

65679-3

65678-3

NO. 65678-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEVIN PEGUES,

Appellant.

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JG*

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly refused the defendant's proposed self-defense instruction in a case where there was no evidence to support the instruction.

2. Whether the defendant received effective assistance of counsel in a case where "all or nothing" was a legitimate trial strategy.

3. Whether the defendant's claims of prosecutorial misconduct should be rejected because he cannot meet his burden of showing that the challenged remarks were flagrantly improper and incurably prejudicial.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Kevin Pegues, with two counts of assault in the second degree (each with a deadly weapon enhancement), one count of harming a police dog, and one count of assault in the fourth degree based on a series of events that took place on June 15, 2009. CP 1-9, 82-84. A jury trial on these charges took place in March and April 2010 before the Honorable Theresa Doyle. Prior to trial, Judge Doyle ruled that Pegues was

not entitled to the self-defense instruction he proposed on the charge of harming a police dog on grounds that the instruction applied to persons, not dogs.¹ RP (4/6/10) 17-18. The trial court further observed that because the State had to prove the mens rea of malice for harming a police dog, Pegues could argue even in the absence of the proposed instruction that he had acted without malice because he was defending himself against the dog. RP (4/6/10) 18.

At the conclusion of the trial, the jury convicted Pegues of two counts of second-degree assault with deadly weapon enhancements and one count of harming a police dog as charged. The jury acquitted Pegues of fourth-degree assault. CP 58-63. The trial court imposed a standard-range sentence totaling 75 months in prison. CP 66-75. Pegues now appeals. CP 81.

2. SUBSTANTIVE FACTS

In the evening on June 15, 2009, Pegues and a female companion entered the Tukwila Trading Company grocery store

¹ As set forth in the first argument section below, the State's position is that the trial court's ruling should be affirmed on alternative grounds, i.e., that there was no evidence to support the instruction.

and began shopping in a manner that immediately caught the attention of store manager Radu Nartea. RP (4/8/10) 3-5. Nartea described their behavior as "kind of weird" because "they would just grab stuff and throw them in the cart" without checking the labels or prices. RP (4/8/10) 5.

After filling their cart with items, Pegues and his companion went to Tima Omerovich's check-out counter. They had over \$100 in groceries in the cart. RP (4/12/10/) 30. After Omerovich rang up the groceries, Pegues's companion was unable to pay for them because she was not entering the PIN for her EBT card correctly. Rather than acknowledge her error, however, Pegues's companion yelled at Omerovich and blamed it on her. Meanwhile, Pegues picked up a ball from a display near the checkstand and started playing with it. RP (4/12/10) 31. Omerovich told them that she would hold the groceries for 20 or 30 minutes so that they could find the PIN for the EBT card. Pegues and his companion left the store; Pegues took the ball without paying for it. RP (4/8/10) 9; RP (4/12/10) 32.

Pegues and his companion returned about 15 minutes later. This time, they had the correct PIN for the EBT card, but the card had no money on it. RP (4/12/10) 32. Again, the woman yelled at

Omerovich and called her names as if it were her fault. Nartea approached and asked if Pegues had paid for the ball, and Omerovich said he had not. RP (4/12/10) 32-33. Nartea asked Pegues to pay for the ball, and Pegues said "what ball?" RP (4/8/10) 9. Pegues and his companion began yelling and making a scene; checker Angela Tonian called the police. RP (4/8/10) 10; RP (4/12/10) 8. Another customer offered to pay for the ball. RP (4/8/10) 10-11. Pegues's companion left. RP (4/12/10) 8.

Nartea tried to detain Pegues, and Pegues "body checked" Nartea into a wall. Nartea told Pegues they were calling the police, and that Pegues would be trespassed from the store. RP (4/8/10) 12. Pegues tried to leave, and security guard Mitchell Johnson tried to grab him. RP (4/8/10) 13. Pegues took a swing at Johnson's face with a closed fist² and took off running. RP (4/12/10) 105. Nartea, Johnson, and Kemran Murtazayev (another store employee) chased Pegues. RP (4/12/10) 50. Pegues pulled a knife. RP (4/8/10) 14-15; RP (4/12/10) 50-51, 106-07.

² This was the basis of the fourth-degree assault charge of which Pegues was acquitted.

