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Court of Appeals
Division III
State of Washington

33965-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

CAMERON J. PETERSON, Appellant

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict the defendant of second degree assault when the State failed to prove the absence of the defense of others.
2. The State committed prosecutorial misconduct by misstating the law to the jury during closing and rebuttal closing.
3. The State lessened its burden of proof by misstating the law to the jury in closing and rebuttal closing.
4. An award of costs on appeal against the defendant would be improper when the defendant is indigent.

II. ISSUES PRESENTED

1. Whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the second degree assault was proven beyond a reasonable doubt?
2. Without objecting at trial, has the defendant, who is claiming prosecutorial misconduct during closing argument, established improper conduct?
3. Even if the defendant could establish the deputy prosecutor's remarks during closing argument were improper, has he demonstrated incurable prejudice?

4. If the defendant could show the deputy prosecutor's comments were incurable, has he shown a substantial likelihood that the comments affected the jury's verdict?

5. If the State is the substantially prevailing party, should this Court presume the defendant is indigent at the time of determining costs without requiring the defendant provide corroboration of his asserted indigency?

III. STATEMENT OF THE CASE

Procedural history.

The defendant/appellant, Cameron Peterson, was charged by amended information in the Spokane County Superior Court with first degree assault (victim Gregory Zielke, Jr.), and second degree assault (victim Gregory Zielke, Sr.). CP 40. Both crimes included a firearm allegation. CP 40.

The matter proceeded to a jury trial on November 30, 2015. The defendant was convicted of the second degree assault, and was acquitted of the first degree assault. CP 166. The jury did not find the defendant was armed with a firearm during commission of either offense. CP 168.

On December 17, 2015, the defendant was sentenced to a low-end standard range sentence of three months. CP 204; RP 621. At the time of sentencing, the court ordered the defendant pay the mandatory legal

financial obligations of a \$500 victim assessment, \$200 court costs, and the \$100 DNA fee for a total of \$800. CP 207; RP 621. Restitution was not requested. CP 207. The court authorized work release and work crew during the defendant's incarceration. CP 205; RP 623. Finally, the court ordered the defendant pay \$25 per month commencing May 1, 2016. CP 207. The defendant did not object to the imposition of the mandatory fees. RP 621-23. In addition, the defendant informed the court that he was not employed at the time of sentencing, but when he is working, he makes \$18 an hour. RP 633.

This appeal timely followed.

Substantive facts.

On April 12, 2015, in the later afternoon hours, Gregory Zielke, Sr.,¹ went to the Special K tavern located in northeast Spokane, at the intersection of Market Street and Garland Avenue. RP 74-75, 147. There, he was meeting some coworkers. RP 75. Mr. Zielke had several beers and several mixed drinks. RP 76. While at the tavern, Mr. Zielke played some pool with his son and several other friends. RP 76. They played at what was known as the "upper pool table." RP 123.

¹ Mr. Zielke, Sr., will be referred to as Mr. Zielke for the remainder of the brief.

Mr. Zielke testified he was at the pool table when his friends momentarily left to use the restroom, at which time he was struck with an object to the back of his head. RP 77. He stated it was a glass or similar object. RP 76. Mr. Zielke did not observe his attacker. RP 77. Thereafter, Mr. Zielke fell down a short flight of stairs and hit his head on a different pool table. RP 77. He became unconscious, and shattered a glass in his hand. RP 77. Mr. Zielke was not armed. RP 79.

When Mr. Zielke regained consciousness in the tavern, he observed an individual cleaning up glass from the pool table, and others were assisting him. RP 77. Mr. Zielke had a large bump on his head where it struck the pool table, and a bruise across his body. RP 77.

On the advice of police officers and others, Mr. Zielke went to the hospital and was released. RP 79. He continued to experience headaches and missed work for several days after the incident. RP 79.

Trenton Hallam testified that he arrived at the Special K tavern and spoke with the owner of the bar about some product for a vending machine. RP 87. He had consumed one mixed drink prior to the incident. RP 104, 115, 117. He heard a commotion in the vicinity of Mr. Zielke. As he turned around to observe, he spotted Mr. Zielke on a pool table with a bloody gash on his head. RP 88, 112-113.

Joetta Adams was a bartender on shift during the incident. Ms. Adams knew the defendant from various bars she had worked at over the last ten years. RP 121. She also knew Mr. Zielke, and his son, from previous contacts. RP 122.

