

FILED

MAR 30 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 321291

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LOUIS LINCOLN HANSON, AKA LOUIS L MONTOYA., Appellant,

BRIEF OF APPELLANT

Mitch Harrison

Attorney for Appellant

Harrison Law Firm

101 Warren Avenue N

Seattle, Washington 98109

Tel (253) 335 - 2965

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I. ASSIGNMENTS OF ERROR

1. THE TRIAL COURT'S JURY INSTRUCTIONS VIOLATED MR. HANSON'S DUE PROCESS RIGHTS BY RELIEVING THE STATE OF ITS BURDEN TO DISPROVE SELF-DEFENSE.
2. BY FAILING TO ISSUE A REVIVED SELF-DEFENSE JURY INSTRUCTION, THE TRIAL COURT ALLOWED DEFENSE COUNSEL TO IRREPARABLY PREJUDICE MR. HANSON'S TRIAL DEFENSE.
3. THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT THE STATE HAD COMMITTED REPEATED ACTS OF PROSECUTORIAL MISCONDUCT.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. WHETHER THE JURY INSTRUCTIONS ADEQUATELY AND CLEARLY DESCRIBED THE BURDEN OF PROOF REQUIRED TO CONVICT MR. HANSON.
2. WHETHER THE AGGRESSOR INSTRUCTION IMPERMISSIBLY LOWERED THE STATE'S BURDEN OF PROOF.
3. WHETHER THE TRIAL COURT'S INSTRUCTIONS MADE IT IMPOSSIBLE FOR THE JURY TO FIND IN FAVOR OF MR. HANSON.
4. WHETHER MR. HANSON'S DEFENSE COUNSEL'S PERFORMANCE COULD BE FOUND EFFECTIVE UNDER *STRICKLAND*.
5. WHETHER THE OMISSION OF A JURY INSTRUCTION REQUIRED TO SUPPORT MR. HANSON'S DEFENSE AMOUNTS TO INEFFECTIVE ASSISTANCE.
6. WHETHER THE STATE'S COMMENTS ON GANG ACTIVITY WERE IMPERMISSIBLE COMMENTS ON MR. HANSON'S PROPENSITY TO COMMIT CRIMES.
7. WHETHER THE STATE'S COMMENT ON MR. HANSON'S FAILURE TO PRODUCE CERTAIN KINDS OF EVIDENCE WAS PREJUDICIAL.
8. WHETHER THE STATE'S CONDUCT PREJUDICED MR. HANSON IN A MANNER THAT COULD NOT BE CORRECTED AT TRIAL.
9. WHETHER QUESTIONS OF THE STATE'S CONDUCT AT TRIAL WERE PRESERVED FOR APPEAL.

III. STATEMENT OF THE CASE

A. CASE OVERVIEW

Louis Hanson Montoya¹ was charged with murder in the first degree after he shot and killed a rival gang member on December 30, 2012. (CP 1). The State served notice that if convicted, Mr. Hanson would be classified as a persistent offender. (CP 7).

At trial, many of vital facts were not in dispute. Mr. Hanson did not dispute that he shot Mr. Cummings, on December 30, 2012, or that the single bullet caused his death. Mr. Hanson's case ultimately rose and fell based upon whether the jury believed that Mr. Hanson was acting in self-defense when he shot Mr. Cummings who was a rival gang member. As the prosecutor told the jury during closing, the issue in this case, basically, is [this:] "was Mr. Hanson defending himself?" (9RP 745).

The shooting occurred inside the bedroom of a home belonging to friends of Mr. Hanson and Mr. Cummings. When Mr. Hanson saw Mr. Cummings in one of the bedrooms inside the home, Mr. Hanson noticed that Mr. Cummings was wearing the colors of a rival gang, and confronted Mr. Cummings about his gang affiliations.

After the two men exchanged a few words, Mr. Hanson punched Mr. Cummings. Mr. Hanson would later testify that Mr. Cummings provoked the punch, a claim the State argued was not credible. That punch knocked Mr.

¹ Hereinafter referred to as "Mr. Hanson"

Cummings onto a bed in the room, putting his feet away from a handgun which was wedged in between the bed and the adjacent wall.

Mr. Hanson testified, once on the bed, Mr. Cummings kicked Mr. Hanson in the face, causing Mr. Hanson to retreat from the fight. Mr. Cummings however, did not want the fight to end, and reached for the nearby handgun. Believing that Mr. Cummings was about to grab the firearm and shoot him, Mr. Hanson fired one single bullet at Mr. Cummings, which hit him in the chest and ultimately killed him.

Three eyewitnesses were inside the home when the shooting occurred. But, because none of them were in the room when it happened, none of them could establish exactly what happened before the fatal shot was fired. Though their testimony could only provide insight into a limited number of facts about the fight between Mr. Hanson and Mr. Cummings, in the end, the entire case turned on the jury's application of the law relating to self-defense, as stated in the jury instructions, and the credibility of Mr. Hanson's testimony.

B. WITNESS TESTIMONY

1. LAY WITNESS TESTIMONY

In addition to Mr. Hanson, three other witnesses testified to being inside the Deligt residence when Mr. Cummings was shot: Penny Pupo (SRP 445), Lela Haisley (SRP 527), and Mindee Deligt (SRP 552; 557).

Penny Pupo. Penny Pupo testified that she was at the Deligt home for both of Mr. Hanson's visits on the day of the shooting. (SRP 446). She first saw Mr. Hanson when he first came to Ms. Deligt's house that afternoon and recalls

that he left for a period of time. (5RP 446). During the time Mr. Hanson was gone, Ms. Pupo testified, she saw Mr. Cummings arrive at the home. (5RP 452). She also saw three other women in the home smoking methamphetamine in the bedroom while Mr. Cummings was there. (5RP 452).

Ms. Pupo also saw portions of the fight between Mr. Hanson and Mr. Cummings, much of which corroborated Mr. Hanson's version of the events. She said, for example, that she saw Mr. Cummings stand up from the bed, but was unsure whether he dove onto the bed or was knocked onto it. (5RP 466, 468). She also saw Mr. Cummings kick Mr. Hanson during the fight, and saw Mr. Hanson step back away from Mr. Cummings. (5RP 466-67). Finally, Ms. Pupo testified that after Mr. Cummings was shot, he tried to go down the hallway, but collapsed in the kitchen. She stepped over him, got into her car, and dialed 9-1-1. (5RP 448).

Lela Haisley. Lela Haisley testified that she was also at Ms. Deligt's home that afternoon. (5RP 527). Ms. Haisley testified as to various parts of the fight. She said that she heard Mr. Hanson ask Mr. Cummings if he was a Norteno. (5RP 530-31). And though she admitted to being preoccupied with the dogs in the room, she said she saw the two men fighting. (5RP 530-31). The fight began after she saw Mr. Cummings move to the edge of the bed, toward the wall. (5RP 537-38). She also knew that, prior to the fight, there was a firearm hidden underneath the bed where Mr. Cummings was ultimately shot. (5RP 539).

Mindee Deligt. Mindee Deligt testified that she had been using methamphetamine that afternoon and admitted that people came to her home all

hours of the day and night to do drugs. (5RP 552; 557). She stated that after Mr. Hanson left the first time, Mr. Cummings arrived at her house. (5RP 553).

She also heard Mr. Hanson ask Mr. Cummings if he was a Norteno, and saw them fight. (5RP 554). From her vantage point, she saw that Mr. Cummings had pulled himself toward the wall while on the bed, but she could not see Mr. Hanson. (5RP 556; 559).

She knew there was a gun between the bed and the wall, and had told others that it belonged to someone named "Santana." (5RP 564-65). She denied ever telling anyone that she saw Mr. Cummings actually reach for the gun. (5RP 572).

Thomas Jones. Thomas Jones testified he was an acquaintance of Mr. Hanson's, but had lived with Ms. Deligt for a couple of years. (6RP 647). He described her as "like a mother to me." (Id.) He talked to her shortly after the shooting and she reported to him there was a gun between the wall and the bed that night. She stated that Mr. Cummings reached for the gun, but it had fallen in the space between the bed and the wall. (6RP 649).

2. PROFESSIONAL WITNESSES

Detective Hill. Detective Hill of the Spokane Police Department testified that on the day of the shooting he searched the home, but did not find any weapons in the bedroom. (5RP 511). A few days later, he received information that there was a weapon in Ms. Deligt's home and located it during a subsequent search. (5RP 512).

Dr. Sally Aiken. Dr. Sally Aiken testified that the cause of death was a gunshot to Mr. Cummings' chest. (6RP 589). She also testified about the likely position of Mr. Cummings body at the time he was shot. She could not determine what position Mr. Cummings was in when he received the gunshot wound: he could have been laying and turned onto his left side, reaching, and it was also possible that he was standing when the weapon was discharged. (6 RP 596; 600-601). Finally, Dr. Aiken testified that toxicology results showed that **Mr. Cumming's blood contained methamphetamine, and amphetamine, a byproduct of methamphetamine.** (6RP 589).

Officer Roberge. Though the State had endorsed him as a witness, it failed to call Officer Roberge of the Spokane Police Department in its case in chief. The defense, however, did call him. His testimony was brief.

