

NO. 48529-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

RAMEIKO TERRELL GRAVES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00191-2

BRIEF OF RESPONDENT

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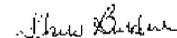
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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED July 21, 2016, Port Orchard, WA



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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether jury instructions on ignorance of the law and self-defense misled the jury as inconsistent where the instructions are correct statements of the law, addressed different topics, and caused no articulable prejudice and where the defense propounded the self-defense instructions and asserted no objection to the ignorance of the law instruction?

2. Whether the prosecution committed misconduct where it argued the actual evidence received, correctly arguing that Graves had a reasonable alternative to stabbing the victim, and where Graves failed to object and the prosecution argument was not flagrant and ill-intentioned?

3. Whether WPIC 4.01 is a proper statement of the law?

4. Whether the trial court abused its discretion by ordering a chemical dependency evaluation as a condition of community custody?

5. Whether appellate costs should be ordered if the state substantially prevails?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Rameiko Terrell Graves was charged by first amended information filed in Kitsap County Superior Court with first degree assault, including

special allegation that he was armed with a deadly weapon. CP 14. Graves proceeded to trial on this count. 1RP 3.

The defense requested that the jury be instructed on self-defense. CP 21-24. The trial court granted that request and self-defense instructions proposed by the defense were given. CP 41-44 (instructions 14, 15, 16, and 17). The trial court also instructed the jury that ignorance of the law is not a defense. CP 33 (instruction 6). The defense had no objection to the giving of instruction number 6. 2RP 301. The trial court gave the reasonable doubt instruction found in Washington Pattern Instruction-Criminal (WPIC) 4.01. CP 30 (instruction 3). The defense had no objection to the giving of instruction number 3. 2RP 301.

The jury rejected Graves's self-defense claim and found him guilty of first degree assault. CP 48. The jury further found that Graves was armed with a deadly weapon (CP 49), that the assault was likely to result in great bodily harm or death (CP 50), and that the assault in fact resulted in great bodily harm. *Id.*

Graves was sentenced within the standard range (including deadly weapon enhancement) to 132 months. CP 62. Various conditions were ordered for 36 months of community custody. CP 66. A timely notice of appeal was filed. CP 72.

B. FACTS

Deputy sheriff Jason Hedstrom responded to a report of a stabbing. 1RP 54. Investigation revealed that Graves had stabbed Jeffery Waldroop with a small pocketknife. 1RP 58-59. Graves had blood on his shorts and on his sock. 1RP 67. Deputy Hedstrom retrieved the knife after Graves pointed it out. 1RP 59. There was blood on the knife. 1RP 61. The deputy also recovered a samurai sword and its sheath belonging to Waldroop. 1RP 62-64.

Victim Jeffery Waldroop got home that day around 4 in the afternoon. 1RP 70. It was a nice day. *Id.* He attended to his dog and mixed himself a drink. 1RP 71. Then, he fed the dog and mixed another drink. *Id.* Being bored, he got out his “katana” in order to do some exercises. 1RP 72. He was practicing on a grassy area outside his apartment. 1RP 73. At some point, his friend Misty Torres and her friends came out of another apartment and watched him. 1RP 74.

The watching made Mr. Waldroop uneasy so he approached Misty and the others and asked if his practicing made her uncomfortable. 1RP 75. She didn’t mind. *Id.* He then went back in his apartment, came back out and continued to practice. *Id.* He saw the others watching again and he again went to talk to them. 1RP 75-76. He showed the others the sword and allowed Misty to hold it. *Id.* Mr. Waldroop then went back to his house, smoked a cigarette, and waited for the others to

“disappear.” Id.

Later, as it began to get dark, Mr. Waldroop continued his sword exercises and had another drink. 1RP 78. He went down to Misty’s to see if she wanted a cigarette. 1RP 78-79. He was told that Misty was not home and had brief conversation with those present. 1RP 79. He went back to his place and was observing activity in the parking lot. Id. Eventually, while watching the parking lot, Mr. Waldroop moved closure. 1RP 80. He believed the people in the parking lot were the group from Misty’s house. Id. He could not tell what they were doing so he returned to his house and asked his brother to go back out with him to check it out. 1RP 81. His brother declined and Mr. Waldroop went back outside to observe. Id.