Pegues ran across the street to a motel. RP (4/12/10) 51, 106. At that point, Tukwila Police officers began arriving in the area in response to the 911 call. RP (4/12/10) 52. Nartea flagged one of the officers down and pointed to where Pegues was hiding. RP (4/8/10) 17. When Pegues spotted the officer, he took off running again. Pegues climbed over a fence and onto a playfield, and he ran through the basketball court where several youths were playing a game. One of the players exclaimed that Pegues had a knife, and the players scattered. RP (4/12/10) 108-09.

Officer Brian Jordan was the first officer to approach Pegues. Pegues turned toward Jordan, started shouting "You are going to have to fucking kill me," and began jumping up and down while brandishing the knife. RP (4/14/10) 33-34. Pegues repeated multiple times that Jordan was going to have to kill him. RP (4/14/10) 34-35. Jordan drew his gun and forcefully commanded Pegues "to get the fuck on the ground" at least 10-12 times. RP (4/14/10) 35. Pegues did not comply. Instead, he continued to bounce up and down while "holding the knife up high." RP (4/14/10) 36.

Pegues started moving toward the exit of the playfield. RP (4/14/10) 37. Officer Jordan decided to prevent Pegues from

getting to the exit; Jordan reached the exit just before Pegues did. RP (4/14/10) 38-39. At that point, only 7-9 feet separated Jordan from Pegues, and Pegues was still brandishing the knife; nonetheless, Jordan did not fire his gun at Pegues because he was afraid of endangering innocent bystanders behind Pegues in the process. RP (4/14/10) 39-40. Instead, Jordan advanced in an effort to try to get Pegues to back up; Pegues was still bouncing up and down while brandishing the knife. RP (4/14/10) 40-41. Pegues was still yelling, "I'll kill you, you are going to have to kill me." RP (4/8/10) 91.

At that point, Detective Jay Seese and Officer James Devlin approached with their guns drawn. RP (4/14/10) 41-42. Officer Jordan decided to try to use his taser now that the other officers were covering Pegues with their guns. RP (4/14/10) 42. Jordan deployed his taser successfully, striking Pegues with both probes. Pegues fell down, and Jordan put his foot on Pegues's back to keep him down. RP (4/14/10) 45.

Just then, K-9 Officer James Sturgill told Officer Jordan to back off. Jordan looked up and saw Sturgill's K-9 partner Gino running toward Pegues. RP (4/14/10) 46. In accordance with his training to bite and hold suspects, K-9 Gino bit Pegues in the head

area. RP (4/14/10) 116-17, 122. Officer Sturgill then gave the "out" command to call Gino off; Gino heeded the command and let go. RP (4/14/10) 123, 127; RP (4/15/10) 63. Sturgill thought the incident was over. RP (4/14/10) 125. Pegues then got on his knees and stabbed K-9 Gino in the neck "right behind his left ear." RP (4/14/10) 127. Gino let out a "blood curdling screech" and ran off. RP (4/14/10) 50. Gino ran around in circles while Sturgill tried to get him to "heel." RP (4/15/10) 63.

After stabbing Gino, Pegues spun around and faced Officer Jordan and Officer Devlin while still holding the knife. Pegues started to get up while moving towards Jordan and Devlin with the knife in his hand.³ RP (4/15/10) 64. Both Jordan and Devlin feared for their lives and had no doubt that Pegues was coming at them with the knife with the intention of using it. RP (4/14/10) 52, 92; RP (4/15/10) 68-69, 82. Just as Jordan and Devlin were drawing their guns and preparing to fire, Detective Seese fired two rounds into Pegues's torso, and Pegues collapsed. RP (4/8/10) 100; RP (4/14/10) 52-53; RP (4/15/10) 64.

³ This action was the basis for the second-degree assault charges.

Detective Seese pinned Pegues's arm with his foot while Officer Jordan tossed the knife away. RP (4/8/10) 101. Officer Jordan and Officer Devlin then secured Pegues in handcuffs. RP (4/14/10) 54. Detective Seese called for aid, and Pegues was taken to Harborview. RP (4/8/10) 101. Pegues is confined to a wheelchair as a result of being shot by Detective Seese.

Meanwhile, Officer Sturgill put K-9 Gino in his patrol car and drove to the nearest veterinarian as quickly as possible, but that veterinarian would not help him. RP (4/14/10) 129. Just then, an unidentified King County detective arrived in an unmarked SUV, and he told Sturgill that he knew how to get to the emergency veterinary hospital in Burien. RP (4/14/10) 130. The detective drove Sturgill and Gino to the hospital in Sturgill's patrol car, and Gino went straight into surgery upon arrival. RP (4/14/10) 130-31. Although the stab wound in Gino's neck was 4-5 inches deep, the vital structures had fortunately not been damaged. RP (4/15/10) 6-9. The veterinarian surgically repaired a severed muscle, and Gino was back on duty in about three weeks. RP (4/14/10) 131-32; RP (4/15/10) 6.

Pegues presented one witness at trial: forensic video expert Thomas Sandor, who analyzed the available video footage from the

dashcams in two officers' patrol cars. RP (4/19/10) 10-12. Sandor testified that the video did not show an aggressive movement by Pegues just before he was shot. RP (4/19/10) 42. On the other hand, Sandor testified that he could not see Pegues stabbing Gino on the video, either. RP (4/19/10) 38. Pegues argued in closing that he stabbed Gino to protect himself, and that he was trying to get away from the officers and did not assault them. RP (4/19/10) 75-76.

Additional procedural and substantive facts will be discussed below as necessary for argument.

C. ARGUMENT

1. THE TRIAL COURT CORRECTLY RULED THAT THE JURY SHOULD NOT BE INSTRUCTED ON SELF-DEFENSE ON THE CHARGE OF HARMING A POLICE DOG.

Pegues first claims that the trial court erred in refusing to give his proposed instruction on self-defense for stabbing K-9 Gino in the neck. More specifically, Pegues argues that the trial court erred in concluding that justifiable force instructions do not apply when the defendant's alleged attacker is a dog rather than a person. Brief of Appellant, at 10-22. This claim should be rejected, albeit on alternative grounds. As the trial prosecutor argued

pretrial, the evidence does not support the instruction, even by the low quantum of evidence required. Thus, it is not necessary for this Court to ponder the issue Pegues presents, as the instructions were properly refused in any event.

If a trial court's stated basis for a ruling is incorrect,⁴ that ruling may still be affirmed on any other proper basis supported by the record. State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

Jury instructions are sufficient if they are supported by substantial evidence, permit each party to argue its theory of the case, and properly inform the jury of the applicable law. State v. Clausung, 147 Wn.2d 620, 625, 56 P.3d 550 (2002). When determining whether the evidence was sufficient to support giving an instruction, the appellate court views the evidence in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-46, 6 P.3d 1150 (2000). However, "[t]o raise self-defense before a jury, a defendant bears

⁴ For purposes of this case, the State is not contesting that the trial court's stated basis (i.e., that self-defense does not apply to dogs) is incorrect. However, the State's position is that there is no need to reach this issue because there was no factual basis to give Pegues's requested instruction, i.e., no evidence that Pegues was in actual imminent danger of serious injury or death, and no evidence that he was defending himself against excessive, unlawful force.

the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense[.]” State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

In this case, Pegues agreed that the applicable standard for self-defense to the charge of harming a police dog is the same as the standard for the use of force against a police officer in resisting an arrest. See RP (4/6/10) 13. Under that standard, a person who is being arrested may use force to resist that arrest only if the officer is using excessive force that creates an actual imminent danger of serious injury or death. State v. Holeman, 103 Wn.2d 426, 430, 693 P.2d 89 (1985). The policy behind this rule is sound, as “[o]rderly and safe law enforcement demands that an arrestee not resist a lawful arrest . . . unless the arrestee is actually about to be seriously injured or killed” by the use of excessive force by the police. Id. (quoting State v. Westlund, 13 Wn. App. 460, 467, 536 P.2d 20 (1975)).

However, police officers are expressly authorized to use deadly force to arrest someone -- or, if their efforts to arrest the suspect are thwarted, they are authorized to shoot the suspect -- when they have probable cause to believe that the person has committed a felony, and particularly when “[t]he suspect threatens

a peace officer with a weapon or displays a weapon in a manner that could reasonably be construed as threatening[.]” RCW 9A.16.040(2)(a). Therefore, the use of deadly force by police officers is, by definition, not excessive in such circumstances.

Here, Pegues requested the following instruction based on WPIC 17.02.01, which correctly states the law for the use of self-defense against police officers:

It is a defense to the charge of Harming a Police Dog that force used was lawful as defined in this instruction.

A person may use force to resist an arrest by someone known by the person to be a police officer only if the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force. The person may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

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

CP 48. Accordingly, in order to receive this instruction, there had to be some evidence produced at trial from which the jury could conclude that Pegues was in actual, imminent danger of serious

injury or death from the use of excessive (and hence, unlawful) force. In this case, such evidence simply did not exist.

In this case, it was undisputed that Pegues displayed a knife when Officer Jordan first attempted to apprehend him. RP (4/14/10) 32-33. Pegues turned toward Jordan, brandished the knife, jumped up and down, and yelled, "You are going to have to fucking kill me." RP (4/14/10) 33-35. At that point, Jordan drew his gun and commanded Pegues to get on the ground multiple times, but Pegues refused to comply. RP (4/14/10) 35-36. Jordan prevented Pegues from leaving the playfield by blocking the exit; Pegues continued to brandish the knife and shout at Jordan. RP (4/14/10) 38-39. Detective Seese and Officer Devlin approached with their guns drawn. RP (4/14/10) 41-42. At that point, Jordan shot Pegues with his taser and Pegues went down. RP (4/14/10) 42-45.

Jordan was in the process of putting his foot on Pegues's back to hold him down when K-9 Officer Sturgill told him to back off. RP (4/14/10) 45-46. K-9 Gino then contacted Pegues and bit him in the head area. RP (4/14/10) 47-48. Gino is trained to bite suspects in order to apprehend them. RP (4/14/10) 116-17. As soon as Gino bit Pegues, Officer Sturgill gave the "out" command,

and Gino let go of Pegues. RP (4/14/10) 123, 127; RP (4/15/10) 63. Pegues then came off the ground with the knife and stabbed Gino in the neck. RP (4/14/10) 127.

Based on these facts, which were almost completely uncontested,⁵ there is no evidence to support the notion that Pegues was actually in imminent danger of serious injury or death, or that he was lawfully defending himself against the use of excessive force when he stabbed K-9 Gino in the neck. Prior to the stabbing, Pegues had brandished his knife at Officer Jordan, ignored numerous commands to surrender, and informed Jordan in no uncertain terms that he would rather be killed than arrested. After Pegues was tased, K-9 Gino followed his training to bite and hold Pegues so that he could be taken into custody. Gino also heeded Officer Sturgill's command to release Pegues, at which point Pegues came up with the knife and stabbed him. Given that the officers were legally justified in using *deadly* force under these circumstances, the fact that they deployed a police dog in a non-lethal manner simply cannot be construed as excessive. In

⁵ Pegues presented video expert Thomas Sandor, who testified that he saw no lunging motion as described by Officers Jordan and Devlin on the dashcam video footage. However, Sandor also readily admitted that he could not see Pegues stabbing Gino on the video, either. RP (4/15/10) 38.

addition, Pegues stabbed Gino after Gino had heeded the "out" command, which further demonstrates that Pegues was not in actual imminent danger and that the police were not using excessive force at the time of the stabbing.

In sum, there was no evidence that would justify giving the self-defense instruction in this case. Accordingly, there is no basis to reverse based on the trial court's refusal to give this instruction, and this Court should affirm.

But even if this Court were to conclude that the failure to give the self-defense instruction was error, any possible error is harmless, even under the higher standard for constitutional error. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that "any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

In this case, in order to prove the crime of harming a police dog, the State was required to prove beyond a reasonable doubt that Pegues acted with malice when he stabbed K-9 Gino. RCW 9A.76.200; CP 104. "Malice" was correctly defined for the jury as "an evil intent, wish, or design to vex, annoy, or injure" another. RCW 9A.04.110(12); CP 103. As noted by the trial court,

the instructions allowed Pegues to argue that stabbing Gino was not malicious because he was merely defending himself against a dog that was biting him. RP (4/7/10) 18. Indeed, the instructions that were given are arguably more favorable to Pegues than the self-defense instruction he proposed, because he could argue his theory of the case without having to convince the jury that he was in actual imminent danger of serious injury or death or that the police were using excessive force. Rather, Pegues could simply argue that he did not act with malice because he was protecting himself. The fact that the jury found beyond a reasonable doubt that Pegues *did* act with malice demonstrates that the self-defense instruction would not have made a difference to the outcome of the trial.

Furthermore, if the trial court had given Pegues's proposed instruction on self-defense, the State would have been entitled to the so-called "first aggressor" instruction, which states:

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

WPIC 16.04. This instruction is based on the principle that self-defense "cannot be successfully invoked by an aggressor or one who provokes an altercation[.]" State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). "If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction." Id. at 910. In this case, it is beyond any rational dispute that Pegues was the first aggressor; indeed, there is no evidence suggesting otherwise. Therefore, even if the self-defense instruction had been given, the jury would still have convicted Pegues because he was undisputedly the first aggressor.

In sum, any rational jury would have convicted Pegues of harming a police dog even if the trial court had given his proposed instruction on self-defense. Accordingly, any possible error is harmless beyond a reasonable doubt. This Court should reject Pegues's claim, and affirm.

2. PEGUES'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT BECAUSE TRIAL COUNSEL'S "ALL OR NOTHING" STRATEGY WAS REASONABLE.

Pegues next claims that he received ineffective assistance of counsel because his trial attorney did not request instructions on unlawful display of a weapon⁶ as a lesser-included offense of assault in the second degree as charged in counts I and II. Brief of Appellant, at 22-32. This claim should be rejected. Trial counsel's strategy to argue for outright acquittal on the second-degree assault charges was reasonable, and the case law Pegues cites in order to argue otherwise has been overruled. Accordingly, this Court should affirm.

A criminal defendant has the constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 682, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

⁶ The State agrees that unlawful display of a weapon would be a lesser-included offense to assault in the second degree in this case.

The defendant bears the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To carry this burden, the defendant must meet both prongs of a two-part test. Specifically, the defendant must show: 1) that counsel's representation was deficient, meaning that it fell below an objective standard of reasonableness considering of all the circumstances (the "performance prong"); and 2) that the defendant was prejudiced, meaning that there is a reasonable probability that the result of the trial would have been different but for counsel's unprofessional errors (the "prejudice prong"). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. As the Supreme Court has warned, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all

too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Therefore, every effort should be made to "eliminate the distorting effects of hindsight," and to judge counsel's performance from counsel's perspective at the time. Strickland, 466 U.S. at 689.

In judging counsel's performance, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes the presumption that challenged actions were the result of a reasonable trial strategy. Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). In any given case, effective representation may be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must also affirmatively show material prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the trial. Strickland, 466 U.S. at 693. If the standard were so low, virtually any

act or omission would meet the test. Strickland, 466 U.S. at 693.

Therefore, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Strickland, 466 U.S. at 694.

In this case, Pegues argues that he received ineffective assistance of counsel because his trial attorney did not request instructions on the lesser crime of unlawful display of a weapon. He makes this claim based on the three-part inquiry from this Court's decision in State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2005), which was then applied in several subsequent Court of Appeals decisions.⁷ That three-part inquiry for the failure to request lesser-included offense instructions consisted of these factors:

- 1) whether there is a significant discrepancy between the penalties for the charged crime and the lesser crime;
- 2) whether the defenses for the charged crime and the lesser crime would have been the same; and
- 3) whether an "all or nothing" strategy poses a significant risk for the defendant given all of the circumstances present at trial.

Ward, 125 Wn. App. at 249-50. Based on these three factors,

⁷ See, e.g., State v. Pittman, 134 Wn. App. 376, 166 P.3d 720 (2006); State v. Breitung, 155 Wn. App. 606, 230 P.3d 614 (2010); In re Personal Restraint of Crace, 157 Wn. App. 81, 236 P.3d 914 (2010).

Pegues argues that his trial counsel's performance was deficient, and that he suffered prejudice as a result. Brief of Appellant, at 26-31.

Recently, however, the Washington Supreme Court expressly overruled Ward and its progeny. In State v. Grier, ___ Wn.2d ___, 246 P.3d 1260 (2011), the defendant made the same claim that Pegues makes here: that trial counsel's decision not to request instructions on a lesser offense constituted ineffective assistance of counsel. The court unanimously reversed Division Two's conclusion that the failure to request manslaughter instructions in Grier's murder case was ineffective, and in so doing, the court expressly rejected the three-part test from Ward. More specifically, the court held that the first two parts of the test "tip the scales in favor of deficient performance, despite the Strickland presumption of effective assistance." Grier, 246 P.3d at 1271. Also, the court held that the third part of the test was "troubling" because it requires an appellate court to substitute its judgment for that of trial counsel and the defendant as to whether the risk of an "all or nothing" strategy is acceptable or not. Id. The court concluded that the strategy to seek an acquittal is reasonable, despite the risk that the jury will convict the defendant as charged. Id. at 1273. Grier is controlling here.

In this case, trial counsel presented the testimony of a forensic video expert to support the defense theory that the aggressive motion with the knife that Officers Jordan and Devlin described (which formed the basis for the second-degree assault charges) did not actually occur. RP (4/19/10) 38, 42. Counsel then argued in closing that Pegues did not assault the officers with the knife, and was instead trying to escape from them. RP (4/19/10) 76. If the jurors had had a reasonable doubt as to whether Pegues had moved aggressively toward the officers with the knife, as counsel argued that they should, they would have acquitted Pegues of both second-degree assault charges.