On direct, he testified about his past duties and experiences with gangs, gang history, gang behavior, and individual gang members. (6RP 623). He also testified that Mr. Hanson was an active Sureno gang member, and that Mr. Cummings was an active Nortenos gang member (6RP 624-25). Then, defense counsel asked Officer Roberge if "Surenos and Nortenos [were] rival gang groups?" Officer Roberge responded, "Generally speaking, yes." And that short line of questioning marked the end of direct examination. (6RP 624-25).

The State's cross examination was also brief, with the prosecutor asking just one strange, compound question: "Are [Norteno and Suyreno gang members] "required to confront each other on site or kill each other?" Officer Robege's answered, "Not necessarily." (6RP 624-25).

Notably, Officer Robege never talked about numerous other aspects that experts typically discuss in gang-related cases like this one. He never testified about gang hierarchies, or how, if at all, gang members might advance their status in a gang. In sum, Officer Robege's testimony essentially established that both Mr. Hanson and Mr. Cummings were rival gang members and that they are "not necessarily" "required" to "confront" or "kill" each other "on site."

3. MR. HANSON

Approximately six to eight weeks before December 30, 2012, Mr. Hanson briefly met Aaron Cummings, at a friend's home in Spokane. (6RP 656). He was unaware that Mr. Cummings was a member of the Norteno gang. (6RP 657-58). After agreeing to sell some drugs to him, Mr. Hanson learned that some people were in the process of stealing items, including his tattoo equipment, from his car parked out in front of the house. (6RP 657-58). Mr. Hanson tossed the drugs to Mr. Cummings and ran outside. Mr. Cummings followed to assist him. (6RP 658). As the police arrived, all the parties scattered. Mr. Cummings left with the drugs and did not pay Mr. Hanson. (6RP 659).

The shooting occurred on December 30, 2012, inside the home of Mindee Deligt. (6RP 659). Mr. Hanson testified that he made two stops at the Deligt residence that day. The first one occurred at around 3 p.m., (6RP 659). When he arrived, he first parked in the driveway and tinkered with his car stereo system. (6RP 660). Then, he briefly spoke with Ms. Deligt, then left to go home, bringing Ms. Deligt's dog and his then girlfriend with him. (6RP 665).

Later that day, Mr. Montoya had a conversation with a friend of his about a firearm inside the Deligt residence. The friend told him the weapon was hidden

between the mattresses on the side closest to a closet. He agreed to retrieve the gun when he went back to the home later that day. (6RP 663).

When he returned to the Deligt residence, Ms. Deligt's aunt answered the door and let Mr. Hanson into the home. (6RP 661). Mr. Montoya noticed four women in the home, most of whom had been smoking methamphetamine. (5RP 451; 6RP 660-62). Looking for the hidden firearm, Mr. Hanson walked to the back bedroom, finding Ms. Deligt sitting in a chair behind the door. 6RP 662).

He then walked out of the back room, answered a phone call, and put on a pair of gloves to avoid getting his fingerprints on the firearm his friend had stored in one of the rooms of the home. (6RP 663-64).

When Mr. Hanson entered the room where the firearm was hidden, he saw Mr. Cummings sitting on the bed. Knowing that the firearm he was looking for was underneath that bed, he asked Mr. Cummings a few questions. (6RP 663-64). He first asked Mr. Cummings if he had the money he owed him for the drugs. (6RP 665). Then, noticing that Mr. Cummings was wearing the colors of a rival gang Mr. Hanson asked Mr. Cummings if he was a Norteno. (6RP 665).

Almost instantly, Mr. Cummings jumped off the bed, aggressively balled up his fists to fight and said, "Yeah, what's up?" (6RP 665). Mr. Hanson stated he was not wearing gang colors that day. (6RP 667). Reacting to Mr. Cummings aggression, Mr. Hanson feared that Mr. Cummings would punch him, so he fought back, striking the first blow with a punch to the face.

Mr. Cummings fell back onto the bed and the two exchanged blows. (6RP 665). The two men then engaged in a mutual fist fight. Then, while lying on the

bed, Mr. Cummings kicked Mr. Hanson in the face. Reacting to the blow to the face, Mr. Hanson backed down, testifying as follows: “And I kind of stumbled back like, all right, you know, whatever, I’m cool I’m done, you know. Have a seat...” (6RP 665).

As Mr. Hanson backed away, Mr. Cummings did the same. But Mr. Hanson saw Mr. Cummings reaching back toward the wall, just where the firearm was hidden in between the mattresses of the bed. (6RP 665). Afraid he was going to be shot, Mr. Hanson reached for his own gun. He testified,

“I was trying to give myself enough time to leave to get away from the threat. I was in fear for my life. Only thing I had the chance to do is to create a distraction so I can leave I just pointed the gun in his direction. I didn’t aim to shoot to kill or nothing. I just fired one shot and took off running.”

He bumped into the doorway as he tried to get away from Mr. Cummings. (6RP 666). Looking back, he saw Mr. Cummings advancing toward him. Mr. Hanson unlocked the deadbolt and ran from the home. (6RP 667).

C. VERDICT, MOTION FOR A NEW TRIAL, & SENTENCING

The jury rejected Mr. Hanson’s self-defense claim, finding him guilty of murder in the first degree.² Shortly after the verdict, defense counsel moved for a mistrial, arguing that the prosecutor engaged in misconduct during his cross examination of Mr. Hanson.³ Defense counsel pointed out two specific instances of misconduct.

First, the prosecutor engaged in misconduct when he questioned Mr. Hanson about whether or not his testimony contradicted that of [another]

² (CP 374).

³ CP 336-348).

witness.”⁴ This line of questioning, explained counsel, was improper because it implied to the jury that, to find Mr. Hanson not guilty, it would have to “believe the [Mr. Hanson’s testimony] and disbelieve the [testimony] of the State’s witnesses.”⁵

Second, he again committed misconduct when he questioned Mr. Hanson about his failure to call other witnesses to corroborate his claim of self-defense.⁶ Specifically, argued defense counsel, by repeatedly questioning Mr. Hanson about his failure to produce witnesses to corroborate his testimony, “the prosecution attempted to shift the burden of” proving self-defense “to the defendant.”⁷

The trial court held a very brief hearing on the motion, but denied the motion without any real analysis into the facts or the legal issues involved.⁸ Immediately after it denied the motion for a new trial, the court sentenced Mr. Hanson, as a persistent offender, to a mandatory sentence of life without the possibility of parole.⁹ He makes this timely appeal.¹⁰

IV. ARGUMENTS

A. THE COURT FAILED TO ACCURATELY AND COMPLETELY INSTRUCT THE JURY ON THE ELEMENTS OF SELF-DEFENSE. THIS RELIEVED THE STATE OF ITS BURDEN TO DISPROVE SELF-DEFENSE. THIS COURT MUST REVERSE BECAUSE THE STATE CANNOT PROVE THAT THIS ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

1. DUE PROCESS STANDARD REQUIRES JURY INSTRUCTIONS TO CLEARLY & FULLY CONVEY THE STATE’S BURDEN OF PROOF.

⁴ (9RP 793).

⁵ CP 339.

⁶ (9RP 793).

⁷ CP 343.

⁸ (7RP 797).

⁹ (7RP 796); (CP 378).

¹⁰ (CP 372).

Due Process requires jury instructions to be clear enough for a “reasonable juror” to understand the law and how to apply it to the facts of the case.¹¹ In Washington, self-defense instructions are subjected to “heightened appellate scrutiny.”¹² They must do more than “*adequately* convey the law of self-defense.”¹³ Instead, they must, when read as a whole, “make the relevant legal standard *manifestly apparent to the average juror.*”¹⁴

2. THE STANDARD OF REVIEW FOR JURY INSTRUCTIONS THAT AFFECT THE STATE’S BURDEN OF PROOF.

This court reviews such instructions *de novo*.¹⁵

3. INSTRUCTING THE JURY THAT AN AGGRESSOR LOSES THE RIGHT TO ACT IN SELF-DEFENSE LOWERS THE STATE’S BURDEN OF PROOF.

“A first aggressor instruction potentially removes self-defense from the jury’s consideration.”¹⁶ Thus, In *Riley*, our Supreme Court warned “use care in giving an aggressor instruction” even when the instruction is warranted under the evidence.¹⁷ The court explained that because of its “impacts . . . the State has the burden of disproving [self-defense] beyond a reasonable doubt.”¹⁸ As this court has said, instructing the jury that it can reject a claim of Self-Defense if it finds that the defendant provoked the fight reduces “State[’s] . . . burden to disprove self-defense.”¹⁹ In other words, an aggressor instruction makes it easier for the

¹¹ *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979) (“[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.”).

¹² *State v. LeFaber*, 128 Wash.2d 896, 900, 913 P.2d 369 (1996).

¹³ *Id.*

¹⁴ *State v. Walden*, 131 Wash.2d 469, 473, 932 P.2d 1237 (1997).

¹⁵ *State v. Brett*, 126 Wn.2d, 136, 171, 892 P.2d 29 (1995).

¹⁶ *State v. Bea*, 162 Wn. App. 570, 575-76, 254 P.3d 948, 951 (2011).

¹⁷ *State v. Riley*, 137 Wn.2d 904, 918, 976 P.2d 624, 632 (1999).