After another failed attempt to involve his brother, Mr. Waldroop again watched the activity while trying to figure out what was going on. 1RP 83. Eventually, his brother came out and took the sword away from him. Id. He had had the sword slung over his back while he had been watching the activity. Id. He then began to follow his brother back to their apartment while his brother carried the sword. 1RP 84.

About halfway back, Mr. Waldroop was knocked to his knees from behind by an unseen assailant and felt sharp pains like being stung by bees. 1RP 84. He felt more pain and went down to his hands and knees. Id. A moment passed, Mr. Waldroop found that he could not get up.

1RP 85. He heard his brother yelling and felt weight on him that kept him from getting up. Id. The weight lessened and he could move but he did not know what happened. 1RP 86. As his brother was helping him up, he was suddenly knocked back down again. Id. He felt more stinging and heard more yelling. Id. He felt the stinging in his back, on both sides, and in his chest area. Id. Once the second attack ended, his brother got him up and dragged him back to their apartment. 1RP 87.

Alex Bedford is Misty Torres's boyfriend and was present at her apartment on the day of the incident. 1RP 116-17. He did not know Graves that well. 1RP 117. That day, they were just hanging out and drinking some beers. 1RP 118. They were going in and out of Ms. Torres's apartment. 1RP 118. Mr. Bedford was present when Mr. Waldroop was stabbed. 1RP 119.

Before the stabbing, Mr. Waldroop had come over and talked to them while holding the sword. Id. Mr. Bedford thought that Mr. Waldroop was "crazy" but he was not scared of Mr. Waldroop at all. 1RP 120. Mr. Bedford thought that what he was doing with the sword was "weird" but he never felt threatened or that it was a dangerous situation. Id. Later Mr. Waldroop came over inquiring about Misty and Bedford and Graves told him that she was not home. 1RP 121. Mr. Waldroop had the sword but did not point it at Bedford or Graves or threaten them with it. Id. He did not seem aggressive. Id.

After that, Mr. Bedford and Graves went outside, at some point approaching Mr. Waldroop and conversing with him. 1RP 122. Mr. Bedford had no concerns for his own safety. Id. Mr. Bedford was aware that Graves had a knife. Id. After Ms. Torres returned, Bedford and Graves went back outside. 1RP 124. The two noticed Mr. Waldroop still outside with his sword but soon Waldroop's brother came out, took the sword away from him and the two were walking away. Id.

At that point, Graves "took out his knife, hid it behind his back and basically was following behind him." 1RP 124. Mr. Waldroop's brother said to Graves to back off because he was handling it. 1RP 125. Mr. Bedford then heard Mr. Waldroop's brother exclaim "Are you stabbing him?" Id. At that time, it was clear to Mr. Bedford that Mr. Waldroop did not have the sword and was walking toward his apartment. Id. Graves was standing near him when he made these observations. Id. Mr. Bedford was shocked when Graves stabbed Mr. Waldroop. Id.

Mr. Bedford fled to Ms. Torres's apartment. 2RP 136. Graves came in and said he had stabbed him six times and knew he was going to jail. Id. Graves washed the blood off himself opened the front door and threw the knife out. 2RP 137.

Jeffery Waldroop was treated for nine stab wounds. 2RP 225. Two of the wounds were "big problems" for medical treatment. 2RP 230. These two wounds where three or four inches long and "[t]hey

went deep.” Id. One wound required surgery to clean out a hematoma, or collection of blood, in the bowel area. 2RP 230. Careful internal inspection was required to ascertain whether the bowel had been perforated. 2RP 230-31. That wound had lacerated the skin and the deeper tissue, had cut a significant amount of muscle, and had chipped the pelvic bone. Id. The wound was consistent with moving the knife laterally or dragging it while inserted rather than a straight up and down or in and out motion. 2RP 232. Another similar wound had in fact penetrated the bowel (2RP 232), causing “bowel content” to spill out into the body cavity. 2RP 233. If left untreated, this wound would have led to “peritonitis and ultimately death.” Id.

III. ARGUMENT

A. JURY INSTRUCTIONS GIVEN WERE NOT INCONSISTENT WITH EACH OTHER AND PROPERLY INSTRUCTED THE JURY ON THE LAW.

Graves argues that the trial court’s instructions were inconsistent with regard to self-defense. This claim is without merit because it was not preserved below, because the instructions addressed different subjects, and because each of the allegedly inconsistent instructions is a correct statement of the law.