As in Grier, seeking an acquittal was a reasonable trial strategy in this case, and Pegues has failed to show otherwise. Pegues cannot meet his burden of showing deficient performance. Moreover, as in Grier, this Court must presume "that the jury would not have convicted . . . unless the State had met its burden of proof[.]" Grier, 246 P.3d at 1274. Accordingly, "the availability of a compromise verdict" in the form of a lesser-included offense "would not have changed the outcome of [the] trial." Id. Therefore, Pegues cannot show prejudice, either. This Court should reject Pegues's claim, and affirm.

3. PEGUES CANNOT SHOW THAT ANY OF THE PROSECUTOR'S REMARKS IN REBUTTAL WERE FLAGRANTLY IMPROPER AND INCURABLY PREJUDICIAL.

Lastly, Pegues argues that the trial prosecutor committed misconduct during his rebuttal argument. Brief of Appellant, at 32-40. More specifically, Pegues argues that the prosecutor's remarks "shifted the burden of proof and diluted the presumption of innocence." Brief of Appellant, at 36. These arguments should be rejected. Pegues cannot demonstrate that he was deprived of a fair trial due to the challenged remarks because the remarks were neither flagrantly improper nor incurably prejudicial.

In order to prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the prosecutor's conduct was both improper and prejudicial in light of the entire record and all of the circumstances present at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003), rev. denied, 151 Wn.2d 1039 (2004) (citing State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). A defendant who claims that prosecutorial misconduct during closing argument deprived him of a fair trial "bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect."

State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

Moreover, a defendant who did not make a timely objection has waived any claim on appeal unless the argument in question is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id.

A prosecutor is afforded wide latitude in closing argument to draw reasonable inferences from the evidence for the jury.

Stenson, 132 Wn.2d at 727. Also, arguments in rebuttal that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v.

Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). The prosecutor's remarks must not be viewed in isolation, but "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury."

Brown, 132 Wn.2d at 561. Pegues's claims of misconduct fail in light of these standards.

As a preliminary matter, Pegues did not object to any of the remarks he now challenges on appeal. Therefore, he bears the burden of showing that the challenged remarks were so flagrantly

improper that they resulted in incurable prejudice. Pegues cannot meet this burden.

The remarks to which Pegues now objects, which are quoted at length in his brief, were made during the prosecutor's rebuttal. Brief of Appellant, at 33-34; RP (4/19/10) 80-82. Thus, under the applicable law, the starting point for this analysis is defense counsel's closing argument to determine whether the rebuttal remarks are a fair reply. Viewing the prosecutor's rebuttal in this context, rather than in isolation as Pegues presents it, the remarks are a fair reply to the arguments of the defense.

During her closing argument, defense counsel argued repeatedly that the officers' testimony was not credible, and that what really happened during this incident was depicted in the dashcam video footage. For instance, near the beginning of her closing, counsel argued that "all of the answers to all of the questions with regard to whether or not these acts were committed" were to be found on the video. RP (4/19/10) 67. Counsel then argued several times that the video did not show that Pegues had lunged at the officers with a knife as they had claimed, but instead it showed that Pegues was trying to escape. RP (4/19/10) 67-69.

In addition, counsel questioned the officers' credibility in general, and Officer Jordan's credibility in particular. She sharply questioned Jordan's testimony that "this was the most scared he has ever been in his life. Really? Really?" RP (4/19/10) 70. She also argued that the police officers had discussed their testimony among themselves "in order for the charge to stick" and to "try to make sure, does it all sound the same?" RP (4/19/10) 71-72. At the end of her closing, counsel returned to the argument that the video was "the truth" and the officers should not be believed:

So when you go back to the jury room I want you to take a look at the video and remember, the truth is here. And the truth is, there was no lunge. Mr. Pegues was trying to get up. There was no lunge at all, and therefore, since the act is getting up, is getting up an act that would cause you to fear? Is the fact that these police officers with a combined experience of over 30 years when someone is getting up, is that going to cause them to fear that they believe they're going to have bodily injury? I'd say no.

RP (4/19/10) 78.

In rebuttal, the prosecutor talked about "spoken" and "unspoken" defenses. As examples of "spoken" defenses, the

prosecutor mentioned self-defense,⁸ alibi, diminished capacity, and insanity. RP (4/19/10) 80-81. The prosecutor then argued that the "unspoken" defense in this case was "one of three things": 1) that the officers were confused; 2) that the officers were mistaken; or 3) that the officers were fabricating. RP (4/19/10) 81. After dismissing the first two options based on the evidence produced at trial, the prosecutor argued that the "unspoken" defense that counsel was arguing in her closing was that the officers were fabricating their stories, and that they had conspired to convict the defendant. RP (4/19/10) 81-82.

These remarks were a fair reply to defense counsel's closing for at least two reasons. First, contrary to what Pegues claims, the prosecutor did not argue that "spoken" defenses were legitimate and "unspoken" defenses were not. The prosecutor merely used this rhetorical device to make it clear to the jurors that defense counsel had not expressly stated the obvious point of her argument, i.e., that the officers were lying. Second, these

⁸ Although Pegues suggests that mentioning self-defense was improper because Pegues was precluded from raising this defense to the charge of harming a police dog, the context of the prosecutor's argument shows that the prosecutor was talking about the second-degree assault charges when he made these remarks, and Pegues's defense to the assault charges was not self-defense.

arguments were a fair reply because they were correct. Defense counsel argued everything short of stating outright that the officers were lying, but that was indeed her "unspoken" argument. Because these remarks were a fair reply to defense counsel's closing argument, the remarks were not improper.

Moreover, Pegues's claims that these remarks shifted the burden of proof and undermined the presumption of innocence are off the mark. Pegues argues that the prosecutor's remarks in this case are the same as the improper argument that "in order to acquit the defendant, you must find that the State's witnesses are lying." See, e.g., State v. Fleming, 83 Wn. App. 213, 921 P.2d 1076 (1996). This is a false comparison. The prosecutor did not argue that the jurors must find that the officers were lying in order to acquit. Rather, he argued that defense counsel was contending the officers were lying, and that defense counsel's contention in this regard should be rejected. Unlike the improper "in order to acquit" argument, which is legally false, there is nothing improper about asking the jurors to reject the defense attorney's argument. Pegues also argues that the prosecutor's remarks undermined the presumption of innocence by suggesting that "spoken" defenses are legitimate and "unspoken" defenses are not, and by suggesting

that a general denial defense is "essentially a concession of guilt." Brief of Appellant, at 37. But nothing in the prosecutor's rebuttal suggests that the jurors should have found Pegues guilty based on the defense he chose to present. Again, the prosecutor was merely arguing that the jurors should reject Pegues's defense.

In sum, Pegues has not met his burden of showing prosecutorial misconduct, particularly under the "flagrant and ill-intentioned" standard, because the prosecutor's remarks in rebuttal were a fair reply to the arguments of defense counsel. Moreover, Pegues has not shown incurable prejudice, particularly in light of the overwhelming evidence against him. This Court should reject Pegues's claim, and affirm.

Lastly, Pegues argues that this Court should apply the standard of review for errors of constitutional magnitude, i.e., that any error is harmless only if the Court is convinced beyond a reasonable doubt that there was no impact on the jury's verdict. Brief of Appellant, at 35-36. This is incorrect, for there is but one standard to apply in evaluating prejudice in a prosecutorial misconduct case: whether there is a substantial likelihood that the misconduct affected the verdict. The State has found no United States Supreme Court case or Washington Supreme Court case

that has applied any other standard. However, a few Court of Appeals cases have applied a constitutional harmless error standard to misconduct cases.⁹ These cases apply an incorrect legal standard. The genesis of the error in these cases can be traced back to a misreading of a footnote from a 25-year-old Washington Supreme Court case.¹⁰

The misapplication of the harmless error standard began in State v. Traweek. In closing argument of Traweek's robbery case, the prosecutor told the jury that the defendant could have called witnesses on his behalf but did not. This was clearly misconduct, the constitutional burden of proof being on the State, a defendant has no burden to present evidence.

⁹ See e.g., State v. Traweek, 43 Wn. App. 99, 715 P.2d 1148 (1986); State v. Contreras, 57 Wn. App. 471, 788 P.2d 1114 (1990); State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996); State v. Moreno, 132 Wn. App. 663, 132 P.2d 1137 (2006); State v. French, 101 Wn. App. 380, 4 P.3d 857 (2000), rev. denied, 142 Wn.2d 1022 (2001).

