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No. 67446-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

TYSON S. WHITFORD,

Appellant.

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

The Honorable Jay V. White

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Tyson S. Whitford appeals his conviction for assault in the second degree with a deadly weapon, while armed with a deadly weapon. At trial, his theory of defense was accident, or, in the alternative, self-defense. The trial court, however, excluded Mr. Whitford's proposed evidence of the complaining witness' reputation for aggressiveness and untruthfulness, excluded evidence of specific instances of untruthfulness by both the complaining witness and his wife, and failed to give his proposed jury instructions on the law of self-defense. In addition, in rebuttal argument, the prosecutor improperly referred to a missing State witness, a medical doctor. The jury subsequently requested to see "the medical report," but the trial court denied Mr. Whitford's motion for either a mistrial or five minutes surrebuttal.

The trial court's failure to instruct the jury on the law of self-defense, the trial court's erroneous evidentiary rulings, and the prosecutor's prejudicial misconduct, individually and cumulatively, require reversal.

B. ASSIGNMENTS OF ERROR

1. Mr. Whitford's constitutional right to proof beyond a reasonable doubt of every element of the charged offense was violated when the trial court failed to instruct the jury on the law of self-defense, where Mr. Whitford presented some evidence of self-defense, thereby requiring the State to prove the absence of self-defense beyond a reasonable doubt.

2. Mr. Whitford's constitutional right to present a defense was violated when the trial court excluded evidence of the complaining witness' aggressive character, when Mr. Whitford asserted he acted in self-defense.

3. The trial court erroneously excluded evidence of complaining witness' aggressive character, in violation of ER 404(a)(2) and ER 405(a).

4. The trial court erroneously excluded evidence offered to impeach the credibility of the complaining witness with evidence of his reputation for untruthfulness within a social community, in violation of ER 608(a).

5. The trial court erroneously limited cross-examination of the complaining witness and the complaining witness' wife into

specific instances of untruthfulness, to impeach their credibility, in violation of ER 608(b)(1).

6. Prosecutorial misconduct in rebuttal argument deprived Mr. Whitford of a fair trial.

7. Cumulative error deprived Mr. Whitford of a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When a criminal defendant presents “any evidence” of self-defense, the prosecution bears the burden of proving the absence of self-defense beyond a reasonable doubt. Here, the evidence established that the complaining witness was enraged minutes prior to the altercation, he may have initiated physical contact, and he followed after Mr. Whitford, yelling and screaming, just prior to the alleged assault by Mr. Whitford. Did the trial court’s failure to give Mr. Whitford’s proposed self-defense instruction relieve the State of its burden of proof, in violation of Mr. Whitford’s constitutional right to proof beyond a reasonable doubt of every element of the offense charged? (Assignment of Error 1)

2. When a defendant asserts self-defense, ER 404(a)(2) and ER 405(a) provide for admission of evidence of a complaining witness’ reputation for an aggressive character to show he acted in conformity with that character. Mr. Whitford offered to introduce

evidence that the complaining witness had a reputation for aggressiveness within the social group "X Marks the Scot." Did the trial court violate Mr. Whitford's constitutional right to present a defense, when it excluded evidence that the complaining witness' reputation for aggression on the basis that "X Marks the Scot" was not a "community," and the evidence was irrelevant? (Assignments of Error 2, 3)

3. When a party seeks to impeach the credibility of a witness, ER 608(a) provides for admission of evidence of a witness' reputation for untruthfulness. Did the trial court abuse its discretion when it excluded evidence of the complaining witness' reputation for untruthfulness in the social community "X Marks the Scot," on the grounds that the group was not a "community" for purposes of the evidentiary rule, the proposed testimony was the witness' opinion, and irrelevant? (Assignment of Error 4)

4. ER 608(b)(1) provides for inquiry on cross-examination into specific instances of untruthfulness to impeach the credibility of the witness being cross-examined. Did the trial court violate Mr. Whitford's constitutional right to confrontation and ER 608(b)(1) when it unduly restricted cross-examination of the complaining witness and the complaining witness' wife into specific instances of

their untruthfulness, on the grounds the proposed impeachment evidence was either irrelevant or its probative value was minimal?