Jury instruction challenges are reviewed de novo, evaluating the jury instruction “in the context of the instructions as a whole.” *State v. Knutz*, 161 Wash.App. 395, 403, 253 P.3d 437 (2011) (quoting *State v. Benn*, 120 Wash.2d 631, 654–55, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993)). This Court recently announced the rules on jury instructions in this context thus

“Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” *Knutz*, 161 Wash.App. at 403, 253 P.3d 437 (internal quotation marks omitted) (quoting *State v. Aguirre*, 168 Wash.2d 350, 363–64, 229 P.3d 669 (2010)). Jury instructions on self-defense must more than adequately convey the law. *State v. LeFaber*, 128 Wash.2d 896, 900, 913 P.2d 369 (1996), abrogated by *State v. O’Hara*, 167 Wash.2d 91, 217 P.3d 756 (2009). The instructions “must make the relevant legal standard manifestly apparent to the average juror.” *LeFaber*, 128 Wash.2d at 900, 913 P.2d 369 (quoting *State v. Allery*, 101 Wash.2d 591, 595, 682 P.2d 312 (1984)); *State v. Painter*, 27 Wash.App. 708, 713, 620 P.2d 1001 (1980), *review denied*, 95 Wash.2d 1008, 1981 WL 190850 (1981). “A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.” *LeFaber*, 128 Wash.2d at 900, 913 P.2d 369. Accordingly, we will review an alleged error that a self-defense jury instruction misstates the law raised for the first time on appeal. RAP 2.5(a)(3); *State v. Kyllo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009) (citing *State v. L.B.*, 132 Wash.App. 948, 952, 135

State v. McCreven, 170 Wn.App. 444, 461-62, 284 P.3d 793, *rev denied* 176 Wn.2d 1015 (2013).

Instruction number six told the jury

It is not a defense to a criminal charge that the defendant believed his or her conduct was lawful. Ignorance of the law is no excuse

for criminal conduct.

CP 33. Graves makes no claim that instruction number six is not a correct statement of the law. He does not assert any argument or case explaining why and when such an instruction should or should not be given. The instruction stands for the proposition that Graves could not successfully argue to the jury that any time another has had a weapon in his control, that person may be lawfully attacked even when that person has not threatened the attacker and has been disarmed before the attack.

Graves claims inconsistency with the subjective element of his self-defense instructions found in instruction 14

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

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

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

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

CP 41. Again, Graves makes no argument that instruction 14, or any of the other of the self-defense instructions, misstate the law or were improperly given. The two instructions clearly cover different ground. Number 14, in contrast to number 6, begins by advising the jury that it is a defense if the use of force was lawful. Instruction number 6 does not address the elements of self-defense at all. Further, as a correct statement of the law, instruction number 6 has no caveat allowing reasonable ignorance of the law.

Moreover, Graves' argument ignores the last passage of instruction 14. Graves argues that instruction number 6 diminished the state's burden of prove but nowhere argues how that might occur in light of the clear and correct statement in instruction number 14. No other instruction in the record told the jury that the state had any other than a beyond a reasonable doubt burden of proof.

1. ***Since the instructions were correct statements of the law, Graves was required to preserve the present issue in the trial court.***

The record is clear that the defense did not object to the giving of instruction #6. Equally clear is that the defense proposed the self-defense instructions given. 2RP 301. This issue, if issue it is, was not preserved for review. Generally, objection below is required because

It has long been the law in Washington that an “appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a); *State v. Lyskoski*, 47 Wash.2d 102, 108, 287 P.2d 114 (1955). The underlying policy of the rule is to “encourag[e] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *State v. Scott*, 110 Wash.2d 682, 685, 757 P.2d 492 (1988). The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter. *See City of Harlaon*, 56 Wash.2d 596, 597, 354 P.2d 928 (1960).

State v. O'Hara, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). These rules command that the inconsistency that Graves claims to have confused the jury should have been appreciated and objected to by counsel at trial. Moreover, in order to overcome this failure to object

To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension. *State v. Kirkman*, 159 Wash.2d 918, 926, 155 P.3d 125 (2007) (citing *State v. WWJ Corp.*, 138 Wash.2d 595, 602, 980 P.2d 1257 (1999); *Scott*, 110 Wash.2d at 688, 757 P.2d 492). Stated another way, the appellant must “identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.” *Id.* at 926–27, 155 P.3d 125. If a court determines the claim raises a manifest constitutional error, it may still be subject to a harmless error analysis. *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995); *State v. Lynn*, 67 Wash.App. 339, 345, 835 P.2d 251 (1992).

O'Hara, *supra*, at 98.

The *McCreven* Court allows for review without objection if the self-defense instructions themselves misstate the law. Here, however, those instructions do not misstate the law of self-defense. It is the

misstatement of the law that drives the analysis under RAP 2.5 as is seen in *O'Hara*. Graves cites no authority that discusses a situation as here were a separate instruction is said to be inconsistent with another instruction. *State v. Irons*, 101 Wn.App. 544, 4 P.3d 174, cited by Graves, does not address the present failure to object. This Court should decline to review this issue as unpreserved.

2. ***Graves must show, and has not shown, prejudice.***

In *Irons*, the evidence was sufficient to justify the giving of self-defense instructions. Irons had been surrounded by four individuals under circumstances that indicated that the four had aggressive motives toward him. In a brief affray, Irons stabbed and killed one of the assailants. In the trial court's self-defense instructions, the jury was told that "[h]omicide is justifiable when committed in the lawful defense of the defendant when: (1) the defendant reasonable believed that *the victim* intended to inflict death or great bodily injury." *Id.* at 550 (emphasis added). Irons argued that the WPIC instruction was ambiguous by limiting its application to one of the four assailants only. The Court of Appeals found that "[w]hen read together in a case involving multiple assailants who were acting in concert with the victim, these jury instructions become internally inconsistent and, therefore, ambiguous." *Id.* at 543.

The *Irons* Court proceeded to collect cases from around the country on this issue. The conviction was reversed. The court held that

Where jury instructions are inconsistent, the reviewing court must determine whether the jury was misled as to its function and responsibilities under the law. Where the inconsistency is the result of a misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant unless the error can be declared harmless beyond a reasonable doubt. *Walden*, 131 Wash.2d at 478, 932 P.2d 1237 (citing *State v. Wanrow*, 88 Wash.2d 221, 239, 559 P.2d 548 (1977), and *State v. Caldwell*, 94 Wash.2d 614, 618, 618 P.2d 508 (1980)).

Id. at. Two situations are covered in this passage: inconsistency that may have misled the jury, without reference to whether or not the inconsistency entails a misstatement of the law, and inconsistency resulting from a misstatement of the law. The present case falls under the first situation and not the second. Here, then, this Court looks to see if there is in fact an inconsistency and if so whether the jury was in fact misled; there is no presumption that it was misled. Moreover, it is the presumption attending a misstatement of the law that obviates the necessity for the defense to show prejudice (the misleading inconsistency is presumed to be prejudicial). Here, however, since the court should review for inconsistency in fact and in turn for whether that inconsistency misled the jury in fact, the burden should fall to the appellant to establish prejudice to her case in fact. Graves misreads the authority and relies on the presumption arising from a misstatement of the law, which does not obtain, and provides no analysis demonstrating how he was prejudiced in

fact. *See also State v. Wanrow, supra* at 239, (“When instructions are inconsistent, it is the duty of the reviewing court to determine whether the jury was misled. . .by the inconsistency...where such an inconsistency is the result of a clear misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant.”)

In *State v. Wanrow*, 88Wn.2d 221, 241, 559 P.2d 548(1977)

We conclude that the instruction here in question contains an improper statement of the law on a vital issue in the case, is inconsistent, misleading and prejudicial *when read in conjunction with other instructions pertaining to the same issue*, and therefore is a proper basis for a finding of reversible error.

(emphasis added) In the present case, the allegedly inconsistent instructions did not “pertain to the same issue.”

Another piece of the prejudice analysis is found in *State v. Barry*, 183 Wn.2d 297, 352 P.3d 161 (2015). There, the Supreme Court considered the rule, found in *Wanrow*, that prejudice is presumed if an erroneous instruction was “given on behalf of the party in whose favor the verdict was returned.” *Id.* at 303. There, the erroneous instruction was given by the trial court in answer to a question sent out from the jury during deliberation. Although the trial court and the state thought the erroneous instruction to be proper (the parties and the Supreme Court disagreed on appeal), “neither party proposed it nor advocated for the

language that the court ultimately chose.” *Id.* at 304. Thus in that case the instruction was not given “on behalf” of the state and “we therefore do not presume prejudice.” *Id.* The upshot of this holding is that the *Barry* Court “[rejected] Barry’s constitutional arguments and [applied] the nonconstitutional harmless error standard.”

Here, the state asserted instruction number 6 but the defense did not object to that instruction (as the defense had in *Barry*) and the defense asserted the self-defense instructions used in the case. Thus each party had an instruction given on its behalf that Graves now claims conflict with one another. This situation serves to underline the problem with Graves’s failure to object. In all, then, the presumption of prejudice rule has no application because both parties were responsible for the creation of the issue, if issue it is. Further, the presumption of prejudice is further inappropriate because, as noted, neither instruction is a misstatement of law. As with *Barry*, Graves is left with the nonconstitutional harmless error standard under which he has the burden of proving prejudice. Graves has not articulated any prejudice and his claim should fail for that reason.

B. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHERE SHE REMARKED ON THE AVAILABILITY OF ALTERNATIVES TO THE USE OF FORCE, ARGUED THE EVIDENCE ACTUALLY RECEIVED AT TRIAL, AND THE ISSUE WAS NOT PRESERVED BECAUSE THE DEFENSE FAILED TO OBJECT.

Graves next claims that the prosecutor's questioning and closing argument constituted misconduct because she asked about and argued that Graves should have avoided the situation instead of attacking Mr. Waldroop. This claim is without merit because the prosecutor was remarking on the facts of the assault and not arguing that Graves had a duty to retreat. Further, since Graves lodged no objection to the prosecutor's arguments, he must show that her remarks were flagrant and ill-intentioned. Finally, the prosecutor simply followed the law in arguing that there was a reasonable alternative to Graves's use of force.

First, no objection was interposed by the defense to either the state's questions or argument on this point. Failure to object to alleged improper remarks constitutes waiver of the issue unless the remarks were so flagrant and ill-intentioned that they cause an enduring and resulting prejudice that could not be cured by an instruction to the jury. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). To avoid waiver, a defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted

in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012), quoting *Thorgerson, supra*. Herein, the remarks were not improper and Graves fails in his burden to show flagrant and ill-intentioned conduct that left an enduring prejudice in the case.

Instruction number 17 was one of four self-defense instructions proposed by the defense. It provides that

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 44. The instruction is verbatim copy of WPIC 17.05 and is a correct statement of the law. The instruction is clear: it has application where a person “has reasonable grounds for believing he was being attacked.” Thus the legal principle is inapplicable under circumstances, like the present case, where Graves pulled out his knife, opened it, hid it behind his back, pursued Mr. Waldroop, and stabbed him in the back. Then, further along, the instruction has no arguable application where, having stabbed his victim multiple times, and rendered the victim defenseless, Graves makes a second attack on the victim. The WPIC comment notes that “[a] defendant is not entitled to a no-duty-to-retreat instruction where there is no evidence that anyone other than the defendant was the original

aggressor.” 11 Wash. Prac., Pattern Jury Instr. Crim. (3d Ed.), *citing State v. Benn*, 120 Wn.2d 631, 845 P.2d 289 (1993).

Here, however, Graves, and only Graves, testified that he was not the original aggressor. Graves did not testified to any sort of dispute with Mr. Waldroop or antagonism toward himself by Mr. Waldroop at any time during the day of the incident. Graves saw Mr. Waldroop’s brother take the sword from Waldroop. 3RP 261. Then, “they [Mr. Waldroop and his brother] turned around and proceeded to go inside the house.” 3RP 261. Then, contrary to the testimony of the three other witnesses who were immediately present when the assault occurred, Graves says that Mr. Waldroop grabbed the sword back from his brother and charged him. 3RP 263. Nowhere does Graves say why Mr. Waldroop would attack him. But he claims that Mr. Waldroop came up on him with the sword so he pulled his knife and stabbed him to get him away. Graves was asked, by his own counsel, why he did not turn and run away. 3RP 268. Graves responded that the thought never crossed his mind. *Id.* Thus, according to Graves, he in fact stood his ground and did not retreat from Mr. Waldroop’s alleged attack.