¹⁰ Recently, when the issue was brought to the Washington Supreme Court's attention that some lower courts were using a different standard, the Supreme Court stated that the approach used by these courts was inconsistent with the Court's long-used approach to evaluating prejudice in misconduct cases. See State v. Warren, 165 Wn.2d 17, 26 n.3, 195 P.3d 940 (2008); see also State v. Dixon, 150 Wn. App. 46, 57 n.4, 207 P.3d 459 (2009).

In analyzing this misconduct, the Court of Appeals stated that "[w]hen a comment also affects a separate constitutional right, such as the privilege against self-incrimination, it is subject to the stricter standard of constitutional harmless error." Traweek, 43 Wn. App. at 108. In making this statement, the court cited to footnote 1 of State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). See Traweek, at 108 (citing Davenport, at 761-62 n.1). The problem is that Davenport did not say what the Court of Appeals asserted.

In Davenport, the Supreme Court stated that trial irregularities do not independently violate a defendant's constitutional rights. Davenport, 100 Wn.2d at 761-62. In footnote 1, the Court contrasted situations wherein defendant's constitutional rights are violated. Specifically, the Court cited to State v. Evans, 96 Wn.2d 1, 633 P.2d 83 (1981), followed by the parenthetical "(improper comments on the defendant's right to remain silent)." Davenport, at 761 n.1. Apparently, this language in the parenthetical was interpreted by the Court of Appeals to mean that improper comments by the prosecutor about a defendant's

right to remain silent must be reviewed under a different standard than the well-established standard for prosecutorial misconduct.

This is not the case.

Evans was not a "trial irregularity" case; it was a "trial error" case. In Evans, testimony regarding Evans's post-arrest silence was improperly admitted. Two officers testified that after being advised of his right to remain silent, Evans declined to talk about the incident, suggesting guilt from the exercise of his constitutional right. Evans, 96 Wn.2d at 3. It is this trial error that was reviewed, correctly, under a constitutional harmless error standard. Id. at 4.

There was also misconduct alleged in Evans involving the prosecutor's questions about the defendant's post-arrest silence. Evans, 96 Wn.2d at 5. The misconduct was analyzed under a different standard, i.e., "whether there was a substantial likelihood that the misconduct affected the jury's verdict, thereby depriving the defendant of his right to a fair trial." Id. Thus, contrary to the assertion in Traweek, neither Davenport nor Evans stands for the proposition that there is anything but one standard for reviewing

misconduct cases.¹¹ This Court should reject Pegues's argument to the contrary.

In sum, under the correct legal standard, the prosecutor's remarks in this case were not flagrant and ill-intentioned, nor were they so prejudicial that they could not have been cured by an instruction from the court if Pegues had requested one.

D. CONCLUSION

Pegues was not entitled to a self-defense instruction, he received effective assistance of counsel, and he has failed to demonstrate that prosecutorial misconduct deprived him of a fair trial. For the reasons stated above, this Court should affirm Pegues's convictions for two counts of assault in the second degree

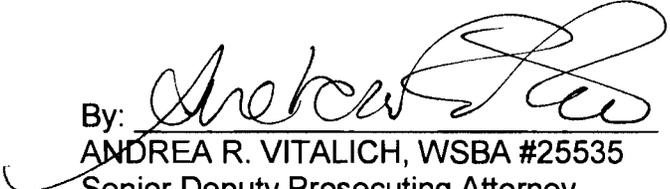
¹¹ A close review of the Court of Appeals cases shows that they all ultimately refer back to Traweek, or the misinterpretation first promulgated in Traweek. See e.g. Contreras, 57 Wn. App. at 473 (citing Traweek); Fleming, 83 Wn. App. at 215-16 (citing Traweek); French, 101 Wn. App. at 386 (citing Traweek and Griffen--see below); Moreno, 132 Wn. App. at 671-72 n.23 (citing Traweek and Contreras). In none of these cases did the State argue that any other standard applied. Instead, the parties merely accepted the incorrect proclamation from Traweek. While not cited by the defendant here, many defendants also cite to two United States Supreme Court cases, but neither is a misconduct case. See Griffen v. California, 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (California's constitution allowed the jury to consider a defendant's silence in determining guilt--the Supreme Court found this violated the United States Constitution); Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) (holding for the first time that post-arrest silence could not be used to impeach a defendant).

with deadly weapon enhancements, and one count of harming a
police dog.

DATED this 30th day of March, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. KEVIN PEGUES, Cause No. 65678-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

3/30/11

Date