¹⁸ *Id.*

¹⁹ *Id.*

State to obtain a conviction, thus lowering the State's normal burden of disproving self-defense.

4. THE COURT'S INSTRUCTIONS FAILED TO MAKE IT "MANIFESTLY CLEAR" THAT MR. HANSON COULD STILL ACT IN SELF-DEFENSE, EVEN IF HE PROVOKED THE FIGHT, SO LONG AS HE RETREATED FROM IT.

A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction.²⁰ Generally, a defendant is entitled to an instruction on self-defense if there is some evidence demonstrating self-defense.²¹ The sufficiency of the evidence of self-defense is evaluated by determining what a reasonable person would do standing in the shoes of the defendant.²² The failure to give an accurate instruction on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party.²³

At the request of the defense, the Court instructed the jury on the law pertaining to justifiable homicide. In that instruction, the court instructed the jury that Mr. Hanson is not guilty of murder unless the State proved, beyond a reasonable doubt, that the kill was not "justifiable." A killing is justifiable, under the court's instructions, if Mr. Hanson:

- (1) . . . reasonably believed that [Mr. Cummings] intended to inflict death or great personal injury,
- (2) . . . reasonably believed that there was imminent danger of such harm being accomplished, and
- (3) . . . employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to Mr. [Hanson], taking into consideration

²⁰ *State v. Werner*, 170 Wn.2d 333, 336-37, 241 P.3d 410, 411 (2010).

²¹ *Id.*

²² *Id.*

²³ *Id.*

all of the facts and circumstances as they appeared to him, at the time of, and prior to the assault. . . .²⁴

This instruction, *on its own*, gave a complete and accurate instruction on the State's burden to disprove self-defense.²⁵ That instruction, however, was not the only instruction given that affected the State's burden to disprove self-defense. And, instructions on self-defense are not sufficient unless they, when read as a whole, "make the relevant legal standard *manifestly apparent to the average juror*."²⁶

Over a defense objection, the court also gave Jury Instruction No. 19, a "first aggressor" instruction, which read as follows:

No person may, by any intentional act reasonably likely to provoke a belligerent response create a necessity for acting in self-defense and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense."²⁷

This instruction tells the jury essentially that Mr. Hanson waived his right to act in self-defense if he was the person who provoked the fight with Mr. Cummings.

But this is only half true under the facts of this case, as Mr. Hanson could have regained this right if the jury found that he attempted to retreat from the fight in good faith. The full legal standard for the Aggressor/Waiver doctrine is stated in several Washington Supreme Court opinions, one of which is *Craig*:

²⁴ CP 251.

²⁵ See RCW 9A.16.050(1). Under that statute, a killing is "justifiable" when the defendant uses "lawful" force to defend himself and has a "reasonable ground to apprehend a design on the part of the person slain to . . . do some great personal injury to the [defendant] . . . and there is imminent danger of such design being accomplished."

²⁶ *Walden*, 131 Wn.2d at 473.

²⁷ CP 254

It is the rule one who was the aggressor or who provoked the altercation in which he killed the other person engaged in the conflict, cannot successfully invoke the right of self-defense to justify or excuse the homicide, unless he in good faith had first withdrawn from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist, from further aggressive action.²⁸

But, here, the court only instructed the jury on the first half of this legal doctrine, which requires the jury to reject a defendant's self-defense claim if it finds that the defendant provoked the fight. The significance of this error is highlighted by cases in which the trial court gives an aggressor instruction when the evidence does not support it.²⁹ Such an error can be raised for the first time on appeal because it "relieve[s] the State of its burden to disprove self-defense" and is reversible error unless the State can show that the error is harmless beyond a reasonable doubt.³⁰

For example, in *Stark*, this court reversed the defendant's conviction when the trial court gave the same instruction that the trial court gave here. In that case, this court observed that the instruction "essentially" told the jury that, if it found that Ms. Stark was the first aggressor, "then self-defense was "not available as a defense."³¹ This court reversed reasoning that, by instructing the jury that it could reject Ms. Stack's entire defense based upon a theory that was not supported by the evidence, the trial court "relieved [the State] of its burden to disprove self-defense" and reversed her conviction.³²

²⁸ *State v. Craig*, 82 Wn.2d 777, 783, 514 P.2d 151, 156 (1973).

²⁹ *State v. Stark*, 158 Wn. App. 952, 960-61, 244 P.3d 433, 437 (2010).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

The same logic applies when, as happened here, the evidence supports an aggressor instruction *and* an instruction on revived self-defense, but fails to give the later instruction. In both cases, the court allows the jury to reject the defendant's self-defense claim, even though, under the facts of the case, the law might very well require otherwise. Here, just as in *Stark*, the court's instructions essentially told the jury that the defendant "waived" his right to have the State meet its burden of proof, *as a matter of law*, even though that might not have been the case under the facts.

Finally, defense counsel here, like in *Stark*, objected to the instruction, but the court gave it anyways. Because the error in the instruction was made "manifest" or obvious to the court, the argument can therefore be raised for the first time on appeal as defense counsel tried to argue that Mr. Hanson did not waive his self-defense claim during closing argument. Yet, the prosecutor was easily able to dispel this closing argument by simply pointing out that the Court's instructions did not support the argument. At that point, the court, and Mr. Hanson's counsel as argued below, had a duty to sua sponte correct the error in the instructions which lowered the State's burden to disprove self-defense through the incomplete statement of law about Mr. Hanson's potential waiver of the right to act in self-defense.

Either way you slice it, the court's instructions failed to make the State's burden to disprove self-defense "manifestly clear" to the average juror and failed

to give a complete and accurate instruction on the State's burden of proof. Mr. Hanson's murder conviction must therefore be reversed.³³

5. THE COURT'S INSTRUCTION IMPROPERLY DIRECTED THE JURY TO REJECT MR. HANSON'S CLAIM OF SELF-DEFENSE BECAUSE IT FAILED TO FULLY DEFINE THE STATE'S BURDEN OF PROOF.

Due process prohibits the court from instructing the jury in a way that directs it to reach a verdict for the State on any element of the crime charged.³⁴ In *Peterson*,³⁵ the defendant was charged with assault with a firearm after he shot a man in the shoulder at a party. At trial, Peterson admitted that he shot the man, but argued that it was an accident, thus negating the required intent to prove the assault.³⁶ Though the court's To-Convict instructions correctly stated the burden of proof for each offense, another instruction, essentially required the jury to find the defendant guilty under the facts of that case. Specifically, instruction No. 7 told the jury that, if it found one fact—that Peterson shot the victim—then it “could presume” that Peterson acted intentionally. This instruction, under the facts of that case essentially directed the jury to find Peterson guilty because Peterson's sole defense was that he *did not* act intentionally. It therefore denied Peterson the right to a jury trial,³⁷ and the defense could be raised for the first time

³³ *See id.*

³⁴ *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986).

³⁵ *State v. Peterson*, 73 Wn.2d 303, 305, 438 P.2d 183, 184 (1968).

³⁶ The State advanced two theories of guilt. Peterson was guilty, under the State's theory, if (a) he willfully pointed the gun at the victim, or (b) he willfully fired the gun and causing grievous bodily harm.

³⁷ *Id.* 306, fn. 7 (“To direct a verdict, as instruction No. 7 does, is to deny the constitutional right to a trial by jury”).

on appeal,³⁸ and it was presumed that the instruction prejudiced Peterson's right to a fair trial.³⁹

Just as Instruction No. 7 essentially directed a verdict in *Peterson*, the court's aggressor instruction essentially directed a verdict on Mr. Hanson's claim of self-defense. Like in *Peterson*, Mr. Hanson's sole defense was that he was acting in self-defense. As the State correctly told the jury, the only issue before the jury "was Mr. Hanson defending himself?" RP 748-49. After all, Mr. Hanson admitted that he shot Mr. Cummings and killed him. Self-Defense was the only realistic way he could be acquitted.

Yet, the court's instructions, when read as a whole, told the jury that it *had to* reject that defense entirely if it found one or more foundational facts: in *Peterson*, it was that the defendant shot the alleged victim, and here, it was that Mr. Hanson started the fight with Mr. Cummings. The effect of the jury instructions in each case was exactly the same: they completely removed the defendants' entire defense upon a factual finding that, under the proper interpretation of the law, did not have that drastic, trial altering effect.

Just as in *Peterson*, the instructions here directed the jury to reach a verdict, and this requires that Mr. Hanson's conviction be reversed.

B. ARGUING THAT MR. HANSON WAS NOT THE AGGRESSOR WAS ESSENTIAL TO THE DEFENSE THEORY, BUT DEFENSE COUNSEL FAILED TO REQUEST AN INSTRUCTION TO SUPPORT THAT THEORY, INSTEAD ARGUING THE THEORY

³⁸ *Id.* at 306 ("here an instruction invades a constitutional right of the accused (such as the right to a jury trial), it is not necessary, in order to have such error reviewed, that an exception be taken and called to the attention of the trial court").

³⁹ *Id.* fn. 4 ("The general verdict of guilty of second-degree assault, even coupled with a special finding that appellant was, at the time, armed with a deadly weapon, offers no adequate clue to the basis for the jury's verdict. While the jury may have found the appellant guilty on both the 'gun pointing' and the 'inflicting grievous bodily harm' theories, or either, there remains the possibility that it was only on the latter. Ambiguities must be resolved against the state.").