The other three present witnesses, including Jeffery Waldroop, saw no attack by Waldroop toward Graves. Jeffery Waldroop recalled surrendering his sword to his brother and turning to walk back home when

he was attacked from behind. 1RP 84. His brother, Ronald Waldroop, took the sword, put his arm on Jeffery's shoulder, and began to walk him home. 2RP 161. While walking away Jeffery stooped to retrieve the scabbard, swung the scabbard around a couple of times and gave the scabbard to Ronald, and continued to walk away. 2RP 161-62. Ronald had dropped the sword when Jeffery picked up the scabbard. When he returned to pick up the sword (Jeffery still doesn't have it), "all of a sudden, right then, I saw somebody come around in front of Jeff and just start punching him." 2RP 163. Ronald tells the assailant to stop and realizes the assailant has a knife. Id. Jeff was "facedown on his hands and knees" and Ronald was trying to get him up when "all of a sudden, out of nowhere, the guy came back." 2RP 165. The assailant stabs Jeffery again.

The testimony of the Waldroop brothers is borne out by the testimony of Alex Bedford, who had no allegiance to the Waldroop brothers and had spent a friendly day with Graves. Again, Bedford testified that Graves "took out his knife, hid it behind his back, and basically was following them." 1RP 124. Mr. Bedford did not know what Graves was planning when he took out the knife and started to follow the Waldroop brothers. 1RP 126. The brothers were already walking away when Graves pulled out his knife and began to follow. 1RP 127. It was

obvious to Mr. Bedford that at one point Jeffery Waldroop had picked up the scabbard, not the sword. *Id.* He was shocked when Graves stabbed Waldroop. 1RP 126. At bottom, none but Graves alleged that Jeffery Waldroop attacked anyone that night.

Graves claims that the argument by the prosecution, that is supported in the record by all but Graves, was misconduct. Graves's claim however ignores the actual testimony. First, the state's questions and argument were supported by credible direct evidence that Graves was not in fact attacked. A prosecutor is entitled to point out the improbability or lack of evidentiary support for the defense theory of the case. *State v. Russell*, 125 Wn.2d 24, 87, 882P.2d 747 (1994). If Graves was not in fact attacked, the duty to retreat instruction has no application. The state never argued that if the jury believed Graves's attack allegation, he should have retreated at that point. Moreover, the state's argument was clearly focused on Mr. Bedford's testimony that Graves was in fact *pursuing* the Waldroop brothers. A prosecutor has wide latitude to comment on the evidence introduced at trial and to draw reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Moreover, an objection would likely have been overruled because the argument is proper.

It simply is a reasonable inference from the evidence produced that

rather than pursue and attack, Graves could have behaved lawfully and walked away. The WPIC comment to instruction 17.02 discusses the interplay between the no-duty-to-retreat rule and the definition of “necessary,” which includes that “no reasonably effective alternative to the use of force appeared to exist.” WPIC 16.05; (given in the present case, number 15, CP 42). The no-duty-to-retreat instruction should be given to avoid jury confusion on this point. However, “[a]t the same time, the prosecutor should not be deprived of the argument that other alternatives to the use of force may have existed.” That was the state’s argument in this case. Contrary to Graves assertion that the prosecutor misstated the law (Brief at 11), the prosecutor in fact argued the law—that there was indeed a reasonable alternative to attacking and stabbing in this case.

The prosecutor does not commit misconduct by arguing the actual facts received by testimony. Should one stalk and attack from behind a person who has not attacked or threatened or should one refrain and walk away? Clearly, the latter answer is correct and does no disservice to the legal principle that if one is in fact attacked there is no duty to retreat. Here, Graves was the assailant and the facts received (and the jury’s verdict) show clearly that his assertion of self-defense lacked credibility. A reasonable alternative, not pursuing Mr. Waldroot with a knife at the

ready, was available to Graves. And there was no misconduct in arguing the case just that way when the evidence clearly supported that argument. In any event, there is no showing that the prosecutor's argument, following closely the evidence received as it did, was flagrant or ill-intentioned. The failure to object, then, is fatal to this claim. And the failure to object is understandable since there is no impropriety in the argument. There was no error.

C. THE REASONABLE DOUBT INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW AS MANDATED BY THE WASHINGTON SUPREME COURT.

Graves next claims that the trial court's reasonable doubt instruction was improper. However, the Washington Supreme Court has held that WPIC 4.01 is mandatory. Since the instruction given at trial followed WPIC 4.01 verbatim, this Court lacks authority to consider the present claim.

WPIC 4.01 provides:

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Instruction 3 in this case provided:

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable

person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 30.

In *State v. Bennett*, 161 Wn. 2d 303, 317-18, 165 P.3d 1241

(2007), the Supreme Court mandated the use of WPIC 4.01 in all criminal trials:

Even if many variations of the definition of reasonable doubt meet minimal due process requirements, the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction. We therefore exercise our inherent supervisory power to instruct Washington trial courts not to use the Castle instruction. We have approved WPIC 4.01 and conclude that sound judicial practice requires that this instruction be given until a better instruction is approved. Trial courts are instructed to use the WPIC 4.01 instruction to inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt.

This Court "is bound to follow precedent established by [Washington's Supreme Court.]" *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006). Because the Supreme Court has mandated the use of the instruction in question, this Court may not find error in the

trial court following the Supreme Court's explicit mandate.

Moreover, even it could, Graves fails to show error. He contends that the phrase "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt" encouraged the jury to undertake an impermissible search for the truth. But our Supreme Court has expressly affirmed the use of this language. *Bennett*, 161 Wn.2d at 318; *see also State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Further, Graves's reliance on *State v. Emery*, where the prosecutor in closing told the jury both that their "verdict should speak the truth" and to "speak the truth by holding these men accountable for what they did" is also misplaced. As this Court has explained:

Fedorov lastly challenges the court's reasonable doubt instruction. He claims it was error to instruct the jury that "[i]f, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." Fedorov argues, "The 'belief in the truth' language encourages the jury to undertake an impermissible search for the truth." Br. of Appellant at 22.

We disagree. *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), and *State v. Pirtle*, 127 Wn.2d 628, 904

P.2d 245 (1995), control. Fedorov relies on *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012), to challenge the “abiding belief” language. He claims this language is similar to the impermissible “speak the truth” remarks made by the State during closing. *Emery*, 174 Wn.2d at 751. Emery found the “speak the truth” argument improper because it misstated the jury’s role. Here, read in context, the “belief in the truth” phrase accurately informs the jury its “job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760, 278 P.3d 653. The reasonable doubt instruction accurately stated the law.

State v. Fedorov, 181 Wn. App. 187, 199-200, 324 P.3d 784 (2014), *review denied*, 181 Wn. 2d 1009 (2014); accord *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 (2014), *review denied*, 337 P.3d 325 (2014) (“We reject Kinzle’s argument that the optional language impermissibly suggests that the jury’s job is to “search” for the truth. The phrase “abiding belief in the truth of the charge” merely elaborates on what it means to be “satisfied beyond a reasonable doubt.”).

In *State v. Kalebaugh*, 183Wn.2d 578, 355 P.3d 253 (2015), the Supreme Court recently reaffirmed that WPIC 4.01 was “the correct legal instruction on reasonable doubt.” After correctly instructing the jury during preliminary remarks that reasonable doubt was “a doubt for which

a reason exists,” the trial judge in *Kalebaugh* paraphrased the explanation as “a doubt for which a reason *can be given*.” Id. at 584 (emphasis the Court’s). In concluding that the error in the trial judge’s comment was harmless beyond a reasonable doubt, the Court rejected any suggestion that WPIC 4.01 required the jury to articulate a reason for having a reasonable doubt or was akin to the improper “fill in the blank” argument criticized in *Emery*. Id.; see also *State v. Thompson*, 13 Wn. App. 1, 4-5, 533 P.2d 395 (1975) (the phrase “a doubt for which a reason exists” does not direct the jury “to assign a reason for their doubts”).