On the date of the event, the defendant entered the bar, ordered a drink, and walked to the vicinity of the “upper pool table.” RP 123. During this time, Ms. Adams was able to observe Mr. Zielke in the area of the pool table. RP 125. She noted Mr. Zielke has a strong voice, which projects. RP 126, 136.²

Shortly before the incident, Ms. Adams thought Mr. Zielke was arguing and looked in his direction. RP 126. “[H]e was just standing toward the table with his drink.” RP 126, 138. Ms. Adams then looked down and began mixing a drink and heard Mr. Zielke “being loud.”³ RP 127. She looked up and observed the defendant “just take off and hit [Mr. Zielke] in the back of the head, knock[ing] [Mr.] Zielke over at the edge,” causing Mr. Zielke to fall and strike his head on a pool table. RP 127. Thereafter,

² Ms. Adams remarked that when Mr. Zielke speaks, it appears he is in argument because of his loud voice, even though he is not. RP 137. At times, Mr. Zielke appears obnoxious, which irritates some people. RP 137.

³ Before the assault, Ms. Adams believed Mr. Zielke was becoming intoxicated. RP 136.

the defendant ran out of the bar. RP 127. He had a glass beverage in his hand before striking Mr. Zielke. RP 138.

Afterward, Ms. Adams and bar patrons helped Mr. Zielke up from the ground and placed him on a bar stool. RP 130. Mr. Zielke did not appear to be in any type of argument before the assault. RP 128, 138-39. After the defendant left the bar, an unknown person entered the bar and yelled there had been a shooting across the street from the tavern.⁴ RP 130-31.

Dale Lewis was at the bar standing next to the defendant shortly before the assault. RP 338. The defendant remarked “I don’t like that guy,” referring to Mr. Zielke. RP 338. Mr. Lewis advised the defendant not to do anything “stupid.” RP 338. The defendant told Mr. Lewis to “keep your opinion to yourself.” RP 338. Mr. Lewis then observed the defendant jump over a rail in the bar and he “clocked [Mr. Zielke] with a glass.” RP 338. He described it as a “rock[s] glass,”⁵ RP 339. Mr. Lewis was not acquainted with either the defendant or Mr. Zielke. RP 339.

⁴ Only the facts pertinent to the second degree assault conviction will be addressed in detail, as the assignments of error relate only to that conviction.

⁵ A “rocks glass” is a short tumbler used for serving alcohol with ice cubes. These types of glasses generally have a wide brim and a thick base. https://en.wikipedia.org/wiki/Old_Fashioned_glass.

Greg Zielke, Jr., arrived at the bar between 4:00 p.m. and 5:00 p.m. on the day of the incident. RP 163. Greg Jr.⁶ testified that he was in the bar with his father, and some friends. RP 163. At some point, the defendant remarked that Mr. Zielke could not make a shot. RP 166. Mr. Zielke told the defendant to leave the group alone and walk away. RP 165. The defendant complied and then returned. RP 166. Greg Jr. was at the bar ordering a drink when the assault occurred. RP 166. During the course of the evening, he became somewhat intoxicated, with one witness describing him as highly intoxicated. RP 188, 220, 231, 253.

Greg Jr. exited the bar in search of the person who struck his dad. RP 168. At some point, Greg Jr. observed the defendant outside running with a pool stick in his hand. RP 170. The defendant ultimately ran and dropped the pool cue. RP 172. Greg Jr. gave chase. RP 172. Eventually, the defendant reached the Panda Express business across the street, turned around, and pointed a gun at Greg Jr. RP 172. Greg Jr. tackled the defendant and was immediately shot several times.⁷ RP 172-73, 175, 186. Greg Jr.

⁶ Greg Zielke, Jr., will be referred to as Greg Jr. for the remainder of the brief.

⁷ The defendant's weapon, a loaded .25 caliber handgun, was ultimately located by the police on the roof of a nearby Starbucks. RP 212, 262, 267, 273, 411. The defendant maintained at trial that he discarded the pistol on the roof because he did not want to get killed by the police. RP 454. Officer Chris Conrath observed two close contact bullet wounds on

punched the defendant several times, but he was uncertain whether he made contact. RP 187, 192. Greg Jr. was not armed at the time of the event. RP 174, 181.

Nathan Lind arrived at the tavern around 4:00 p.m., with several people, and joined up with Mr. Zielke. RP 141. Mr. Lind stepped outside and reentered the bar when he heard a glass break. RP 142, 152. He observed the defendant running out of the bar. RP 142. Mr. Lind exited the bar and observed the defendant “sneaking around.” RP 145. At one point, the defendant approached him and another person with a pool cue. RP 145. The defendant dropped the pool cue and began reaching into his waistband. RP 145. Mr. Lind did not have a weapon, nor did he observe a weapon on the individual from the bar who accompanied him. RP 146. The defendant was subsequently chased across the street by Greg Jr. RP 146, 148. Greg Jr. tackled the defendant, and then Mr. Lind heard several gunshots. RP 157.

