled,

> [t]he first time you said, actually – and I should have just sustained it outright—I did sustain it, but I made a comment about I wasn't sure. But, in thinking back, you said,' I firmly believe that".....So it was personalized, and then the last two times, you changed it to 'the state believes', but, I don't think that solves the problem either. You need to say, 'The evidence shows' or 'I assert that'".....

It is the use of the word 'belief,' [sic] I think, that becomes problematic. RP 840-41.

Prejudicial prosecutorial misconduct denies a defendant his constitutional right t o a fair trial. Washington Constitution Article 1 § 22; United States Constitution, Sixth and Fourteenth Amendments; State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1992).

> We realize that attorneys, in the heat of a trial, are apt to become a little over-enthusiastic in their remembrance of the testimony. However, they have *no right to mislead the jury*. This is especially true of a prosecutor, who is a quasi-judicial officer whose duty it is to see that a defendant in a criminal prosecution is given a fair trial.

(Emphasis added in Davenport) Davenport, 100 Wn.2d at 763, quoting, State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955)

In Washington State prosecutors have a special duty in trial to act impartially in the interests of justice and not as a "heated partisan". State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993), citing, State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984), quoting, People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899).

A new trial is required when misconduct in prejudicial. Misconduct is viewed against the backdrop of the entire argument. Stith, 71 Wn. App. at 19, citing, State v. Graham, 59 Wn. App. 418, 426, 428, 798 P.2d 314 (1990). Misconduct is prejudicial when there is, "a substantial likelihood" the misconduct "affected the jury's verdict." State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991). See also, Davenport, 100 Wn.2d at 762, citing, State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). The defendant bears the burden of proving that there is

a substantial likelihood that the misconduct affected the jury's verdict. Stith, 71 Wn. App. at 19, quoting, Barrow, 60 Wn. App. at 876.

Arguments that are designed to inflame the passions and prejudice are improper and prejudicial. State v. Torres, 16 Wn. App. 254, 264-65, 554 P.2d 1069 (1976).

> [T]he safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims.

Torres, 16 Wn. App. at 264-65. Arguments that are based on facts not in evidence and that mislead the jury are equally as improper and prejudicial. Davenport, 100 Wn.2d at 760; State v. Rose, 62 Wn.2d 309, 312 382 P.2d 513 (1963).

a. Arguing Facts Not In Evidence

During closing and rebuttal argument the prosecutor argued facts not in evidence. The prosecutor created a non existent scenario between a husband and wife and described it to inflame the passions of the jury against Ra in favor of Huff because the facts of girlfriend and boyfriend were not as

powerful. RP 795-796. The use of a husband wife scenario was intentionally designed to arouse the passions of the jury rather than focusing on the facts. This was misconduct. The prosecutor's made-up definition of "tapping ass" was also out side the record and misconduct.

In Stith, the Court held that the prosecutor's remarks in closing that Stith was out "dealing drugs again" improperly argued facts not in evidence. The trial court in Stith, sustained the defense objections to all of these improper and prejudicial comments and gave a strongly worded curative instruction to disregard the comments. The court also admonished the jury that it could only consider evidence given in testimony. Stith, 71 Wn. App. at 22.

In Ra's case, the purpose of arguing facts not in evidence and personally defining terms that have not been defined by the court was to sway the jury to convict based on emotion rather than the facts. When coupled with the prosecutor's denigrating comments toward defense counsel and Ra and the prosecutor's expression of his personal belief that Ra was guilty amounted to prejudicial misconduct.

The court and not the prosecutor is charged with instructing the jury. When the prosecutor oversteps his bounds, he commits misconduct. Davenport, 100 Wn.2d 701.

In Davenport, the prosecutor argued an accomplice liability theory even though the trial court did not instruct the jury on accomplice liability. Davenport, 100 Wn.2d at 760. The Supreme Court held that the prosecutor committed prejudicial misconduct when he "introduced to the jury the extraneous matter of accomplice liability, which was not before the jury. " Davenport, 100 Wn.2d at 701. The prosecutor misled the jury by arguing law that was not properly before it. The Supreme Court reversed the Court of Appeals finding of harmless error and remanded for a new trial.