Graves argues that this Court should not follow Division One’s *Kinzie* and *Fedorov* cases in resolving this claim. Brief at 15-16. But Graves argument was written before this Court decided *State v. Jenson*, Washington State Court of Appeals, Division II No. 47647-9-II, filed July 6, 2016, where this Court did in fact follow the precedent from Division I and the Supreme Court. Specifically, in the published section of the opinion, this Court said in *Jenson* “[w]e adopt Division One’s reasoning in *Fedorov*.” Id., slip. op., at paragraph 7.

Our Supreme Court has repeatedly commanded the use of WPIC 4.01. This Court has thoroughly reviewed the issues raised here and held that the giving of WPIC 4.01 is not error. There is no error in the giving of that instruction until the Supreme Court changes the standard. Graves’s

claim fails.

**D. COMMUNITY CUSTODY CONDITIONS
IMPOSED WERE CRIME RELATED AND SUPPORTED
BY THE RECORD.**

Graves next claims that the trial court erred in imposing substance abuse conditions on his sentence. He claims that there is “no evidence” of chemical dependency issues or intoxication at the time of the incident. Brief at 17. This claim is without merit because the conditions are authorized by statute and there is evidence in the record of the drinking of alcohol by Graves before he assaulted Mr. Waldroop.

Graves was sentenced to 36 months of community custody as required by his conviction for a serious violent offense. CP 63. Included as conditions of that community custody were prohibitions to not possess or consume controlled substances without prescription, to not possess or consume legal intoxicants alcohol or marijuana, to not enter bars or places where alcohol is the chief item of sale, to submit to UA and breath tests, to refrain from contact with users, possessors, or seller of controlled substance, and to complete a substance abuse evaluation. CP 66.

A trial court’s imposition of crime-related community custody conditions is reviewed for abuse of discretion. *State v. Cordero*, 170

Wn.App. 351, 373, 284 P.3d 773 (2012). RCW 9.94A.030(10) defines the term

“Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department

The particular conditions were imposed under the authority of RCW 9.94A.505(9), which provides

As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter. “Crime-related prohibitions” may include a prohibition on the use or possession of alcohol or controlled substances if the court finds that any chemical dependency or substance abuse contributed to the offense.

Further, particular affirmative conditions with respect to chemical dependency are authorized by RCW 9.94A.607(1), which provides

Where the court finds that the offender has any chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender. A rehabilitative program may include a directive that the offender obtain an evaluation as to the need for chemical dependency treatment related to the use of alcohol or controlled substances, regardless of the particular substance that contributed to the commission of the offense. The court may also impose a prohibition on the use or possession of alcohol or controlled

substances regardless of whether a chemical dependency evaluation is ordered.

The order to refrain from possessing or consuming controlled substances is authorized by RCW 9.94A.703(2)(c), which allows such a prohibition as “part of any term of community custody.” These provisions taken together provided the necessary authority for the trial court’s prohibitory orders. What remains is the affirmative conduct condition ordering Graves to undergo a chemical dependency evaluation.

The record does not reflect whether or not the trial court made a finding of chemical dependency. However, the record does reflect that Graves was in fact drinking beer with Alex Bedford and the others at Ms. Torres’s apartment. Mr. Bedford said that those at Ms. Torres’s apartment “just hung out. Just drank some beers and just hung out.” IRP 118. Bedford was asked “what about the defendant? Did you see him drinking some beers?” He responded “Yes.” Id. Thus there is in fact credible evidence in the record that Graves had been drinking alcohol before he attacked Mr. Waldroop.

Given the evidence that Graves had been drinking alcohol before he committed a serious violent assault, the trial court did not abuse its discretion in ordering that that circumstance be addressed as part of Graves’s sentence. Graves’s sentence should be affirmed so that use of

alcohol preparatory to assaulting another can be addressed.

**E. SHOULD THE STATE SUBSTANTIALLY
PREVAIL THE STATE WILL NOT SEEK APPELLATE
COSTS .**

Graves next claims that should the state substantially prevail herein that he should not be taxed with appellate costs because he is indigent. Without conceding the legal authority by which such costs may be assessed, this office believes that even if such costs were assessed the likelihood of the state actually collecting such costs is extremely low. The state will not submit a cost bill in this matter.

IV. CONCLUSION

For the foregoing reasons, Graves's conviction and sentence should be affirmed.

DATED July 21, 2016.

Respectfully submitted,

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