(Assignment of Error 5)

5. The due process provisions of the federal and state constitutions require a prosecutor to seek a verdict based on the evidence and free of prejudice. Was Mr. Whitford's constitutional right to due process violated by prejudicial prosecutorial misconduct where the prosecutor improperly and prejudicially referred to a missing State witness in rebuttal argument? (Assignment of Error

6)

6. A criminal defendant is entitled to a new trial when the cumulative effect of multiple errors results in a trial that was fundamentally unfair. Did the cumulative effect of multiple evidentiary errors, the failure to give the defense proposed jury instruction on self-defense, and prosecutorial misconduct result in a trial that was fundamentally unfair and requires reversal?

(Assignment of Error 7)

D. STATEMENT OF THE CASE

Tyson S. Whitford offered to purchase a car dolly from Kerry Mason. 5RP 86. At the time, Mr. Whitford was renting a room from Perry McElroy and Mr. Mason was storing the dolly in Mr. McElroy's yard. 5RP 85-86. Mr. Whitford locked the dolly for security. 6RP 151-52.

Mr. Whitford needed time to get the money for the dolly. 5RP 87. When he did not pay within the time period set by Mr. Mason, Mr. Mason and his wife, Deborah Porter, went to Mr. McElroy's house to repossess the dolly. 4RP 141; 5RP 101, 103. Mr. McElroy was home but Mr. Whitford was not present. 5RP 102.

According to Mr. McElroy, Mr. Mason was angry when he arrived and became enraged when he saw the locks. 6RP 150, 154. Mr. McElroy described Mr. Mason as "hollering and screaming," "off the hook," and "in a rage." 6RP 153, 154. Mr. McElroy called Mr. Whitford and told him Mr. Mason was repossessing the dolly. 6RP 153. Mr. McElroy offered the telephone to Mr. Mason so he could speak to Mr. Whitford, but he refused. 6RP 153.

Mr. Mason cut the locks and took the dolly to the condominium complex where he lived, approximately one half mile

away. 5RP 103, 136. Within minutes, Mr. Whitford and his girlfriend, Nicole Broughton, arrived at the complex and parked where Mr. Mason and a neighbor, Mark Denton, were putting the dolly into a parking space. 4RP 30; 5RP 105. Ms. Porter and another neighbor, Bruce Wade, were watching. 3RP 53; 4RP 32, 145.

Here the witness accounts vary. Ms. Broughton testified that she and Mr. Whitford got out of the van, and Mr. Whitford and Mr. Mason immediately started yelling and swearing at each other. 6RP 83-84, 118-19. Mr. Mason was very angry, confrontational, flailed his arms, and charged at Mr. Whitford. 6RP 84, 86, 87-89. According to Ms. Broughton, Mr. Mason was "obviously" going to hit Mr. Whitford. 6RP 124. She became alarmed and got back inside the van. 6RP 88. From inside the van, she did not see any physical altercation and she did not see either man hold a weapon or other object. 6RP 98, 124-26, 140. Very shortly thereafter, Mr. Whitford got into the van and they drove away. 6RP 90.

Several days later, Mr. Whitford showed Ms. Broughton a dark red stain that looked like dried blood on the driver's side mirror on the van. 6RP 91. When she learned that Mr. Mason was

injured in the altercation, she surmised that he hit his head on the mirror as he charged at Mr. Whitford. 6RP 128-31.

Bruce Wade testified that Mr. Whitford and Ms. Broughton got out of the van and Mr. Mason and Mr. Whitford had a "heated conversation." 3RP 57-58. Mr. Wade described Mr. Mason as "aggressive," "explosive," "pissed off," red in the face, and flailing his arms, and he may have touched Mr. Whitford first. 3RP 82, 87-88. Mr. Whitford then produced a telescoping metal baton approximately 2-3 feet long. 3RP 57-58, 68. Mr. Whitford hit Mr. Mason with the baton three or four times on the head and arms, then he and Ms. Broughton got back in the van and drove away. 3RP 57-58, 69, 71.

Mark Denton testified that Mr. Whitford and Ms. Broughton got out of the van and Mr. Whitford yelled that Mr. Mason had stolen the dolly from him. 4RP 38, 40. Both men were angry, yelling, swearing, and making accusations. 4RP 42. Mr. Whitford turned away, walked towards the front of the van, stopped, reached into his right front pocket, and pulled out a metal baton. 4RP 44. He flexed the baton so it telescoped open to about 18 inches and became rigid. 4RP 44. Mr. Whitford returned to where Mr. Mason was standing and swung the baton. 4RP 50. While he swung the

baton, Mr. Mason shoved and wrestled with Mr. Whitford. 4RP 51. Mr. Mason was struck twice on the head and twice on his forearms. 4RP 51, 58-59. After the second blow, Mr. Mason staggered to one knee, Mr. Whitford got back in the van and drove away, and Mr. Denton called the police. 4RP 51, 60, 63.