The defendant testified that when he arrived at the tavern on the day of the incident, he observed “a buddy” named Paul Cook inside the bar. RP 425. The defendant claimed there was an argument between Mr. Cook and Mr. Zielke. RP 426. Thereafter, the defendant ordered a drink and positioned himself so he could observe what was going on. RP 427. He

“Greg Jr.’s” forearms. RP 231; 241. Four shell casings were found at the crime scene. RP 303.

stated no other bar patrons were around him prior to or during the incident. RP 474.

The defendant maintained the “argument” escalated when Mr. Zielke raised his voice and removed his eyeglasses. RP 428. He claimed none of the bar staff were concerned with the behavior. RP 428. At this point, Mr. Cook told Mr. Zielke to step outside. RP 428. The defendant asserted he was concerned that Mr. Cook had a back injury, and that he was disabled by it. RP 428. The defendant claimed he faced a dilemma between calling the police and getting involved. RP 429. He purported that Mr. Zielke “was going in a rage and he -- he was clearly out of control.” RP 430.⁸

Thereafter, the defendant asserted he “jumped ... and tried to get between them.” RP 429. The defendant then professed that Mr. Zielke lunged at him, and the defendant “hit [Mr. Zielke] with a right hook out of reflex.” RP 429. The defendant professed he was not “mad” or “angry” at the time. RP 429. His only purpose for getting involved was to separate Mr. Cook and Mr. Zielke. RP 429. The defendant also asserted that he did not speak with Mr. Zielke and did not have any disagreements with him.

⁸ The defendant never observed either Mr. Cook or Mr. Zielke raise a fist, a pool cue, a glass, or any other weapon, or brandish a firearm prior to the assault. RP 472-73.

RP 430. The defendant then maintained that Mr. Zielke's "legs went rubbery," but he never fell onto the pool table or to the ground. RP 430, 515. He also denied striking Mr. Zielke with a glass, and asserted that Mr. Zielke did not bleed after the incident. RP 475, 477.

After the assault, five to six individuals surrounded Mr. Zielke. RP 431. The defendant immediately left the bar. RP 431.

Mr. Cook testified Mr. Zielke was pestering him about a wager regarding a pool shot. RP 525, 528. He asserted he complained to the bartender, and she spoke with Mr. Zielke. RP 528. Shortly thereafter, Mr. Cook had enough of Mr. Zielke and challenged him to a fight outside. RP 526. He did not observe the assault, but did see the aftermath of Mr. Zielke on the ground, and broken glass on the pool table. RP 527. Mr. Zielke appeared dazed afterward, and he was bleeding. RP 527. Mr. Cook claimed that if the defendant had not struck Mr. Zielke, he would have hit and hurt Mr. Zielke.⁹ RP 529. He alleged Mr. Zielke was a belligerent drunk. RP 527.

⁹ Mr. Cook described himself as six foot, two inches tall and weighed approximately 265 pounds. RP 527. He contended Mr. Zielke outweighed him by 150 pounds. RP 527.

When asked if he thought it would have been a fair fight with Mr. Zielke that evening, Mr. Cook forthrightly responded: “How do you have a fair fight with a drunk person? You tell me.” RP 534.

IV. ARGUMENT

A. VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR SECOND DEGREE ASSAULT.

Standard of review regarding sufficiency of the evidence.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Rich*, 184 Wn. 2d 897, 903, 365 P.3d 746 (2016); U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

A sufficiency of evidence challenge is reviewed de novo. *Rich*, 184 Wn. 2d at 903. The standard of review for a sufficiency of the evidence assertion in a criminal case is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found each element of the offense proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Rich*, 184 Wn. 2d at 903. A defendant challenging the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

The State may establish the elements of a crime by either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). This Court defers to the trier of fact regarding credibility, conflicting testimony, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992), *abrogated on other grounds by In re Pers. Restraint of Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014).

Argument.

The defendant first claims there was insufficient evidence to convict him of the second degree assault because he acted in lawful defense of Mr. Cook. Appellant’s Br. at 12. More specifically, he argues the State presented insufficient evidence to disprove his claim of defense of others.

The second degree assault statute under which the defendant was convicted provides:

- 1) A person is guilty of assault in the second degree if he or she ... [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.

RCW 9A.36.021(1)(c).

The trial court's instruction number 12, in relevant part, read as follows:

To convict the defendant of the crime of assault in the second degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 12th day of April, 2015, the defendant intentionally assaulted Gregory Zielke, Sr.;
- (2) That the defendant thereby recklessly inflicted substantial bodily harm; and
- (3) That the acts occurred in the State of Washington.

CP 152.

The court defined substantial bodily harm in instruction number 16 as follows:

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

CP 153.

The trial court also instructed the jury on defense of others. CP 156 (WPIC 10.02 lawful force – defense of others); CP 157 (WPIC 16.04.01 aggressor – defense of others); CP 158 (WPIC 17.05 lawful force – no duty to retreat); CP 159 (WPIC 17.04 lawful force – actual danger not necessary); and CP 160 (WPIC 16.05 necessary – definition). In addition, the defense

attorney argued the defendant acted in defense of Mr. Cook during his closing argument. RP 580, 587-89.

Under Washington law, a defendant may use force to defend another person if he or she subjectively believes the other is in danger and a reasonable person considering only the circumstances known to the defendant would share his or her belief. RCW 9A.16.020(3); *State v. Penn*, 89 Wn.2d 63, 66, 568 P.2d 797 (1977). A person may use force to defend a third party to the same extent the person could defend him or herself. *Id.* When self-defense or defense of others is properly raised, the absence of the defense becomes another element of the State's proof. *State v. Acosta*, 101 Wn.2d 612, 615–16, 683 P.2d 1069 (1984).

The jury must evaluate the claim of self-defense by considering “*all* the facts and circumstances known to the defendant.” *State v. Wanrow*, 88 Wn.2d 221, 234, 559 P.2d 548 (1977).¹⁰

A defendant may not, however, use more force than a reasonable person would use, considering only the circumstances known to the defendant. *State v. Dunning*, 8 Wn. App. 340, 342, 506 P.2d 321 (1973).

¹⁰ A person may not claim defense of another if he denies the acts that the defense would justify. *State v. Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977) (“[the] [d]efendant ... explicitly and expressly denied that he had hit anyone with a pool cue or with his fists. One cannot deny that he struck someone and then claim that he struck them in self-defense. Defendant was not entitled to self-defense instructions.”)

With respect to whether an injury is substantial, in *State v. McKague*, 172 Wn.2d 802, 262 P.3d 1225 (2011), the Supreme Court explained what type of bodily injury constitutes “temporary but substantial disfigurement” for purposes of RCW 9A.04.110(4)(b) (substantial bodily harm definition). In *McKague*, the defendant shoplifted several items from a store, and subsequently punched the employee in the head several times, and pushed him to the ground. The employee suffered a concussion without loss of consciousness, a scalp contusion and lacerations, and he had severe head and neck pain. *Id.*

The court commented that “‘substantial’... signifies ... a showing greater than an injury merely having some existence.” *Id.* at 806. The court approved a definition of “substantial” as “considerable in amount, value, or worth.” *Id.* at 806. In holding that the facts supported the jury's finding that McKague had caused his victim sufficient injuries to meet the substantial bodily harm measure, the court also cited with approval *State v. Hovig*, 149 Wn. App. 1, 5, 13, 202 P.3d 318 (2009) (red and violet teeth marks lasting up to two weeks constituted substantial bodily injury); and *State v. Ashcraft*, 71 Wn. App. 444, 448–49, 455, 859 P.2d 60 (1993) (several

bruises on a three year old, some more than three days old, from being disciplined with a shoe, were temporary but substantial disfigurement).¹¹

In the present case, viewing the facts in the light most favorable to the State, and admitting the truth of the State's evidence and all inferences that reasonably can be drawn from it, a rational trier of fact could conclude that the defendant was unprovoked and intentionally struck Mr. Zielke in the back of the head with a bar glass, rendering Mr. Zielke unconscious for a period of time.

In addition, after Mr. Zielke regained consciousness, and for several days after, he had a large bump on his head and a bruise across his body. He continued to experience headaches and missed work for several days. These injuries were sufficient to allow the jury to find that Mr. Zielke had suffered a temporary but substantial impairment of a body part or organ. Significantly, Mr. Zielke temporarily lost the function of his brain as he lost consciousness. Viewing this evidence in the light most favorable to the State, the State's evidence was sufficient to establish the elements of second degree assault.

¹¹ The Court rejected Division One's definition that would make any demonstrable impairment a substantial injury, no matter how minor. *Id.* at 806.

Likewise, the defendant's disagreement with the jury's valuation of the evidence, and its verdict is not a basis to claim error. Our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981).

As stated above, the trial court instructed the jury on the law of defense of others. The fact that the jury found the defendant's theory of the case and his evidence unpersuasive is not reversible error. The State's witnesses and the defense witnesses were at odds in their testimony.¹² The jury was free to believe the State's witnesses, and disbelieve the defendant, and discount his evidence in view of other conflicting testimony. The jury was also at liberty to give no weight whatsoever to the defendant's argument that he acted in defense of Mr. Cook.

¹² Examples include the defendant's testimony that he did not strike the victim with a glass, he denied Mr. Zielke was unconscious after the assault, he denied observing any broken glass or blood after the assault, and he denied making statements to or observing Mr. Lewis next to him in the bar, shortly before the assault, all contrary to other witnesses' testimony.