TO THE JURY, WITHOUT ANY LEGAL SUPPORT. THIS FAILURE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

1. THE STANDARD FOR DETERMINING INEFFECTIVE ASSISTANCE OF COUNSEL.

In *Strickland*, the Court established a two part test for ineffective assistance of counsel.⁴⁰ Under that standard Mr. Hanson must show that counsel's performance was deficient—*i.e.*, that it fell below an objective standard of reasonableness—and that the deficient performance was prejudicial.⁴¹ The proper measure of attorney performance is reasonableness under prevailing professional norms.⁴²

2. WASHINGTON COURTS HAVE REPEATEDLY HELD THAT COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION ON A POINT OF LAW THAT IS CRUCIAL FOR THE DEFENSE THEORY CAN AMOUNT TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Counsel's failure to request an instruction that would have supported the defense's trial theory can amount to ineffective assistance of counsel.⁴³ The failure to request a jury instruction is ineffective if (1) the court would have given the instruction, (2) no conceivable trial tactic excuses the failure, and (3) the instruction could have, within reasonable probabilities, allowed the jury to render a more favorable verdict.⁴⁴

In *Kyllo*, the defendant was charged with a non-deadly assault. *Kyllo* claimed that he was acting in self-defense. At trial, defense counsel erroneously proposed a jury instruction that defined self-defense when using *deadly* force.⁴⁵

⁴⁰ *Strickland*, supra at 686.

⁴¹ *Id.* at 688.

⁴² *Id.* at 688.

⁴³ See, e.g., *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007).

⁴⁴ See *State v. Powell*, 150 Wn. App. 139, 154-58, 206 P.3d 703 (2009).

⁴⁵ *State v. Kyllo*, 166 Wn.2d 856, 215 P.3d 177 (2009) (ineffective assistance of counsel).

The court reversed, reasoning that there was simply no legitimate reason to offer an instruction on deadly force, which *eased* the State's burden to disprove self-defense in that case.

In *Thomas*, the defendant claimed a similar intoxication defense, this time to the crime of eluding, under the previous felony flight statute. Like in *Kruger*, the defense counsel argued its intoxication defense without asking for so-called *Sherman* Instruction.⁴⁶ That instruction would have allowed the jury to acquit based upon Thomas's *subjective* state of mind while intoxicated."⁴⁷

In *Kruger*, the defendant was charged with assault after he got drunk and head-butted a police officer.⁴⁸ Defense counsel's primary defense was that Kruger was too drunk to form the intent to assault, but failed to request an instruction on diminished capacity to support that theory. Such an instruction would have clarified for the jury that intoxication can negate intent, but one was never requested. This failure, said the court, amounted to ineffective assistance of counsel.⁴⁹

3. DEFENSE COUNSEL ARGUED A REVIVED SELF-DEFENSE THEORY TO THE JURY, BUT INEXPLICABLY FAILED TO REQUEST AN INSTRUCTION TO SUPPORT THAT ARGUMENT.

In closing, the State argued that Mr. Hanson provoked the fight and could not, as a matter of law, claim that he acted in self-defense. In response, defense counsel argued that Mr. Hanson could act in self-defense, even if he started the fight, under a revived self-defense theory:

⁴⁶ *Thomas*, 109 Wn.2d at 226-27.

⁴⁷ *Id.* at 229.

⁴⁸ *State v. Kruger*, 116 Wn.App. 685, 693-94, 67 P.3d 1147 (2003).

⁴⁹ *Id.*

Now, even assuming you [could find that] Mr. Hanson had initiated this fight, *that instruction also tells you that he can utilize and benefit from the right of self-defense if first he has withdrawn from the fight.* Well, guess what? He gets kicked in the face. Both people back up. Mr. Hanson, he steps back. Fights over until Mr. Cummings goes for a weapon, which Mr. Hanson did not even attempt to do before that. He's going for a weapons because he's going to kill Mr. Hanson. He withdrew. He did not offer deadly force until Mr. Cummings attempted it. He is justified in doing that.

Unfortunately for Mr. Hanson, however, his trial counsel utterly failed to request an instruction to support that argument, and the prosecutor seized on this mistake during closing argument by pointing out that counsel's argument was not at all supported by the jury instructions, which required the jury to disregard the theory completely. Inexplicably, even after being notified to the omission in the jury instructions, defense counsel still inexplicably failed to ask for an instruction to support his theory.

4. COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION ON REVIVED-SELF-DEFENSE WAS DEFICIENT & PREJUDICIAL UNDER *STRICKLAND*.

Court must assume, at least initially, that defense counsel rendered constitutionally adequate performance.⁵⁰ A defendant "rebut this presumption," however, by showing "that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy."⁵¹ A competent criminal attorney is expected propose jury instructions when they are necessary to support his defense theory.⁵² And those jury instructions should give a complete and accurate statement of the law.

⁵⁰ *State v. McFarland*, 127 Wn.2d, 322, 335, 899 P.2d 1251 (1995).

⁵¹ *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citing *Strickland*, 466 U.S. at 688-89).

⁵² *Thomas*, 109 Wn.2d at 226-27; *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).

a) *Defense counsel was deficient for arguing a revived self-defense theory to the jury, but not asking for an instruction to support that theory.*

Reasonable attorney conduct includes a duty to investigate the relevant law.⁵³ Armed with a correct understanding of the law, defense counsel has a duty make legal arguments consistent with the law,⁵⁴ and to ensure that the court's instructions accurately and completely convey the State's burden of proof.⁵⁵

In *Woods*, this court held that defense counsel was deficient where he proposed an instruction that misstated the State's burden of proof. Specifically, the instruction incorrectly required the jury to find that the defendant "believed he was in actual danger of great bodily harm" for the jury to acquit based upon self-defense. The court held that there was no conceivable "strategic or tactical reason" to excuse counsel's deficient performance where counsel proposed the court's instruction, which "incorrectly stated the law" and "eased the State of its proper burden of proof on self-defense."⁵⁶ Citing these same reasons—namely unnecessarily lowering the State's burden of proof—the court held that *Woods* was necessarily prejudiced by counsel's error, simply because "the jury may have applied the more stringent" burden of proof when it found *Woods* guilty.

Though Mr. Hanson's trial counsel did not propose an instruction that misstated the State's burden of proof, as happened in *Woods*, under the facts of this case, he might as well have. Defense counsel knew that a revived self-defense

⁵³ *Strickland*, 466 U.S. at 690–91, 104 S.Ct. 2052.

⁵⁴ *Kyllo*, 166 Wn.2d at 870.

⁵⁵ *Woods*, 138 Wn. App. At 197-98 (counsel ineffective for proposing a deficient self-defense instruction that misstated the State's burden to disprove self-defense)

⁵⁶ *Id.* at 201-02.

theory was supported by the evidence, as he argued that theory to the jury, but he utterly failed to request an instruction to support that theory.

The facts supported the revived self-defense instruction. Even if the defendant is the initial aggressor in a fight, he can still claim self-defense if the jury finds that he “withdrew” from the conflict.⁵⁷ To meet the legal standard for withdrawal, the jury must find two things. First, he must withdraw, in good faith, from the fight.⁵⁸ Second, as he withdraws, he must make it clear to the person slain that he was trying to withdraw from the confrontation before he ultimately kills that person in self-defense.⁵⁹ If the jury finds both elements of withdrawal, the defendant is not considered a first aggressor and does not lose his chance to claim self-defense.

b) This mistake was not a reasonable trial tactic.

No reasonable attorney, who possess a thorough understanding of the law, would intentionally omit a revived self-defense jury instruction. Before the court agreed to instruct the jury on the first aggressor doctrine, defense counsel had an obvious reason for not requesting an instruction on withdrawal: the doctrine of withdrawal is only relevant when the jury is instructed that the defendant could be the first aggressor. But once the trial court finally decided to give the first aggressor instruction, all possible reasons to not request a second instruction on withdrawal, was eliminated.

Not requesting an instruction on withdrawal was potentially fatal to Mr. Hanson’s defense. Once it was given a first aggressor instruction, unless counsel

⁵⁷ *Craig*, 82 Wn.2d 777; accord *State v. Wilson*, 26 Wn.2d 468, 174 P.2d 553 (1946).

⁵⁸ *Id.*

⁵⁹ *Id.*

requested a second instruction on withdrawal, the jury was required to reject Mr. Hanson's entire defense if it found that Mr. Hanson was the first aggressor. The additional instruction on how Mr. Hanson could legally revive his right to self-defense was quite literally his only hope of being acquitted if the jury believed that he was the first aggressor.

Not only was omitting such an instruction detrimental to his defense, but there are simply no conceivable reasons why, i.e. reasonable "tactical reasons," for counsel to decide against requesting the instruction. Sometimes, for example, defense counsel may reasonably reject one defense in favor of another when the defenses would force counsel to argue conflicting or inconsistent case theories. But, that was certainly not the case here. The revived self-defense theory was not inconsistent with his general self-defense claim. Counsel could have and did, in fact argue both theories: The theory of self-defense presumes that the defendant is not the initial aggressor, while the theory of revived self-defense allows an initial aggressor the right of self-defense once he or she has withdrawn from the conflict.⁶⁰

Without the instruction, Mr. Hanson was not able to argue his defense based on both the self-defense and revived self-defense theories. This was a fundamental and completely unreasonable mistake by counsel and defective under *Strickland*.

5. MR. HANSON WAS PREJUDICED BY DEFENSE COUNSEL'S PERFORMANCE.

The remaining question is prejudice. It requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

⁶⁰ *Craig*, 82 Wash.2d at 783.

have been different.”⁶¹ In other words, counsel's deficiencies must have adversely affected the defendant's right to fair trial to an extent that “undermine[s] confidence in the outcome.”⁶²

Defense Counsel’s deficiencies in this case—forgetting to request a vital defense instruction, but nevertheless arguing that theory to the jury—were egregious in this case. Errors in jury instructions on self-defense can alter can be very detrimental to the defense, especially when they alter or even reduce the State’s burden of proof, making its case even easier to prove. The accused is prejudiced by counsel's failure to propose a necessary jury instruction when the jury is provided with no way to recognize and weigh the legal significance of the evidence.⁶³

That is exactly what happened here.

Without a jury instruction regarding withdrawal, the State did not have to disprove the defense theory whatsoever. Even if the jury wanted to find that Mr. Hanson regained his right to self-defense and acquit him, the jury could not do so without ignoring the instructions it was given. Once Mr. Hanson became, in the eyes of the jury, an aggressor, he lost his right to act in self-defense.⁶⁴

Defense counsel’s closing argument, which incorrectly told the jury to acquit him based upon legal rules that were nowhere in the instructions, only exacerbated the mistake. In closing, the prosecutor argued that that Mr. Hanson’s self-defense claim should fail before the jury even had a chance to consider it:

⁶¹ *Strickland*, 466 U.S. at 694.

⁶² *Id.*; *Brett*, 126 Wn.2d at 199.

⁶³ *Powell*, 150 Wn. App. at 156.

⁶⁴ *Dennison*, 115 Wn.2d at 617.

First of all, I would draw your attention to Instruction No. 19. And it talks about when self-defense can be used, and that instruction says no person may by any intentional act reasonably likely to provoke a belligerent response create a necessity for acting in self-defense and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant, Mr. Hanson, was the aggressor and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available.⁶⁵

Defense counsel responded by arguing that even if the jury believed he started the fight, Mr. Hanson did not forfeit his right to act in self-defense because he retreated from the initial fight:

Now, even assuming you [could find that] Mr. Hanson had initiated this fight, that instruction also tells you that he can utilize and benefit from the right of self-defense if first he has withdrawn from the fight. Well, guess what? He gets kicked in the face. Both people back up. Mr. Hanson, he steps back. Fights over until Mr. Cummings goes for a weapon, which Mr. Hanson did not even attempt to do before that. He's going for a weapons because he's going to kill Mr. Hanson. He withdrew. He did not offer deadly force until Mr. Cummings attempted it. He is justified in doing that.⁶⁶

But, because defense counsel never asked for an instruction to support that theory, the prosecutor's response easily dismissed the defense argument:

Finally, the argument of the defense is that Mr. Hanson is not an aggressor. Read the instruction. . . . Ladies and gentlemen, that's murder. That's not self-defense.⁶⁷

Thus, the prejudice caused by counsel's failure is obvious, as it was to the prosecutor, who easily rebutted the defense, not on its merits, but on defense counsel's failure to ask for an otherwise appropriate instruction.

In the end, Mr. Hanson's only viable defense was self-defense. Yet, his trial counsel made a fundamental legal error that prevented the jury from even

⁶⁵ 7RP 748-49

⁶⁶ 7RP 770.

⁶⁷ 7RP 778.

considering a vital part of that defense, without which, the jury could have and likely did find Mr. Hanson guilty of aggravated first degree murder. Given these circumstances, there is at least a reasonable probability that counsel's errors affected the outcome in this case.

C. THROUGHOUT MR. HANSON'S TRIAL, THE STATE REPEATEDLY COMMITTED ACTS OF PROSECUTORIAL MISCONDUCT THAT IRREPARABLY PREJUDICED MR. HANSON'S RIGHT TO A FAIR TRIAL.

1. STANDARD FOR SHOWING PROSECUTORIAL MISCONDUCT.

Due Process grants all criminal defendants the right to a fair trial.⁶⁸ Prosecutors are required to protect, not thwart, that sacred right. A prosecutor fails to in this duty if he engages in trial conduct that is (1) improper and (2) prejudicial.⁶⁹ A defendant who shows that prosecutorial misconduct denied him a fair trial must be given a new one.⁷⁰ "Misconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom."⁷¹

2. THE PROSECUTOR'S QUESTIONS TO MR. HANSON ABOUT THE GENERAL PROPENSITIES OF GANG MEMBERS AND WHETHER HE, AND OTHER GANG MEMBERS "JOINED A GANG TO COMMIT CRIMES" WERE IMPROPER. THIS MISCONDUCT WAS ONLY MADE WORSE BY THE PROSECUTOR'S USE OF SUCH QUESTIONS DURING CLOSING ARGUMENT.

When a question could potentially illicit an inflammatory response, prosecutors must exercise "due caution" with the questions they ask and how they word them.⁷² Asking questions that are likely to "elicit potentially incendiary

⁶⁸ *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (holding that a prosecutor's improper trial conduct must "so infected the trial with unfairness as to make the resulting conviction a denial of due process.")

⁶⁹ *State v. Lindsay*, 180 Wn.2d 423, 430-31, 326 P.3d 125, 129 (2014).

⁷⁰ *Id.*

⁷¹ *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653(2012) (internal citation omitted).

⁷² *See U.S. v. Reyes*, 18 F.3d 65 (2d Cir. 1994) ("We add a note of caution to criminal prosecutors. Because in criminal cases there has been little prior discovery, and the defense lawyers often do

evidence” which is clearly inadmissible can amount to misconduct.⁷³ A prosecutor commits misconduct when he questions the defendant based upon “unsubstantiated allegations,” such as trying to link him to “gangs and gang activity.”⁷⁴ Such generalized questioning serves no purpose “but to allow the State to ‘suggest’ that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged.”⁷⁵

a) *The prosecutor’s questions about how people join gangs to commit crimes were improper.*

Though a prosecutor is encouraged to ask the jury to make *reasonable* inferences from proven facts, he is absolutely prohibited from implying that the defendant’s propensity to commit a crime is a valid basis to convict.

ER 404(b) presumptively prohibits the prosecutor from arguing that the defendant’s prior bad acts, i.e. his gang membership, is a valid reason to convict:

“Introducing a defendant’s prior bad acts to prove current criminal intent is tantamount to telling the jury to convict the defendant of the current charges because his prior bad acts show that he has a propensity to commit crimes. ER 404(b) forbids such inference because it depends on the defendant’s propensity to commit a certain crime.”⁷⁶

If evidence has been admitted for a limited purpose, such as to prove motive, it is improper for a prosecutor to encourage the jury to use that evidence for improper purposes, such as the defendant’s propensity to commit crimes.⁷⁷

For these reasons, it is improper for the prosecutor to encourage the jury “to

not know in advance what will be the testimony of prosecution witnesses, *trial judges have little ability to prevent error if prosecutors act without due caution.*”).

⁷³ *Id.*

⁷⁴ *State v. Mee*, 168 Wn.App. 144, 154, 275 P.3d 1192 *review denied*, 175 Wn.2d 1011, 287 P.3d 594 (2012).

⁷⁵ *Id.*

⁷⁶ *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1998).

⁷⁷ *State v. Ra*, 144 Wn. App. 688, 175 P.3d 609 (2008) (published in part),

render a verdict based on [gang] affiliation rather than the evidence.⁷⁸ ER 404(b) may allow a prosecutor to argue that a defendant's gang membership is why he committed the charged crime (to prove motive), as was the case here. But, ER 404(b) *never* allows him to imply that he is more likely to engage in the *criminal acts* charged, simply because he is part of a gang.⁷⁹

Yet, this is *exactly* what the prosecutor did here, both when he cross examined Mr. Hanson, and in closing argument.

During Mr. Hanson's cross examination, the prosecutor did ask a few questions about his gang membership that that appeared to relate to his motive to kill Mr. Cummings, a rival gang member. But he also asked several other questions that were clearly designed to imply that Mr. Hanson was more likely to commit the *crimes in general*, rather than the crime charged: the alleged murder of Mr. Cummings.

On cross examination, the State vigorously cross examined Mr. Hanson. Despite several objections, several of which were sustained by the court, the prosecutor grilled Mr. Hanson on a variety of prejudicial subjects, including Mr. Hanson's gang affiliations:

Q. Now when you join a gang, the intent of joining a gang is so you can commit crimes and not work or be a member of regular society; is that correct?

A. Incorrect.

Q. You don't join a gang to commit crimes?

A. No sir.

⁷⁸ *State v. Davis*, 175 Wn.2d 287, 336, 290 P.3d 43, 65 (2012) (citing *Belgarde*, 110 Wash.2d at 506–08 observing that “prosecutor's comments regarding the defendant's membership in the American Indian Movement were misconduct because they encouraged the jury to render a verdict based on that affiliation rather than the evidence”).

⁷⁹ *See, e.g., Ra*, 144 Wn. App. at 701 (error to admit gang evidence; evidence that investigation was assigned to gang division and argument that defendant shot victim to elevate his status in gang was improper propensity evidence and prejudicial).

Q. I mean do you not commit crimes when you're in a gang?

Defense Counsel: Objection Your Honor.

The Court: Overruled.

Q. So you're saying you don't commit crimes when you join a gang?

A. Are you speaking about myself or everybody?

Q. Yourself and others in your gang.

The Court: That's a fair distinction, and it goes to his objection.

Q. You join your gang. Did you commit crimes?

Defense Counsel: Objection Your Honor.

The Court: Sustained.

Q: Generally speaking, a person who joins a gang, are they supposed to commit crimes for their gang?

A: I can't answer for anybody else but only myself.

Q. Really. So, you don't know what other gang members do?

A. I am here to speak on my own actions.

Q. So, you're basically refusing to answer the question. You don't know or you just don't want to answer it?

A. If you rephrase the question and ask me about myself in particular.

Q. Sir, you're not here to tell me how to ask a question. You're refusing to answer the question; is that correct?

A. No.

Q. So you don't know whether gang members don't join gangs to commit crimes? You don't know the answer to that question

Defense Counsel: This already –

The Court: Overruled.

These types of general questions about how people involved in gangs act are always improper when asked to imply that gang members are more likely to commit crimes.⁸⁰ Yet, that is exactly that these questions asked Mr. Hanson to admit. Throughout the above cited portion of the transcript, the prosecutor repeatedly asked Mr. Hanson whether he, and “others” “join gangs to commit crimes, whether gang members “are supposed to commit crimes for their gang,” and whether they actually do “commit crimes when [as part of that] gang.” This was clearly improper.

⁸⁰ See *State v. Bluehorse*, 159 Wn.App. 410, 429, 248 P.3d 537 (2011).

Although the court overruled two of defense counsel's three objections to these questions, it clearly abused its discretion by doing so, as they served no other legitimate purpose than to imply that Mr. Hanson, and all other gang members, were bad people who commit crimes.⁸¹ These questions asked for answers that were pure propensity evidence, would never be admissible under ER 404(b), and had absolutely *nothing* to do with Mr. Hanson's claimed motive, apart from implying that all gang members commit crimes in general.

The State may attempt to justify these questions by arguing that they addressed the defendant's gang motive to commit the crime, but previous cases have rejected such arguments under less obvious circumstances.⁸² Though the prosecutor could have fairly argued from *specific facts*, such as the admitted gang rivalry, that Mr. Hanson's gang membership supported the State's motive, but none of these questions did that.

Defense counsel labored to avoid these exact types of questions, by pre-trial and during trial by filing pre-trial motions, which the Court granted, and objecting at the time of the statements, but the court inexplicably "overruled" those objections when they mattered the most. By failing to sustain defense counsel's meritorious objection, the Court did more than allow extremely prejudicial and misleading argument in front of the jury. By allowing these questions, which was undoubtedly an abuse of discretion, the trial court

⁸¹ See, e.g., *Mee*, 168 Wn. App. 144 (trial court abused its discretion in admission of gang-related evidence concerning general behavior of gangs when of limited probative value and such probative value was substantially outweighed by danger of unfair prejudice in inviting jury to convict based upon defendant's gang activity and propensity to commit crimes; harmless error in this case, given the evidence).

⁸² See, e.g., *State v. Pierce*, 169 Wn. App. 533, 554-55, 280 P.3d 1158 (2012).

propounded the prejudicial effect of the prosecutors repeated misconduct by lending an “aura” of legitimacy to the prosecutor’s argument.⁸³ In effect, the jury was thus allowed to believe that defense counsel *did in fact admit to their client’s own guilt as an accomplice.*

Further, the prosecutor must have known that these questions were obviously improper but asked them anyway violating both his pre-trial promise to not ask such questions, and the Court’s pre-trial ruling prohibiting such questions. ER 404(b) seeks to prevent the jury from making such improper inferences, which helps ensure a fair trial by “confine[ing] the fact finder to the merits of the current case in judging a person’s guilt or innocence.”⁸⁴ No reasonable prosecutor could ever believe that these questions would elicit and answers other than pure propensity evidence. Asking a witness these questions, in any case where gang evidence is introduced, is egregious, flagrant, ill-intentioned and seriously jeopardized Mr. Hanson’s chances of a fair trial.

b) *The prosecutor’s closing argument continued to seize on his theory that Mr. Hanson, as gang member, was guilty of this crime because “violence is the way [they] do business,” and all gang members join gangs so they can engage “in violent acts,” “commit[] crimes,” and “even commit[] homicide.”*

Finally, if there was any doubt about the message the prosecutor was trying to send with these questions, he made that message clear to the jury during his closing argument we he said:

“Mr. Hanson testified at length about the fact of joining a gang and how by joining a gang, he wanted to be the shark. He didn’t want

⁸³ See *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984) (prosecutor’s statement improperly introduced accomplice liability which was not before the jury and finding prejudice where court’s ruling lent aura of legitimacy to prosecutor’s misconduct).

⁸⁴ *Wade*, 98 Wn. App. at 336.

to be eaten up. He wanted to be the big dog; that he talked about increasing his status in a gang by doing violent acts, by committing crimes, by even committing homicide. Mr. Hanson joined a gang by his own choice.”⁸⁵

While it is true that he said he joined a gang to avoid being “eaten by the sharks,” he never said he joined a gang to become a shark. More importantly, he never said that he would be “committing homicide,” in this case in order to increase his status in the gang. Both Mr. Hanson and the State’s own gang expert, which it did not call in its case in chief, testified that such an act “could” in “*certain circumstances*” do such a thing, but neither of them explained what circumstances would do that. Without such an explanation, the State’s motive here was pure speculation.

Further, just because a motive could exist for all gang members, does not mean it motivated Mr. Hanson to commit *this particular crime*.⁸⁶ Yet, the prosecutor’s closing argument implied just the opposite, i.e. because any gang member might commit a crime for that reason, this is why Mr. Hanson shot Mr. Cummings in this case.

And the prosecutor’s use of this generalized gang motive did not stop there. Only a few moments later, the prosecutor “suggest[ed]” to the jury that

if you're four or five feet away and you're a gang member and violence is the way you do business, you know how to scare somebody with a gun and not hit them. I think you can draw that inference.⁸⁷

⁸⁵ RP 752 (emphasis added).

⁸⁶ The mere allegation that a shooting was gang-motivated does not make it so: gang membership is not proof of an individual’s motive. *See Bluehorse*, 159 Wn.App. 429-31.

⁸⁷ RP 754 (emphasis added)

Not only did this comment tell the jury that gang members were more likely to commit crimes in general, it also told the jury that “violence was the way [they] do business,” linking the improper argument directly to the violent crime charged.

This was improper not only because it appealed to the jury’s fear of gang violence, but also because it had no basis in the record. Mr. Hanson never testified that “violence was the way [he did] business,” nor did any other witness. Further, no expert witness testified that his particular gang’s values required him to attack Mr. Cummings, a rival gang member, simply because they were rivals. Without such evidence, these arguments were unsupported by the record. Instead, the comments were nothing more than the prosecutor’s personal opinions about gangs and Mr. Hanson, as a gang member, i.e. all gang members, including Mr. Hanson are “violent” people and therefore more likely to have committed *this* crime.

Still, the prosecutor’s generalized gang theory continued. The prosecutor next implied to the jury that these improper inferences were proper considerations for the jury in find Mr. Hanson guilty, i.e. to reject his claim of self-defense because he was the aggressor:

Just the walking up, *based upon the testimony you heard about gangs*, just the walking up and confronting a rival gang member made Mr. Hanson the aggressor. There are no other facts even based upon his own testimony.⁸⁸

In other words, the prosecutor told the jury that, because Mr. Hanson and Mr. Cummings were rival gang members, it could find that Mr. Hanson’s “provoked the fight.” But, yet again, “the testimony [the jury] heard about gangs,”

⁸⁸ RP 748-49 (emphasis added).

did not support that inference because neither Mr. Hanson, nor the State's expert witness testified to facts to support that theory.

This comment was improper because it relied upon unproven biases and assumptions about gangs, rather than evidence and reasonable inferences there from. In *Scott*, the court observed that there was no evidence presented about the importance of 'respect' in the gang culture or that violence was a recognized response to 'disrespect, despite the prosecutor's promise that a detective would fully address the topic.⁸⁹ The court noted that trial courts regularly admit gang affiliation evidence to establish the motive for a crime or to show that defendants acted in concert: in those cases, there was a connection between the gang's purposes or values and the offense committed.⁹⁰

Here, just as in *Scott*, the State it utterly failed to produce any evidence that showed Mr. Hanson had a duty to kill rival gang members at trial. Though the State had intended on eliciting such testimony through its gang expert, the State failed to call him as his own witness in its case in chief. And although the defense did call that expert in its case, none of his testimony supported the inference that Mr. Hanson was obligated to confront Mr. Cummings or kill him on sight, as the prosecutor tried to tell the jury.