Deborah Porter testified that Mr. Whitford got out of the van but Ms. Broughton stayed inside. 4RP 146. Mr. Whitford and Mr. Mason moved towards each other, screaming and yelling. 4RP 144-45, 156. Ms. Porter described "a lot of anger on both sides." 4RP 145. Mr. Whitford went to his van briefly, returned with a metal stick in his hand, and hit Mr. Mason on the head at least one time. 4RP 145, 150, 157, 197.

Kerry Mason also testified that he and Mr. Whitford were angry and yelling at each other. 5RP 105-07. Although Mr. Mason denied being the first aggressor, he testified that Mr. Whitford headed to the van, and that he followed Mr. Whitford and continued to yell at him. 5RP 109. Mr. Whitford then pulled out a metal baton and hit him on the head several times. 5RP 109-10, 112. After being hit, Mr. Mason testified that he again followed Mr. Whitford to the van because he was "angry, plain and simple." 5RP 120. Mr.

Whitford got in the van, locked the doors, and drove away. 5RP 120.

Mr. Whitford was charged with assault in the second degree with a deadly weapon, while armed with a deadly weapon, in violation of RCW 9A.36.021(1)(c), RCW 9.94A.825, and RCW 9.94A.533(4). CP 5. Mr. Whitford asserted self-defense and moved to present evidence of Mr. Mason's reputation for aggression within X Marks the Scot, pursuant to ER 404(a) and ER 405(a). CP 9-11, 14-18, 42-44; 2RP 88-103; 3RP 25-26. He also moved to impeach the credibility of Mr. Mason with evidence of his reputation for untruthfulness within the "X Marks the Scot," a social organization to which he belonged, and to impeach the credibility of both Mr. Mason and Ms. Porter by cross-examination into specific instances of their untruthfulness, pursuant to ER 608(a) and ER 608(b). CP 11-13, 18-20, 44-48, 49-50; 2RP 103-05; 3RP 21; 5RP 48-50, 63-66.

The trial court ruled that Mr. Mason's reputation for untruthfulness and aggression within X Marks the Scot was inadmissible, because the group was not a "community," for purposes of ER 404(b) and ER 608(a), and the proposed testimony was irrelevant. 2RP 118-19; 3RP 26-30; 5RP 66-74. The court

specifically noted that its ruling excluding the reputation evidence was not based on a finding that the reputation was too remote in time to the incident sub judice. 2RP 125-27.

At trial, Mr. Whitford attempted to impeach the credibility Ms. Porter by cross-examining her about specific instances of untruthfulness during a trip she and Mr. Mason took with a couple they met through X Marks the Scot, when the trip ended bitterly and resulted in a small claims lawsuit involving the dolly. 4RP 163-67. The State objected and the court instructed the jury to disregard any testimony regarding the trip. 4RP 167-77.

Mr. Whitford attempted to cross-examine Mr. Mason regarding the small claims lawsuit, but the trial court prohibited the cross-examination, on the grounds it was irrelevant. 5RP 145, 156-60; 6RP 109.

Mr. Whitford proposed instructions, inter alia, on self-defense. CP 74-75; 7RP 10-11, 29-30. The court declined to give the instructions, ruling the defense failed to present sufficient evidence to support self-defense. 7RP 31.

During closing argument, the prosecutor referred to a medical doctor, a State's witness who was not called by the prosecutor. 7RP 88. The defense objection was sustained but the

defense motion for either a mistrial or five minutes surrebuttal was denied. 7RP 88, 90. During deliberations, the jury inquired about “the medical report.” CP 101. The court directed the jury to refer to the instructions. CP 102. The defense renewed its motion for a mistrial which was again denied. 7RP 99.

Mr. Whitford was convicted as charged. CP 99-100.

E. ARGUMENT

1. MR. WHITFORD'S CONSTITUTIONAL RIGHT TO PROOF BEYOND A REASONABLE DOUBT WAS VIOLATED WHEN THE TRIAL COURT ERRONEOUSLY FAILED TO GIVE HIS PROPOSED JURY INSTRUCTIONS ON THE LAW OF SELF-DEFENSE.