The jury could have considered the bartender's testimony that she did not perceive any imminent danger between Mr. Cook and Mr. Zielke; the testimony of Mr. Lewis, a disinterested witness, that the defendant remarked he did not like Mr. Zielke and struck him with a bar glass for no apparent reason; or Mr. Cook's own testimony that it would not have been a fair fight between himself and Mr. Zielke considering he believed Mr. Zielke too intoxicated to defend himself.

The defendant's argument is without factual or legal support, and his conviction for second degree assault should be affirmed.

B. THIS COURT SHOULD DECLINE TO ACCEPT REVIEW OF THE ALLEGED ERRORS OCCURRING DURING CLOSING ARGUMENT BECAUSE THERE WAS NO OBJECTION MADE AT TRIAL, THERE HAS BEEN NO SHOWING THE COMMENTS WERE INCURABLE, AND THE DEFENDANT HAS NOT DEMONSTRATED THAT ANY REMARK WAS SO FLAGRANT AND ILL-INTENTIONED THAT THERE IS A SUBSTANTIAL LIKELIHOOD THAT IT AFFECTED THE JURY'S VERDICT.

The defendant contends several comments made by the deputy prosecutor during closing argument constituted prosecutorial misconduct. *See*, Appellant's Br. at 8-9, 15-20.

Standard of review regarding closing argument.

The defendant has the burden when claiming prosecutorial misconduct to show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

An appellate court reviews a prosecutor’s comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Id.* at 561. However, even if the conduct is improper, it is not grounds for reversal “if [it was] invited or provoked by defense counsel and [is] in reply to his or her acts and statements, unless [the conduct is] not a pertinent reply or [is] so prejudicial that a curative instruction would be ineffective.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

In the context of closing arguments, the prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.2d 1105 (1995).

If a defendant fails to object to alleged prosecutorial misconduct at trial, he fails to preserve the issue unless he establishes that the misconduct was so flagrant and ill-intentioned that it caused an enduring prejudice that could not have been cured with an instruction to the jury. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); *State v. Hilton*, 164 Wn. App. 81, 98, 261 P.3d 683 (2011).¹³ The focus of this inquiry is

¹³ Objections are required [during closing argument] not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process.” *Emery*, 174 Wn.2d at 762. Moreover, objections “serve[] the goal of judicial economy by enabling trial

more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remark. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

1. Claim of misstating the law on defense of others.

The defendant claims the following passages by the deputy prosecutor at the time of closing argument constituted prosecutorial misconduct:¹⁴

If a reasonably prudent person, you guys, would not have used the same force and means under the same or similar conditions, then self-defense is not available. If you would not have pulled a gun on a drunk 20-year-old who was coming staggering across the street, if you'd have done something else, then you can't claim self-defense. You can't find self-defense. If you would have done something else, then self-defense doesn't apply.

RP 571 (emphasis added).

Mr. Zielke gets shot and is immediately -- well, not immediately because it takes a while. We can see Mr. Hallam on the video, but he is taken off to the side. So

courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from 'riding the verdict' by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address." *State v. Strine*, 176 Wn.2d 742, 749-50, 293 P.3d 1177 (2013).

¹⁴ The highlighted portions are those comments specifically referenced by the defendant in his opening brief at pages 8 and 9, which he claims constitute prosecutorial misconduct.

there's no belief that he is going to continue to assault Mr. Peterson. *There is no reasonable belief that Mr. Peterson was about to be injured or that Mr. Cook was about to be injured. And if you find there's no reasonable belief that he was about to be injured or that anybody else was about to be injured, then you have to deny him his self-defense claim.*

RP 573-74 (emphasis added).

Excessive force. You pick fights with two unarmed men. He brought a gun to fight two unarmed men. He hit an unarmed man on the back of the head, he pulled a gun and threatened to kill an unarmed man. He aimed at the face and shot in the chest. You can stick your finger across the line and be a little irritant, but you don't get to strike back. That made our moms mad and it's a crime.

You don't get to use excessive force. You do not get to use more force than necessary. *He didn't use reasonable alternatives. He didn't call the police. He didn't contact management.* He stopped feet before the Panda Express doors. So he could have gone into the Panda Express if -- if we believe that he was in imminent harm. He didn't warn anybody, hey, I got a gun; leave me alone.

What would a reasonable person have done to avoid using deadly force? Ask yourselves that because you're the ones who set this standard. *Did he use reasonable alternatives?* Well, what would you guys have done? And if he didn't use reasonable available alternatives to pulling a gun and shooting it and almost creating the risk of death or serious injury, then self-defense doesn't apply. And, yes, I'm spending a lot of time on this self-defense stuff because it's the State's burden. Now, you may have already dismissed the notion of self-defense when you heard he hit an unarmed man on the back of the head and thought, oops, no thank you, but I have to spend some time on it because it's the State's burden.

RP 574-75 (emphasis added).

During rebuttal argument by the State, the deputy prosecutor made the following remarks:

So we -- we reviewed the self-defense instructions with you now a couple of times but what is the phrase that is possibly more important than anything else that is replete in these instructions is reasonable person. How would a reasonable person act. What would a reasonable person do.

Yeah, you can take into consideration what Mr. Peterson knew or thought he knew or, you know -- but what would you, as reasonable people, do with that information? Would you heeded Mr. Lewis's advice to not do anything stupid?

Would you have gone into the Panda Express? Would you have picked up your cell phone and called 9-1-1 or somebody for a ride? What would you have done, because that's ultimately the analysis; what would a reasonable person do.

RP 599, 603 (emphasis added).

Defense counsel did not object to the deputy prosecutor's several remarks "what would you have done." RP 560-79, 597-603. 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 Wn.2d 682, 685, 757 P.2d 492 (1988).

It is apparent that the deputy prosecutor was referencing the trial court's instruction number 19 which, in pertinent part, provided:

The use of, attempt to use, or offer to use force upon or toward the person of another is lawful when used, attempted, or offered by a person who reasonably believes that he is about to be injured, or by someone lawfully aiding a person who he reasonably believes 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.

CP 156; RP 555-556 (emphasis added).

The jury must assess the self-defense evidence from the perspective of a reasonably prudent person standing in the defendant's shoes, knowing all the defendant knows and seeing all the defendant sees. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). "Courts must inform the jury that the self-defense standard incorporates both objective and subjective elements: the subjective portion requires the jury to stand in the defendant's shoes and consider all the facts and circumstances known to the defendant, while the objective portion requires the jury to determine what a reasonably prudent person similarly situated would do." *State v. Woods*,

138 Wn. App. 191, 198, 156 P.3d 309 (2007); *see also State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).¹⁵

Here, although the deputy prosecutor used in-artful language, she was rhetorically asking the jury to objectively assess the evidence from the standpoint of how a reasonably prudent person similarly situated in the bar at the time of the assault using the jury's common sense and experience, in conjunction with assessing the defendant's subjective view, would have reacted, taking into consideration WPIC 17.02 and the trial court's instruction number 19.¹⁶

In addition, the defendant admits his failure to object at any time during closing. Appellant's Br. at 9. As discussed previously, the defendant's failure to object to any allegedly improper remark during closing argument constitutes a waiver of that error unless the remark is "so flagrant and ill-intentioned that it evinces an enduring and resulting

¹⁵ Our high court requires an objective component because "[t]he objective portion of the inquiry serves the crucial function of providing an external standard. Without it, a jury would be forced to evaluate the defendant's actions in the vacuum of the defendant's own subjective perceptions." *Janes*, 121 Wn.2d at 239.

¹⁶ The jury was advised in the trial court's instruction number four that it could rely on its own common sense and experience when deciding the issues in the case. CP 141.

prejudice that could not have been neutralized by an admonition to the jury.”
State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

The defendant provides no discussion, case law, or argument regarding whether any potential prejudice resulting from the allegedly improper statements could have been neutralized by an admonition to the jury. Either the above waiver, or the failure to argue incurable prejudice, makes this issue unreviewable. Appellate courts “will not review issues for which inadequate argument has been briefed or only passing treatment has been made.” *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).

The defendant impliedly argues his objection was not necessary, relying on *State v. Walker*, 164 Wn. App. 724, 265 P.3d 191 (2011), *remanded for reconsideration*, 175 Wn.2d 1022 (2012), 173 Wn. App. 1027 (2013), *review denied*, 177 Wn.2d 1026 (2013). *Walker* is distinguishable.

In *Walker*, Division Two of this Court found the cumulative effect of multiple errors made by the State during closing argument required reversal. Specifically, the prosecutor substantially mischaracterized the law by telling the jury that determining the defendant's culpability depended on whether they “would have done the exact same thing [he did] if [they] had the same decision to make.” *Walker*, 164 Wn. App. at 735. The State also made several other errors – for example, the deputy prosecutor asked the jury to “fill-in-the-blank” argument; advised the jury it needed to explain

any reason it had for not finding Walker guilty, compared reasonable doubt to everyday, common standards used to make decisions, and tasked the jury with “declaring the truth.” *Id.* at 731. Importantly, defense counsel *objected* during rebuttal argument. *Id.* at 198.

In addition, in *Walker*, the deputy prosecutor also had a PowerPoint slide instructing the jury that the entire case turned on whether “I would do it too, if I knew what he knew.” *Id.* at 736. The court held the statements were improper because they “misstated the law of defense of others.” *Id.* at 736.

Here, the defendant fails to show the prosecutor’s statements amount to similar misconduct. Unlike in *Walker*, the deputy prosecutor, in this case, in addition to asking the jury what it would do, also referenced “... [w]hat is the phrase that is possibly more important than anything else that is replete in these instructions is reasonable person. How would a reasonable person act. What would a reasonable person do.” The deputy prosecutor discussed the defendant’s actions in light of this reasonable person standard. The deputy prosecutor also informed the jury to consider what the defendant knew or thought he knew at the time of the event. Finally, none of the alleged improper comments here were so egregious that they could not have been cured by an instruction.

2. Claim of misstating the law on defense of others with respect to “reasonable alternatives.”

The defendant also claims the deputy prosecutor committed misconduct by misstating the “law on reasonable alternatives to defense of others” when she spoke about what the jury would do. Appellant’s Br. at 18.

The trial court’s instruction number 23 read as follows:

Necessary means that, under the circumstances as they appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 160; RP 557.

The jury was also instructed regarding the “no duty to retreat” provision under the court’s instruction number 12.

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. Notwithstanding the requirement that lawful force be “not more than is necessary,” the law does not impose a duty to retreat. Retreat should not be considered by you as a “reasonably effective alternative.”

CP 129; RP 557.

The deputy prosecutor was certainly allowed to argue under the circumstances of the case, and in view of the trial court’s instruction 23, that

other reasonable effective alternatives were available to the defendant, outside of smashing a glass against the victim's head. As referenced above, the relevant portion of the deputy prosecutor's argument is as follows:

You don't get to use excessive force. You do not get to use more force than necessary. He didn't use reasonable alternatives. He didn't call the police. He didn't contact management. He stopped feet before the Panda Express doors. So he could have gone into the Panda Express if -- if we believe that he was in imminent harm. He didn't warn anybody, hey, I got a gun; leave me alone.

What would a reasonable person have done to avoid using deadly force? Ask yourselves that because you're the ones who set this standard. Did he use reasonable alternatives? Well, what would you guys have done? And if he didn't use reasonable available alternatives to pulling a gun and shooting it and almost creating the risk of death or serious injury, then self-defense doesn't apply. And, yes, I'm spending a lot of time on this self-defense stuff because it's the State's burden. Now, you may have already dismissed the notion of self-defense when you heard he hit an unarmed man on the back of the head and thought, oops, no thank you, but I have to spend some time on it because it's the State's burden.

RP 574-75.

Again, defense counsel did not object to the deputy prosecutor's remarks. RP 560-79, 597-603. He has also failed to show that a curative instruction would not have obviated the alleged prejudicial effect on the jury. Certainly, the deputy prosecutor could also argue the evidence did not support the defendant's theory of the case. *See, Hilton*, 164 Wn. App. at 97.

Moreover, it is not misconduct for a prosecutor to argue that the evidence does not support the defense theory. *Russell*, 125 Wn.2d at 86, *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014, 797 P.2d 514 (1990). Here, the deputy prosecutor, as an advocate, was entitled to make a fair response to the evidence and arguments of defense counsel. *See, Russell*, 125 Wn.2d at 84.

3. If the Court determines the comments were improper, the defendant has not established the comments were prejudicial and incurable.

If this Court determines the deputy prosecutor committed error, the defendant has failed to establish that the deputy prosecutor's remarks were so "flagrant and ill-intentioned" that the prejudice, if any, could not have been cured by an admonition to the jury.

In *Emery, supra*, the Supreme Court found the State improperly made a "fill in the blank" argument, and improperly asked the jury to determine the truth in a trial involving codefendants. *Id.* at 664. Because the defendants failed to object to the comments at trial, the court found the defendants had to meet a "heightened standard" and establish "(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." *Id.* at 761. The *Emery* court concluded that even if the defendant could show that the prosecutor's

argument was incurable, they could not show a substantial likelihood that it affected the jury's verdict. *Id.* at 765.

In the present case, the defendant fails to argue or establish the deputy prosecutor's argument was flagrant or ill-intentioned. Further, he does not present any argument as to why a curative instruction would have been insufficient. Finally, he has not addressed or argued there was a substantial likelihood the jury's verdict was influenced by the alleged misconduct, even if the argument was incurable. Instead, he simply argues "[a] curative instruction would not have overcome the prejudice created by the improper statements." Appellant's Br. at 18.

Furthermore, the trial court instructed the jury in its first instruction that the lawyer's statements are not evidence and to disregard any remark, statement, or argument that is not supported by the evidence or the law in the court's instructions. CP 137; RP 548. In its third instruction (WPIC 4.01), the court informed the jury that the defendant is presumed innocent, and remains innocent unless the presumption is overcome by evidence beyond a reasonable doubt, and that a reasonable doubt can exist because of a lack of evidence. CP 140; RP 550

Jurors are presumed to follow the court's instructions. *State v. Davenport*, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984) (jurors are presumed to follow the court's instructions absent evidence proving the

contrary). There is no argument or inference that the jurors did otherwise in this case.

Accordingly, the defendant cannot demonstrate the necessary prejudice and he has waived any error regarding the alleged improper remarks by the deputy prosecutor.

C. IF THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY, THIS COURT SHOULD REQUIRE THE DEFENDANT AFFIRMATIVELY ESTABLISH A CLAIM OF INDIGENCY BEFORE THIS COURT DETERMINES WHETHER TO AWARD COSTS AS AUTHORIZED IN RCW 10.73.160 AND RAP 14.2.

If he is unsuccessful in this appeal, the defendant requests this Court decline to impose the appellate costs authorized in RCW 10.73.160 and RAP 14.2.¹⁷

The imposition of costs on criminal appeals is addressed by RCW 10.73.160 and RAP 14.1 – RAP 14.6. RCW 10.73.160 provides:

(1) The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.

(2) Appellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack from a criminal conviction. Appellate costs shall not include expenditures to maintain and operate government agencies that must be made irrespective of specific violations of the law. Expenses incurred for producing a verbatim report of proceedings and clerk's

¹⁷ It appears this Court has addressed this issue in its general order dated June 10, 2016, dealing with motions on costs.

papers may be included in costs the court may require a convicted defendant to pay.

RCW 10.73.160(1) and (2).

Under RCW 10.73.160(1), appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). RAP 14.2 states:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review. If there is no substantially prevailing party, the commissioner or clerk will not award costs to any party.

The defendant requests this Court prematurely exercise its discretion and limit the commissioner's duty to impose costs should the State substantially prevail. The defendant conflates the presumption of indigence continuing throughout his appeal with his ability to pay costs now or in the future, after the appeal is over. The former allows appointment of counsel, transcripts, and printing without prepayment, while the latter ability to pay is dependent on his current and future ability to pay.

The defendant argues that because he was found indigent by the trial court, his indigency is presumed to continue under RAP 15.2(f). The Supreme Court in *State v. Blank*, 131 Wn.2d 230, 251, 930 P.2d 1213 (1997), rejected an identical argument, stating: “[A]n award of costs under

RCW 10.73.160 is made after review is completed; thus, there is no conflict with the rule, which provides for a presumption of indigency only ‘throughout the review.’”

Most recently, this holding was cited by our high court in *State v. Stump*, 91531-8, 2016 WL 1696754, n. 4 (Apr. 28, 2016):

We have upheld the courts’ authority to impose such costs against indigent criminal defendants. *State v. Blank*, 131 Wn.2d 230, 234–35, 930 P.2d 1213 (1997) (upholding then new RCW 10.73.160's application to indigent criminal defendants against a variety of constitutional challenges, in large part because of the after-the-fact possibility of remission); *State v. Nolan*, 141 Wn.2d 620, 629, 8 P.3d 300 (2000) (affirming Court of Appeals' award of costs to the State under RCW 10.73.160 and thus rejecting defendant's attempt to limit such awards to frivolous appeals).

Here, the trial court’s determination of indigency addressed a different question. In determining whether to appoint counsel for an appeal, the court must apply the definition of indigency as set forth in RCW 10.101.010. *State v. Johnson*, 179 Wn.2d 534, 325 P.3d 1090 (2014). Under that definition, a person is “indigent” if, among other criteria, he or she has an income less than 125% of the calculated poverty level. A person may be indigent under this definition and still have the availability to make regular payments. Lawyers in private practice often require advance payment of substantial sums. The same is often true of court reporters. A

person may be unable to make such payments and still have the ability to pay the amounts over time.

If the defendant is out of custody, his financial situation is subject to change, including possible employment opportunities.¹⁸ At present, it is impossible to determine the amount he will be able to pay if the State is the substantial prevailing party. As *Stump* points out, such a finding should be made when the time avails itself, based upon the information available at that time.

RAP 14.2 is not the exclusive means for determining a defendant's financial viability upon affirmance of a trial court decision. The rules of appellate procedure are instead designed to allocate appellate costs in a fair and equitable manner depending on the realities of the case. *Stump, supra*, at *3.

The defendant is in the best position to provide the information regarding his financial status for both the present and future. If the State is the substantially prevailing party, it requests that the defendant and his appellate attorney submit an affidavit detailing his financial circumstances to enable this Court to make a determination as to the defendant's ability to

¹⁸ As referenced previously, the defendant did remark at sentencing that when he is working, he makes \$18 an hour.

pay. The defendant and his lawyer are in the best position to provide this information in support of their request.

V. CONCLUSION

The State respectfully requests this Court affirm the defendant's conviction for second degree assault.

Dated this 17 day of June, 2016.

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

STATE OF WASHINGTON,

Respondent,

v.

CAMERON J. PETERSON,

Appellant,

NO. 33965-3-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 17, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kristina M. Nichols
Wa.appeals@gmail.com

6/17/2016
(Date)

Spokane, WA
(Place)



(Signature)