The jury, hearing these questions and argument certainly got the prosecutor's message: Mr. Hanson, as a gang member who commits *other*, unproved crimes, is more likely to have started the fight and thus not entitled to act in self-defense. By injecting this theme of propensity evidence throughout the

⁸⁹ *State v. Scott*, 151 Wn.App. 520, 528, 218 P.3d 71 (2009).

⁹⁰ *Id.* at 527.

trial, the prosecutor repeatedly expressed his own opinions about gangs and gang members as being violent people whose primary objective in life is “to commit crimes, which he neither proved, nor connected directly to the case at bar. This is exactly the type of evidence and argument that ER 404(b) intends to prohibit. These questions and argument, which permeated the case, had no legitimate purpose and were therefore improper.

3. THE PROSECUTOR’S REPEATED COMMENTS ON MR. HANSON’S FAILURE TO CALL CERTAIN WITNESSES TO “CORROBORATE” HIS STORY WAS, WITHOUT A MISSING WITNESS INSTRUCTION, IMPROPER.

It is improper for the prosecutor to point out that the defendant failed to produce certain evidence and imply that such failure is a valid reason to find him guilty.⁹¹ Yet, that is exactly what he did here, on at least three different occasions.

At the first instance, the prosecutor asked Mr. Hanson for the name of the individual at whose home he met Mr. Cummings for the first time.⁹² Mr. Hanson declined to give that individual’s name, stating that he refused to get anyone involved “that did not need to be involved.” The prosecutor then said, “So that person can’t corroborate what you’re saying; is that what you’re saying?” The court sustained the defense objection.

At the second instance, the prosecutor asked Mr. Hanson to give the name of the woman who accompanied him to Ms. Deligt’s house. Mr. Hanson stated, “I’m here to speak about my actions alone.”⁹³

⁹¹ *State v. Thorgeron*, 172 Wn.2d 438, 453,258 P.3d 43 (2011); *see, e.g., State v. Frazier*, 55 Wn.App. 204, 777 P.2d 27 (1989), review denied 113 Wn.2d 1024, 782 P.2d 1071 (1989) (defense counsel improperly argued the missing witness rule where there was no instruction given).

⁹² (6RP 668-672).

⁹³ (6RP 673).

The third instance, the prosecutor asked Mr. Hanson about the man who asked him to retrieve the gun from Ms. Deligt's home:

Q. Now you talked about a phone call and homey called you up or some acquaintance of yours called you up and says, "Hey, there's a gun in Mindee Deligt's bedroom, correct?"

A. Wrong.⁹⁴

Q. What did you say?

A. I said . . . a friend of mine, mutual acquaintance of mine and Ms. Deligt's asked me if I had got a new dog. And I said, "No, this is Mindee's dog." He asked me, oh, that he was out of town and if I could pick up his gun for him because he didn't want it to get stolen because the house --

Q. So your friend asked you to pick up a gun he had at Mindee's house?

A. Yes.

Q. Who is this friend?

A. I do not wish to speak on that...⁹⁵

And in the fourth instance, the prosecutor again asked Mr. Hanson to produce evidence that corroborated his story:

Q. Okay. And you were testifying you had injuries?

A. That I did?

Q. Yes.

A. Yes.

Q. And again, did anybody else see those injuries?

A. No.

Q. In fact, the detective testified he didn't see any injuries on you when he contacted you.

A. Detective Burbridge?

⁹⁴ (6RP 672-74)

⁹⁵ (6RP 674).

Q. Yes.

Defense Counsel: Your Honor that is in the record and Mr. Hanson does not have to answer that question.

The Court: So that's an objection?

Yes.

The Court: Sustained.⁹⁶

Defense counsel brought a motion for a new trial, arguing that these comments denied Mr. Hanson a fair trial. Without much discussion or analysis, the court denied the motion for a new trial.⁹⁷ That was an abuse of discretion.

First, the prosecutor engaged in misconduct when he questioned Mr. Hanson about whether or not his testimony contradicted that of [another] witness."⁹⁸ This line of questioning, explained counsel, was improper because it implied to the jury that, to find Mr. Hanson not guilty, it would have to "believe the [Mr. Hanson's testimony] and disbelieve the [testimony] of the State's witnesses."⁹⁹

Second, he again committed misconduct when he questioned Mr. Hanson about his failure to call other witnesses to corroborate his claim of self-defense.¹⁰⁰ Specifically, argued defense counsel, by repeatedly questioning Mr. Hanson about his failure to produce witnesses to corroborate his testimony, "the prosecution attempted to shift the burden of" proving self-defense "to the defendant."¹⁰¹ As

⁹⁶ (6RP 679-80).

⁹⁷ (7RP 797).

⁹⁸ (9RP 793).

⁹⁹ CP 339.

¹⁰⁰ (9RP 793).

¹⁰¹ CP 343.

pointed out by defense counsel, the trial court granted a pre-trial motion that specifically prohibited the State from that very same misconduct.¹⁰²

But the prosecutor ignored that pretrial ruling and began asking him questions that clearly violated that ruling. Specifically, the prosecutor asked Mr. Hanson “if his trial testimony on direct examination contradicted that of the State’s witnesses.”¹⁰³ Defense counsel immediately objected and the court sustained the objection. Yet, the prosecutor persisted his improper line of questioning, again asking Mr. Hanson if his testimony contradicted the testimony of another State’s witness (Detective Burbridge). Again, the court sustained the objection.¹⁰⁴

In *Toth*, the defendant was charged with DUI, and testified at trial that he was not intoxicated. In closing argument, the State urged the jury to disregard that testimony, pointing out that “He didn’t provide you with anything to back [that] story up.”¹⁰⁵ The prosecutor also pointed out that Toth failed to call his brother as a witness, who was with him when he has arrested. At one point, the prosecutor admitted that Toth “doesn’t have the burden to present anything in this case,” but then contradicted that statement in his next breath, asking the jury this rhetorical question: “Did he provide anything at all to corroborate his story?” To this last comment, defense counsel objected, but the trial court overruled the objection. These repeated comments on Toth’s failure to produce specific evidence to corroborate his story constituted prejudicial misconduct. These comments made it

¹⁰² CP 340.

¹⁰³ CP 341.

¹⁰⁴ CP 341.

¹⁰⁵ *State v. Toth*, 152 Wn.App. 610, 217 P.3d 377 (2009).

reasonably likely that the jury would go into the jury room asking the very same rhetorical question counsel asked during closing, which improperly shifted the State's burden of proof State to Toth.¹⁰⁶

Like in *Toth*, the prosecutor here did more than explore witness credibility. The clear implication of this line of questions was that the jury should infer guilt because Mr. Hanson had the burden of producing some evidence of his innocence, but that he failed to meet that burden because he did not "corroborate" his story by calling several specific witnesses into court.

The initial very direct comment by the prosecutor, "So that person can't corroborate what you're saying; is that what you're saying?" framed the questioning about all other potential witnesses for the defense. Further, the comment referencing that Mr. Hanson had not brought forward any witnesses who had seen his injury, (to which defense counsel again objected) created an unfair and unfavorable inference of guilt simply because Mr. Hanson did not produce witnesses as proof that his testimony was accurate and that he was innocent.

4. THE APPELLANT HAS PRESERVED THE "SUBSTANTIAL LIKELIHOOD" STANDARD.

a) *Trial counsel objected to the prosecutor's improper questions during Mr. Hanson's cross examination.*

¹⁰⁶ Similarly, in *Dixon*, the defendant was charged with VUCSA for possession of Meth. His theory at trial was that the State failed to prove possession, because the drugs were located in a purse, inside a car, and another person, not present at trial, could have possessed it. In closing argument, the prosecutor asked jury to consider why def didn't call passenger of car as a witness to corroborate that theory. Thought defense counsel failed to object, this Court still reversed and ordered a new trial reasoning that, without a missing witness instruction, the argument was improper and prejudicial. *State v. Dixon*, 150 Wn.App. 46, 207 P.3d 459 (2009).

A timely objection preserves the “substantial likelihood” standard for appeal.¹⁰⁷ Here, as argued above, defense counsel made numerous objections to the prosecutor’s improper questioning on cross examination, but the court overruled most of those objections. These objections alone are enough to preserve the lower standard of prejudice for appeal.¹⁰⁸

b) *Trial counsel filed a timely motion for a new trial based upon the prosecutor’s improper closing argument.*

A timely motion for a new trial preserves the “substantial likelihood” standard for appeal.¹⁰⁹ Here, defense counsel filed a timely motion for a new trial, arguing that the prosecutor’s questioning was also improper. In *Lindsay*, our Supreme Court recognized a motion for a new trial is “an acceptable mechanism by which” a defendant can preserve an argument of prosecutorial misconduct for appellate review.¹¹⁰ Notably, *Lindsay*’s motion for a new trial did not object to every instance of misconduct, but the Supreme Court still reviewed all instances of misconduct under the substantial likelihood standard.¹¹¹ Consistent with *Lindsay*, this court should do the same, and hold that Mr. Hanson has preserved the issues for appellate review so “that the ordinary standard for examining prejudice applies.”¹¹²

5. THE PROSECUTOR’S IMPROPER ARGUMENTS DENIED MR. HANSON A FAIR TRIAL.

¹⁰⁷ See, e.g., *State v. Allen*, No. 89917-7, Slip opinion at 10 (oral objection court objection).

¹⁰⁸ See *id.*

¹⁰⁹ See, e.g., *Lindsay*, 180 Wn.2d at 430-31 (written motion for a new trial).

¹¹⁰ *Id.* (holding that “following the prosecutor’s closing is ‘an acceptable mechanism by which to preserve challenges to prosecutorial conduct.’”) (citing *United States v. Prantil*, 764 F.2d 548, 555 n. 4 (9th Cir.1985)).

¹¹¹ *Id.*

¹¹² *Id.* at 441.

Prejudicial effect must be judged by viewing the improper comments in context, not in isolation.¹¹³ Here, the prosecutor's comments, when viewed in totality, were unnecessary, and served no other purpose than to imply that Mr. Hanson, as a gang member, was bad person who should be convicted because he committed other crimes, which the State neither proved, or even tried to prove. Viewed in context, these comments denied Mr. Hanson a fair trial, for several reasons.

First, the prosecutor's misconduct, i.e. his improper use of gang evidence to prove Mr. Hanson's criminal intent, was "a key issue of the case."¹¹⁴ When a prosecutor's misconduct strikes at the heart of such an issue, as happened here, the misconduct is especially egregious. This factor weighs in favor of a finding of prejudice.

Second, the misconduct was not isolated; rather it was repeated throughout two of the most crucial parts of the trial: Mr. Hanson's testimony, which established the sole basis for his only defense, and claims argument, the only chance for the parties to argue their theories of the case. Our Supreme Court has held that such "repetitive misconduct" "can have a 'cumulative effect'" on the jury and is much more likely to violate the defendant's right to a fair trial.¹¹⁵ Washington courts consider gang evidence prejudicial due to its general

¹¹³ *Davis*, 175 Wn.2d at 330-31.

¹¹⁴ *Allen*, *supra*, Slip opinion at 10 (holding that misstating the law on accomplice liability, a "key issue" for the jury to decide, weighed in favor of finding prejudice).

¹¹⁵ *Id.* (noticing that "the record reveal[ed] numerous instances where the prosecuting attorney misstated the definition of "knowledge."); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696,707, 286 P.3d 673 (2012); *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

“inflammatory nature.”¹¹⁶ And when the prosecutor uses such evidence, to merely prove that the defendant is a bad, violent, or criminal type person,

Third, the trial court overruled legitimate defense objections to several instances of misconduct, which can “tend an aura of legitimacy to what was otherwise improper argument.”¹¹⁷ This factor also increases the amount of prejudice to Mr. Hanson’s right to a fair trial.

Fourth, this is not a case in which the State proved the defendant’s guilt by overwhelming or objectively irrefutable evidence. In fact, it was quite the opposite. The case was “turned largely on credibility,” which is exactly the kind of case in which this kind of misconduct is the most prejudicial.¹¹⁸ If the jury believed Mr. Hanson’s testimony, it almost certainly had to acquit him. Even if this court does not believe that testimony, it makes no difference, because the jury, not this court, must decide that issue. Because the prosecutor’s misconduct struck at the heart of that issue, it is especially likely that the misconduct influenced the jury’s decision to reject Mr. Hanson’s self-defense claim to find him guilty.

Fifth, the State will likely argue that the Court’s curative instruction was enough to cure any prejudice. But curative instructions have limited effect, especially when they address matters that are highly prejudicial to the defense.¹¹⁹ Moreover, such instructions are even less effective when, as happened here, the

¹¹⁶ *State v. Asaeli*, 150 Wn.App. 543, 579, 208 P.3d 1136 (2009).

¹¹⁷ *Allen, supra*, Slip opinion at 12 (citing *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984) (overruling timely and specific objection lends “an aura of legitimacy to what was otherwise improper argument”).).

¹¹⁸ See, e.g., *Lindsay*, 180 Wn.2d at 443.

¹¹⁹ See *Dunn v. United States*, 307 F.2d 883, 885-86 (5th Cir. 1962) (recognizing the inadequacies of curative instructions).

court overrules the defense objections and are not given immediately following the prejudicial conduct¹²⁰

Sixth, neither Mr. Hanson nor his attorney did anything to “provoke” or “invite the prosecutor’s unsolicited misconduct in this case. In *Lindsay*, the State argued that the defendant waived his right to complain about the misconduct, claiming that the defendant “baited the prosecutor into [the] misconduct.”¹²¹ Here, the State may try to advance a similar argument here. Though “[i]t is true that improper comments by the prosecutor might not be grounds for reversal if they were specifically provoked by defense counsel,¹²² nothing like that happened here.

Any such argument would be meritless, as it was in *Lindsay* because the prosecutor’s comments were not a “pertinent reply” to any conduct by defense counsel or the defendant.¹²³ First, many of the improper comments came during closing argument, when there was no improper argument from defense to even respond to. Second, the remaining comments, viewed in context, were not “pertinent replies” to any witness statements during trial, nor were they fair responses to anything defense counsel said in his closing. In the end, throughout the trial, the prosecutor repeatedly made improper comments that disregarded Mr. Hanson’s right to a fair trial. The defense did nothing improper to excuse the prosecutor’s improper conduct throughout this trial.

¹²⁰ See *United States v. Solivan*, 937 F.2d 1146, 1156 (6th Cir.1991) (observing that “to mitigate the negative and highly prejudicial impact of clearly prohibited prosecutorial questioning, curative steps should be taken immediately following a proper defense objection.”).

¹²¹ *Lindsay*, 180 Wn.2d at 441-42 (2014).

¹²² *Id.* at (citing—77, 149 P.3d 646 (2006)).

¹²³ See, e.g., *State v. Russell*, 125 Wash.2d 24, 86, 882 P.2d 747 (1994).

The State may argue that the higher standard of prejudice here applies, despite the case law cited above to the contrary.¹²⁴ But even under that higher standard, the results would be the same. In *In re Personal Restraint of Glasmann* and *Lindsay*, despite the defendant's failure to object, “[T]he misconduct was so pervasive that it could not have been cured by an instruction.”¹²⁵ Here, as in *Lindsay* and *Glasmann*, “[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.”¹²⁶

In *Charlton*, the prosecutor remarked briefly on the defendant's spouse's failure to testify. The Supreme Court held such reference to be flagrant and ill-intentioned and reversed the conviction in spite of a failure to request a curative instruction.¹²⁷ There, because no prosecutor would have reasonably believed that those comments were proper, the Court held that the comments were flagrant and ill-intentioned.

The same is true about the prosecutor's improper questions about the prosecutor's obviously improper questions about how gang members, including Mr. Hanson, join gangs “to commit crimes.” The prosecutor's questioning of Mr. Hanson was baseless, questioning him on unsubstantiated allegations linking gangs and criminal activity. Such generalized questioning serves no purpose “but to allow the State to ‘suggest’ that a defendant is guilty because he or she is a

¹²⁴ In that case, he must show that the conduct was so egregious that it caused an enduring prejudice “that an instruction could not have cured the resulting prejudice.” *Id.*

¹²⁵ *Lindsay*, 180 Wn.2d at 443; *In re Personal Restraint of Glasmann*, 175 Wash.2d 696, 707, 286 P.3d 673 (2012).

¹²⁶ *Id.* (alteration in original) (quoting *Walker*, 164 Wn. App. at 737).

¹²⁷ *State v. Belgarde*, 110 Wash.2d 504, 507–08, 755 P.2d 174 (1988) (Summarizing *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978) (holding that a deliberate reference to the failure of a spouse to testify is flagrant and ill-intentioned conduct requiring reversal)).

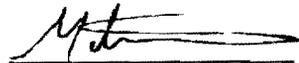
criminal-type person who would be likely to commit the crime charged.”¹²⁸ No reasonable prosecutor could have believed that these questions did not violate 404(b), or the trial court’s pretrial ruling excluding the introduction of such evidence.

In sum, given the numerous instances of misconduct explained above, the prosecuting attorney’s misconduct violated Mr. Hanson’s Due Process right to a fair trial. Because there was a substantial likelihood that the improper statements affected the jury’s verdict, the prosecuting attorney committed prejudicial misconduct. This court should reverse the underlying conviction and remand the case for a new trial.

V. CONCLUSION

Mr. Hanson respectfully requests that this court grant he relief as requested in this brief.

Dated March 25, 2015



Mitch Harrison, ESQ.,
WSBA#43040
Attorney for Appellant

¹²⁸ *Mee*, 168 Wn.App. at 154.

CERTIFICATE OF SERVICE

I, Christopher Wieting, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.
2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.
3. On the date set forth below, I served in the manner noted a true and correct copy of this **Brief of Appellant** on the following persons in the manner indicated below:

Court of Appeals, Div. III 500 N. Cedar St. Spokane, WA 99201	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email: <input type="checkbox"/> Fax:
Spokane County Prosecutor Public Safety Building 1100 West Mallon Spokane, WA 99260	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email: <input type="checkbox"/> Fax:
Louis L. Hanson, DOC # 838483 Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay, WA 98326	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email: <input type="checkbox"/> Fax:

DATED this 25th day of March, 2015 at Seattle, Washington.


Christopher Wieting