- a. Mr. Whitford was entitled to have the jury

instructed on the law of self-defense. Mr. Whitford proposed the following two jury instructions on the law of self-defense.

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

The use of force upon or toward the person of another is lawful when used by 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 the force may employ such force and means as a reasonably prudent person would use under the same of similar conditions as they appeared to the person, taking into consideration all

of the facts and circumstances known to the person at the time of and prior to the incident.

The State 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.

A person is entitled to act on appearances in defending himself or herself, if he or she believes in good faith and on reasonable grounds that he or she is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 74-75.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

By statute, self-defense is a lawful use of force. RCW 9A.16.020(3).¹ Thus, proof of self-defense negates the knowledge element of assault in the second degree. State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984).

Where a defendant produces “any evidence” to support a claim of self-defense, the State bears the burden of disproving self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997); Acosta, 101 Wn.2d at 618-19.

Here, the evidence from various witnesses was sufficient to constitute “any evidence” of self-defense. Mr. McElroy testified that Mr. Mason was enraged minutes before Mr. Whitford arrived at the condominium complex. 6RP 150, 153-54. Ms. Broughton testified that Mr. Mason was angry, confrontational, flailed his arms, and charged at Mr. Whitford. 6RP 84, 86, 87-89. Mr. Wade testified that Mr. Mason was aggressive and explosive when Mr. Whitford arrived and he may have pushed Mr. Whitford first. 3RP 82, 87-88.

¹ RCW 9A.16.020(3) provides:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

...

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary;

Then Mr. Mason testified that he followed after Mr. Whitford as Mr. Whitford was going to his van and continued to yell at him. 5RP 109. This evidence was more than sufficient to raise the issue of self-defense.

b. The trial court's failure to give Mr. Whitford's proposed jury instructions on the law of self-defense requires reversal. "Once any evidence of self-defense is produced, the defendant has a due process right to have his theory of the case presented under proper instructions." State v. Adams, 31 Wn. App. 393, 396, 641 P.2d 1207 (1982). Failure to instruct the jury that the State has the burden of disproving self-defense beyond a reasonable doubt is an error of constitutional magnitude because it improperly places the burden of proof on the defendant. State v. McCullum, 98 Wn.2d 484, 488, 496-97, 656 P.2d 1064 (1983). In the absence of the proper instructions on the burden of proof, "[a] reasonable juror could have mistakenly concluded that the petitioner had not met his 'burden of proof' to establish a 'reasonable doubt,' and thus convicted him." Id. at 498.

A trial court's failure to provide jury instructions that make clear the burden of proof is reversible error per se, unless the instructions as a whole make clear that the State has the burden of

disproving self-defense beyond a reasonable doubt. Acosta, 101 Wn.2d at 621; McCullum, 98 Wn.2d at 499. Here, the trial court failed to instruct the jury in any manner regarding the law of self-defense and the State's burden of proof. Reversal is required.

2. MR. WHITFORD'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN THE TRIAL COURT EXCLUDED EVIDENCE OF THE COMPLAINING WITNESS' AGGRESSIVE CHARACTER.

A criminal defendant has the constitutional right to present a defense. U.S. Const. amend. VI; Wash. Const. art. I, sec. 22; State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The right to present relevant evidence to establish a claim of self-defense is accordingly a fundamental element of due process of law. Adams, 31 Wn. App. at 396.

A trial court's decision regarding the admission of evidence is reviewed for abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). Even where a court has discretion regarding the admission or exclusion of evidence, however, that discretion may not be exercised in a manner that violates a defendant's constitutional rights. State v. York, 28 Wn. App. 33, 36-37, 621 P.2d 784 (1980). In a close case, the balance must tip

in favor of the defendant. State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

a. The trial court erroneously excluded evidence of Mr. Mason's reputation for aggressiveness when Mr. Whitford asserted he acted in self-defense. ER 404(a)(2) authorizes a criminal defendant to introduce evidence of a pertinent character trait of the alleged victim. ER 404(a)(2) provides, in pertinent part:

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for proving action in conformity therewith on a particular occasion, except:

...
(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, ...

Proof of the pertinent character trait is limited to evidence of the alleged victim's reputation for that trait, pursuant to ER 405(a), which provides:

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

For purposes of ER 404(a) and ER 405(a), "character" includes traits such as honesty and peacefulness, and the term "pertinent" is synonymous with "relevant." City of Kennewick v. Day,

142 Wn.2d 1, 6, 11 P.3d 304 (2000). “Thus, ‘a pertinent character trait is one that tends to make the existence of any material fact more or less probable than it would be without evidence of that trait.’” Id., quoting State v. Eakins, 127 Wn.2d 490, 495-96, 902 P.2d 1236 (1995).

Where a defendant claims self-defense, evidence of the complaining witness’ reputation for aggressiveness is relevant and admissible to establish he was the first aggressor, even if the defendant did not know of that reputation. State v. Hutchinson, 135 Wn.2d 863, 886, 959 P.2d 1061 (1998); State v. Adamo, 120 Wash. 268, 270, 207 Pac. 7 (1922).

Here, the trial court excluded the proposed evidence of Mr. Mason’s reputation for aggressiveness among members of X Marks the Scot on the grounds the group was not a community. 2RP 118-19. This was in error.

The reputation for aggressiveness must be within a neutral and general “community.” State v. Callahan, 87 Wn. App. 925, 934, 943 P.2d 676 (1997). In Callahan, when considering whether the defendant established a relevant “community,” the court adopted the definition of “community” for purposes of ER 608(a). As Tegland commented:

Under a similar reference to reputation in Rule 608, a line of cases has developed on where the reputation must exist before it is admissible; i.e., on the nature of the community where the reputation must be shown to exist. Only a few such cases have arisen under Rule 405, but in general, the results parallel the results under Rule 608.

5A K Tegland, Wash. Prac., Evidence § 405.2, at 4 (5th ed. 2007).

Tegland sets forth five requirements for admission of reputation evidence pursuant to ER 608(a):

When presenting reputation testimony, the first requirement is a foundation for the testimony. Witness A (the impeaching witness) must have personal knowledge of the reputation of Witness B (the witness being impeached).

Second, the Witness A's impeaching testimony must be limited to the Witness B's reputation for truth and veracity and may not relate to Witness B's general, overall reputation.

Third, the questions must be confined to Witness A's knowledge of Witness B's reputation in a neutral and general community, such as the community where Witness B lives or among persons with whom Witness B works. Witness B's reputation among a narrower, more specific group of persons may be inadmissible. ...

Fourth, the reputation at issue must not be too remote in time; reputation too remote in time may be irrelevant.

Finally, Witness A's testimony must truly be about Witness B's reputation, and must not simply reflect Witness A's personal opinion about Witness B's credibility.

5A K. Tegland, Wash. Prac., Evidence § 608.4, at 427-29 (5th ed. 2007).

As noted, testimony regarding the witness' reputation must be based on the perceptions of a neutral and general community, rather than on the personal opinion of the individual providing the testimony. State v. Lord, 117 Wn.2d 829, 874, 822 P.2d 177 (1991); State v. Thach, 126 Wn. App. 297, 315, 106 P.3d 782 (2005). “[R]elevant factors might include the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community.” State v. Land, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). The community is not limited to the witness' residential community. In Land, for example, the State established a community comprised of a small group of business associates in which the defendant worked as a salesman for several years and developed a reputation for untruthfulness among his business contacts. Id. By contrast, in State v. Gregory, 158 Wn.2d 759, 804-05, 147 P.3d 1201 (2006), the court ruled that two family members were not a community for purposes of rule, because the proposed group was too small and family members are not neutral.

X Marks the Scot meets the criteria for a neutral and general community. The members share a common interest in their

Scottish heritage, the local members meet regularly, Mr. Mason had been a member for at least two years, and Mr. Nielson had met at least one hundred members. In this regard, X Marks the Scot is similar to the Boy Scouts, which is a community for purposes of the rule. See State v. Carol M.D., 89 Wn. App. 77, 94-95, 948 P.2d 837 (1997) (on remand, defendant should be able to introduce testimony regarding complaining witness' poor reputation for truthfulness in Boy Scout community). The Boy Scouts, like X Marks the Scot, is a national organization with local councils that meet regularly to promote the goals of the organization.²

There was no tenable reason to distinguish X Marks the Scot from other organizations, such as the Boy Scouts, which have a national membership and local events. The concept of "community" must evolve with the "realities of our modern, mobile, impersonal society." Land, 121 Wn.2d at 498. The trial court's ruling that X Marks the Scot was not a community was contrary to case law and an abuse of discretion.

²See www.scouting.org.

b. The proper remedy is reversal. An evidentiary error that results in prejudice requires reversal. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Here, the trial court's evidentiary rulings precluded Mr. Whitford from presenting his defense of self-defense, which culminated in the denial of his proposed jury instructions on the law of self-defense. In light of the testimony suggesting that Mr. Mason was the first aggressor, the error was highly prejudicial. Reversal is required.

3. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED EVIDENCE OF THE COMPLAINING WITNESS' REPUTATION FOR CROSS-EXAMINATION OF THE COMPLAINING WITNESS AND HIS WIFE INTO SPECIFIC INSTANCES OF UNTRUTHFULNESS.

a. A criminal defendant may impeach the credibility of a witness with evidence of the witness' reputation for untruthfulness and with cross-examine of that witness about specific instances of untruthfulness. ER 608 authorizes impeachment of a witness' credibility through evidence of the witness' reputation for untruthfulness, as well as through cross-examination of that witness regarding specific instances of untruthfulness. ER 608 provides, in pertinent part:

(a) Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness,

...
(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness....

A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion but, again, the balance must tip in favor of the defendant in a close case. State v. Foxhaven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007); Wilson, 144 Wn. App. at 177.

b. The trial court abused its discretion when it erroneously excluded evidence of Mr. Mason's reputation for untruthfulness. Mr. Whitford sought to present testimony by Brian Neilson to impeach the credibility of Mr. Mason regarding his reputation for untruthfulness. In his offer of proof, Mr. Whitford asserted that Mr. Neilson would testify that Mr. Nielson and his wife met Mr. Mason and Ms. Porter through events coordinated by

members of X Marks the Scot,³ an organization wherein individuals interested in their Scottish heritage can connect on the internet and meet for local social events. CP 7, 17. Mr. Neilson was prepared to testify that X Marks the Scot hosts at least twelve social events each year in Washington, he had been a member of the organization for approximately five years, Mr. Mason had been a member for two or three years, he had met at least one hundred members of the organization, and he had specifically spoken to fifteen to twenty members of the organization about Mr. Mason and learned that Mr. Mason had a reputation for untruthfulness within the organization. CP 42-43.

Again, however, the trial court excluded the evidence on the grounds X Marks the Scot was not a community and the proposed evidence was irrelevant. 2RP 118-19; 3RP 26-30; 5RP 66-74. As discussed above, however, this was in error. X Marks the Scot meets the criteria for “community” for purposes of ER 608(a). And ER 608 does not limit inquiry into matters related to the case sub judice. 5A K. Tegland, Wash. Prac., Evidence § 608.7, at 438 (5th ed. 2007). The trial court’s exclusion of the relevant evidence of

³See www.xmarksthescot.com

Mr. Mason's reputation for untruthfulness was an abuse of discretion.

c. The trial court abused its discretion when it unduly limited cross-examination of Mr. Mason and Ms. Porter regarding specific instances of untruthfulness, to impeach their credibility.

"Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Mr. Whitford sought to impeach the credibility of Mr. Mason and Ms. Porter by cross-examination into specific instances of untruthfulness that occurred on a vacation they took with Mr. Neilson and his wife. In his offer of proof, Mr. Whitford asserted that, in the fall of 2009, Mr. Mason, Ms. Porter and the Neilsons went on a trip in the Neilson's recreational vehicle and towed Mr. Mason's car with the car dolly. CP 7; 5RP 49-50, 63-66. Although the couples agreed to split expenses, Mr. Mason and Ms. Porter either disappeared when it was time to fill the recreational vehicle with gasoline or stated they had no money. CP 8, 19; 5RP 49. Yet, Mr. Mason and Ms. Porter had money to buy food, alcohol, and other items for themselves. CP 8; 5RP 49. Mr. Neilson confronted Mr. Mason and said they could not longer travel

together, at which point Mr. Mason and Ms. Porter took their car, and left the dolly attached to the recreational vehicle without any instructions as to its disposal. CP 8; 5RP 49. Several months later, Mr. Mason filed a small claims lawsuit against the Neilsons, demanding \$800 for the dolly, even though they had paid only \$300 for the dolly, and even though the Neilsons incurred expenses towing the dolly back from vacation and storing it. CP 8-9, 18-19, 49-50; 5RP 64-65.

Pursuant to ER 608(b), specific instances of the witness' past conduct, probative of credibility, may be inquired into during cross-examination of the witness. State v. Simonson, 82 Wn. App. 226, 234, 917 P.2d 599 (1996). "Any fact that goes to the trustworthiness of the witness may be elicited if it is germane to the issue." York, 28 Wn. App. at 36. Specific prior acts of fraud or deception are generally admissible to establish a witness' untruthfulness. See, e.g., State v. Johnson, 90 Wn. App. 54, 71, 950 P.2d 981 (1998) (prosecution was allowed to impeach a defense alibi witness on her past use of four different aliases).

Here, the small claims lawsuit was settled mere days before Mr. Whitford's trial, those specific instances of untruthfulness were very recent and pertained to the dolly that was the subject of the

altercation. 2RP 84-86. In Gregory, the court discussed ER 608(b), and stated:

In exercising its discretion, the trial court may consider whether the instance of the witness's misconduct is relevant to the witness's veracity on the stand and whether it is germane or relevant to the issues presented at trial. State v. O'Conner, 155 Wash.2d 335, 349, 119 P.3d 806 (2005). While R.S.'s lie to defense counsel about her recent drug use was not a lie under oath because the August 8, 2000 interview was not a deposition, it was a very recent lie in response to questioning from defense counsel in the context of this case. R.S.'s lie was relevant to her veracity on the stand and it was relevant to this case.

158 Wn.2d at 798-99 (emphasis in original).

A trial court abuses its discretion when it excludes evidence of specific instances of untruthfulness when that evidence is the only means of impeachment. "Failing to allow cross-examination of a State's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct is the only available impeachment." State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001). Here, Mr. Mason, as the complaining witness, was clearly crucial, and there was no alternative impeachment evidence, other than the excluded evidence of his reputation for untruthfulness. Ms. Porter, as an eye witness to the altercation, was also a crucial witness and there was no other impeachment evidence at all. See

State v. Barnes, 54 Wn. App. 536, 539, 774 P.2d 547 (1989) (court should consider what other impeachment evidence may be available to the defense).

Cross-examination into the prior acts of untruthfulness with Mr. Neilson was the only evidence available to impeach the credibility of Mr. Mason and Ms. Porter. The proposed cross-examination pertained to the dolly, the subject of the present altercation, and was recent in time to the criminal prosecution. Exclusion of that evidence was an abuse of discretion.

d. The proper remedy is reversal. Where a trial court abuses its discretion, reversal is required unless the error is harmless. State v. Gresham, Nos. 84148-9, 84150-1, 2012 WL 16694, at *1 (WA Sup. Ct., Jan. 5, 2010). The erroneous exclusion of evidence requires reversal where, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Halstien, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

Here, as the prosecutor specifically noted at the very beginning of her closing argument, “This case comes down who do you believe. You all know that. Comes down to who you think is credible” 7RP 37. Because the case turned on the credibility of the witnesses, the error likely affected the outcome. Reversal is

required.

4. PROSECUTORIAL MISCONDUCT
DEPRIVED MR. WHITFORD OF HIS
CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

a. Improper and prejudicial conduct by a prosecutor

violates a criminal defendant's constitutional right to a fair trial.

Prosecutors, as quasi-judicial officers, have a special duty to seek a verdict free of prejudice and based on the evidence. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). The special duty is based on a prosecutor's obligation to afford an accused a fair and impartial trial. State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978); U.S. Const. amend. V, XIV; Wash. Const. Art. I, sec. 3. "Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Where a prosecutor violates that duty, prosecutorial misconduct "may deprive a defendant of a fair trial. And only a fair trial is a constitutional trial." Charlton, 90 Wn.2d at 665; accord State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

As Justice Sutherland wrote over seventy five years ago:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.

1314 (1935).

The defense bears the burden of establishing the prosecutor's conduct was both improper and prejudicial. State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.2d 43 (2011). The misconduct is viewed "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).

b. The prosecutor's improper and prejudicial remarks in rebuttal argument violated Mr. Whitford's right to a fair trial. In rebuttal argument, the prosecutor stated, "Well, as you'll recall, Mr. Mason indicated to you that the doctor, who wasn't able to be here,

based on schedules -- ” The defense objected and was sustained.
7RP 78. At the conclusion of the State’s rebuttal argument, Mr.
Whitford moved for a mistrial or, in the alternative, five minutes for
surrebuttal. 7RP 88. The motion was denied. 7RP 90. During
deliberations, the jury inquired, “Can we see the medical report?”
CP 101. The court contacted counsel to discuss a response, and
Mr. Whitford was represented by a stand-in attorney from the office
of his trial attorney. 7RP 93. After consultation with the prosecutor
and the stand-in defense counsel, the court responded, “The jury is
referred to the Court’s instructions, considered as a whole.” CP
102. Shortly thereafter, the jury returned a verdict of guilty of
assault in the second degree, as charged, and a special verdict
that Mr. Whitford was armed with a deadly weapon. CP 99-100.
Mr. Whitford’s stand-in counsel renewed the motion for a mistrial,

I’m renewing [defense counsel]’s motion for a mistrial,
particularly magnified in light of the fact that the
questions that was posed by the jury prior to
rendering their verdict was a request to see medical
record would tend to indicate that they were focused
in some measure on some unknown or unproduced
hospital or medical personnel, and so I think that that
question further points out the fact that the jury was
tainted by the comments that were made in closing....”

7RP 98-99. Again, the motion was denied. 7RP 99.

The prosecutor's reference to a missing witness for the State was highly improper. First, in context, the prosecutor was clearly attempting to argue facts not in evidence. Argument intended to encourage the jury to render a verdict based on facts no in evidence is improper. State v. O'Neal, 126 Wn. App. 395, 421, 109 P.3d 429 (2005). Second, the reference was hypocritical in light of the State's own pre-trial motion to exclude any reference by the defense to missing witnesses. "The State moves in limine for an order excluding any defense argument or jury instruction pertaining to a "missing witness" should the State decline to call one or more of the persons involved in the investigation, arrest, and/or processing of the defendant." CP 203 (State's Trial Memorandum). This motion was granted. 2RP 140-41.

The prosecutor's improper statement was prejudicial. Although Mr. Whitford's objection was sustained, the enduring prejudice of the remark was highlighted by the jury inquiry to see "the medical report." Given that there was no medical testimony and no evidence regarding a medical report, the only source for that inquiry must be the prosecutor's reference.

c. The proper remedy is reversal. Prosecutorial misconduct is prejudicial and requires reversal where there is a substantial likelihood the misconduct affected the verdict. Fisher, 165 Wn.2d at 747. As this court has noted, “[T]rained and experienced prosecutor’s presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case.” State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996) (quoting defense counsel’s brief).

Here, as indicated by the jury inquiry, there is a substantial likelihood that the prosecutor’s improper remarks affected the jury and contributed to a verdict that was not based on the evidence. Reversal is required.

5. CUMMULATIVE ERRORS RESULTED IN A
FUNDAMENTALLY UNFAIR TRIAL.

In the alternative, if this Court does not find that the above errors individually merit reversal, the cumulative effect of the errors deprived Mr. Whitford of a fair trial. Under the cumulative error doctrine, a criminal defendant may be entitled to a new trial when errors cumulatively resulted in a trial that was fundamentally unfair. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835

(1994). The cumulative error doctrine requires reversal where several trial errors standing alone may not require reversal but, when the errors are combined, the defendant was denied a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 109 P.3d 390 (2000); Johnson, 90 Wn. App. at 74.

Here, the trial court erroneously excluded evidence of Mr. Mason's reputation for untruthfulness and aggression, erroneously excluded evidence of specific instances of untruthfulness by Mr. Mason and Ms. Porter, erroneously excluded specific instances of aggression known to Mr. Whitford, and erroneously failed to instruct the jury on the law of self-defense. In addition, the prosecutor committed flagrant and prejudicial misconduct in rebuttal argument. The cumulative effect of these errors deprived Mr. Whitford of his ability to properly impeach the complaining witness and the complaining witness' wife, to fully present the defense theory of self-defense, and deprived his of his right to a verdict based on the evidence. Reversal is required. See State v. Venegas, 155 Wn. App. 507, 526-27, 228 P.3d 813 (2010).

F. CONCLUSION

Mr. Whitford's right to confront witnesses, to present a defense, and to proof beyond a reasonable doubt was violated by the court's evidentiary rulings and failure to instruct the jury on the law of self-defense. Mr. Whitford's right to a fair trial based on the evidence was violated by the prosecutor's improper and prejudicial remarks in rebuttal argument. The cumulative effect of these violations resulted in a fundamentally unfair trial. For the foregoing reasons, Mr. Whitford respectfully requests this Court reverse his conviction for assault in the second degree with a deadly weapon enhancement and remand for a new trial.

DATED this 2nd day of February 2012.

Respectfully submitted,



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