In Ra's case, the prosecutor argued facts not in evidence and misstated the law throughout his closing argument (definition of "tapping ass" and husband/wife scenario. As in Davenport, it is prejudicial misconduct to discuss law that is not before the jury and as in Stith it is prejudicial misconduct to discuss matters that were inadmissible at trial.

In Ra's case, the prosecutor's denigrating comments about "poor, poor, Mr. Ra" and arguing to the jury that if they considered Ra's testimony they would not be doing their job, and the prosecutor's personal opinion of Ra's guilt was flagrant, ill-intentioned and tantamount to telling the jury that their job was to convict rather than to evaluate the evidence. With or without an objection from the defense, no curative instruction could have undone the prejudicial damage created by the prosecutor.

In State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988), aff'd, 119 Wn.2d 711, 599 P.2d 837 (1992), the Supreme Court reversed a conviction for prosecutorial misconduct, where the "remarks were flagrant, highly prejudicial and introduced 'facts' not in evidence." The prosecutor called AIM, a group Belgarde associated with, a bunch of "madmen" and Butchers".

In Stith, citing to Belgrade, the court recognized that "[i]nstructions to the jury to disregard the comments cannot cure such prejudice. The mandatory remedy is a mistrial." Stith, 71 Wn. App. at 16. As in Belgarde and Stith the prosecutor inflamed the prejudice of the jury. Standing alone, each separate act of misconduct was prejudicial and reversible error, with or without an objection. Belgarde, 110 Wn.2d at 508; Stith, 71 Wn. App at 22; State v. Powell, 62 Wn. App. 914, 919, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992). The cumulative effect of the repeated acts of misconduct made it impossible for Ra to receive a fair trial.

Reversal is required because the improper comments were highly prejudicial and cut to the heart of the defense case. The jury was mis-informed by the state that Ra's testimony should be disregarded and that Ra was guilty because the prosecutor said he was, and the focus on a husband and wife and Ra's buddies wanting have sex with the wife were not part of

the record and combined to create prejudice which could not be undone by a jury instruction. For these reasons, this Court should reverse and remand for a new trial.

9. CUMULATIVE ERROR DENIED RA HIS RIGHT TO A FAIR TRIAL

Where multiple errors occur during trial which deny the defendant his right to a fair trial, due process is violated and the defendant is entitled to a new trial. In re Personal restraint of Lord, 123 Wn.2d 269, 332, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994). The cumulative error doctrine applies when there are multiple errors at trial, but none standing alone is sufficient to warrant reversal. State v. Hodges, 118 Wn. 668, 673, 77 P.3d 375 (2003), review denied, 151 Wn.2d 1013, 94 P.3d 960 (2004). State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998); State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997).

Under the cumulative error doctrine when multiple errors deny a defendant his right to a fair trial, he is entitled to a new trial. As argued above and hereunder, the errors at trial were so prevalent and prejudicial, that Ra was denied his right to a fair trial. The prosecutor committed repeated acts of

misconduct, Ra was denied his right to present a defense, the trial court refused to grant a mistrial for an irregularity in the proceedings that was prejudicial to Ra (victim collapse), and a witness was permitted to identify Ra without any personal knowledge. For these reasons, Ra is entitled to a new trial.

D. CONCLUSION

Ra respectfully requests this Court reverse his conviction and dismiss his charge of unlawful possession of a firearm with prejudice because the state failed to present evidence of guilt beyond a reasonable doubt. Ra also requests remand for a new trial with a self defense instruction on the other charges with admonitions to the prosecutor not to commit misconduct

DATED this 30th day of November 2009.

COURT OF APPEALS
DIVISION II
09 DEC -1 PM 12:41
STATE OF WASHINGTON
BY
DEPUTY

Respectfully submitted,

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Ryna Ra DOC# 894748 MCC Wash State Reform Unit P.O. Box #77 Monroe , WA 98272 on November 30, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature