NO. 69814-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

AENOY PHASAY,

Appellant.

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

The Honorable Lori Smith, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In the early morning hours of March 30, 2010, appellant Aenoy Phasay ("Noy")[1] shot and killed decedent Thomas Bennett Sr. ("Tom") in self-defense after Tom attacked him. The trial court erred in refusing to admit, as *res gestae*, testimony about a heated conflict between Tom and Noy's brother, Mark Phasay, approximately 24 hours before Tom attacked Noy.

2. The trial court erred in allowing the state's crime scene reconstructionist to offer an opinion that was speculative and unsupported by any evidence at trial, and thus not helpful to the jury.

3. The trial court erred in refusing to grant the defense motion for a mistrial, where the state did not disclose, prior to trial, that the crime scene reconstructionist would likely have a new theory at trial, and the court allowed that theory to be presented to the jury over the defense objection.

4. The trial court erred in allowing evidence and argument that infringed on Noy's constitutional right to counsel.

5. The trial court erred in allowing evidence and argument that contradicted Washington's "no duty to retreat" law.

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[1] For clarity's sake, the first names of the primary individuals involved in the incidents, as those individuals were referenced during the trial, will be used in this brief.

6. Prosecutorial misconduct deprived Noy of his right to a fair trial when the prosecutor suggested Noy and his attorneys manufactured a defense, and presented evidence and argument contrary to Washington's "no duty to retreat" law.

7. Defense counsel's failure to timely object to the admission of inadmissible evidence and argument constituted ineffective assistance of counsel.

Issues Pertaining to Assignments of Error

1. The night before the charged incident, Mark and Tom had a heated argument and Tom threatened Mark saying "bullets will fly." Did the defense properly offer Mark's testimony about his conflict with Tom as *res gestae*, and did the trial court improperly exclude the evidence?

2. Where the state's crime scene reconstructionist offered a new theory at trial that was unfairly prejudicial, where the theory was unsupported by evidence, and where the reconstructionist admitted his new theory was only one possible theory, was the "opinion" speculative, unhelpful to the jury and unfairly prejudicial, and did the court err in refusing to exclude it?

3. Where the state did not disclose the new theory in a timely manner and where the defense was prejudiced as a result of the late

disclosure, did the trial court err in refusing to grant a mistrial or exclude the evidence?

4. Did the trial court err in refusing to exclude the state's evidence and argument which suggested to the jury that Noy and defense counsel had met to manufacture a defense?

5. Did the prosecutor commit misconduct when he suggested the defense team had manufactured a defense, violating Noy's constitutional right to counsel?

6. Did the trial court err in refusing to exclude repeated statements from the investigating detectives and argument from the prosecutor wrongly suggesting Noy had a duty to retreat?

7. Did the prosecutor commit misconduct when he offered evidence that contradicted Washington law on "no duty to retreat"?

8. Where defense counsel failed to timely object to admission of inadmissible evidence, was Noy denied effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts.

On April 1, 2010, the state charged Noy with one count of second degree murder, alleging that Tom's death occurred March 30, 2010 during the commission of first and second degree assault. CP 1-6 (RCW 9A.32.050(1)(a)-(b)). An amended information filed June 22, 2012 added

one count of second degree assault committed against Thomas Bennett Jr. ("Thomas"). CP 10-11 (RCW 9A.36.021(1)(c)). On November 28, 2012, the state amended the information yet again, to add a second count of second degree murder, alleging that Noy intentionally caused Tom's death. CP 63-64 (RCW 9A.32.050(1)(a)-(b)).

Noy's trial took place from October 29, 2012 to December 6, 2012, the Honorable Lori K. Smith presiding. On December 6, 2012, Noy was found guilty of second degree intentional murder in count I (CP 134, 164) and second degree felony murder in count II. CP 142, 171. The jury acquitted Noy of the second degree assault against Thomas in count III. CP 170.

Sentencing occurred January 10, 2013. With an offender score of 0, the standard range was 123-220 months. CP 186. The court sentenced Noy to 124 months in prison, one month over the minimum, plus a 60-month firearm enhancement, for a total of 184 months. CP 188. This appeal follows.

2. Substantive Facts.

a. Summary of Incident.

The shooting that led to this appeal involved two men who had known each other for many years, 27-year-old Noy Phasay and 48-year-old Tom Bennett. Supp. CP __ (Sub No. 152, Phasay Statement, p. 2);

6RP 131. At approximately 3:00 a.m. on March 30, 2010, Tom confronted Noy in the Auburn Top Food parking lot and falsely accused him of involvement in a home invasion robbery and assault of Tom's wife and son. This occurred at Tom's home just a few hours earlier, which was possibly precipitated by a heated argument earlier that day between Tom and Mark Phasay, Noy's brother. In the parking lot, Tom beat and choked Noy, and stopped only because Tom's son Thomas intervened and stopped the beating. Noy, who did not believe the altercation with Tom was truly over, hit Tom on the head after Tom had gotten back into the car. According to what Noy told the police, Noy brought a gun for protection and took it out at some point; Tom lunged for the gun and Noy shot him. He did not intend to kill Tom, but shot him to protect himself. According to what Thomas told the police, after Noy hit Tom in the head he saw Noy with the gun, got out of the car to take cover, briefly saw a struggle over the gun, and then heard shots. Thomas later claimed Noy walked over to him after the shooting, pointed the gun at him, said "Don't say a word," and ran away.

Noy was charged with second degree murder for Tom's death and second degree assault for pointing the gun at Thomas. The jury found Noy guilty of second degree murder. It apparently did not believe that Thomas was entirely credible, as it acquitted Noy of second degree assault.

b. The relationship between the Phasay family and the Bennett family.

Noy had known the Bennetts for many years prior to the shooting. Noy dated Tom's stepdaughter, Melissa, several years previously while they were in high school. Noy and Melissa had a daughter together. Noy lived with the Bennetts for a short time in approximately 1999 or 2000, when Noy was approximately 16 or 17. 8RP 35, 66-69.[2] After Noy and Melissa broke up, Noy's brother Mark began dating Melissa and they eventually married and had children. 8RP 68.

Tom Bennett's reputation for violence and being quarrelsome was well-known in the community. Mark testified that Tom had a bad reputation in that regard. 8RP 112. He described Tom as arrogant, disagreeable, and hard to get along with. 8RP 119-20. One of Noy's sisters, Vilayvanh Phasay, testified she was aware of Tom's reputation that he could get violent when he has been drinking. 11RP 59. She further described him as "scary," a "redneck," a "drunky," "kind of fierce," "angry," and "always the hotshot." 11RP 89. Another of Noy's sisters testified that Tom's reputation was that "he was just drunk and bad." 11RP 92.

[2] This brief refers to the transcripts as follows: 1RP - 10/29/12; 2RP – 10/30/12; 3RP – 10/31/12; 4RP – 11/5/12; 5RP – 11/6/12; 6RP – 11/7/12; 7RP 11/8/12; 8RP – 11/13/12; 9RP – 11/14/12; 10RP – 11/15/12; 11RP – 11/26/12; 12RP – 11/27/12; 13RP – 11/28/12; 14RP – 11/29/12; 15RP – 12/4/12; 16RP – 12/5/12; 17RP – 12/6/12; 18RP – 1/10/13.

Thomas also testified about his father's temperament. According to Thomas, when Tom got angry he could not be reasoned with. 9RP 16. "Never back down" was the way Tom lived his life. 9RP 40. The night of the shooting, when Tom sought out and attacked Noy, Tom was as mad as Thomas had ever seen. 9RP 39.

c. The night before the shooting.

The night before the shooting, Mark and Melissa had an argument at home and Melissa left. Sometime after midnight Tom stormed into the house without knocking, and he and Mark got into a "yelling argument" about Melissa that lasted for an extended period of time. Tom was drinking. Mark demanded repeatedly that Tom leave and Tom ignored him. Mark ended up leaving to pick up Melissa. When they returned, Tom was just driving away. This happened approximately 2:00 a.m. 4RP 17-18; 13RP 2-3; Ex. 102, 103. During the argument Tom threatened Mark, saying "bullets will fly." 4RP 31.

d. The night of the shooting.

i. The invasion of the Bennetts' home.

Thomas, who was 19 at the time, testified that at about 11:00 p.m. the evening of March 29, 2010, he and his mother Sally Bennett were home. Thomas had just gone to bed. Tom was not home, but his El Camino was parked in front. Thomas heard a knock at the front door and

Sally asked him to answer it. Several masked men armed with guns then kicked in the door, attacked them and tied them up. The men demanded to know where the El Camino driver was, and the location of the safe. 8RP 77-79.

Thomas told them his dad drove the El Camino and was not home. 8RP 80. Thomas also said they had no safe. 8RP 81. One of the men pistol whipped Thomas and another punched Sally in the face. 8RP 82. Two men were African American and one was white with long blond hair. 8RP 85. The men bound Thomas and Sally with zip ties, searched the house, and eventually left. 8RP 79-84.

Thomas and Sally soon freed themselves and called Tom; they did not call the police. 8RP 86-88. Tom came home and was very upset, more angry than Thomas had ever seen him. 8RP 90; 9RP 39. Thomas testified Tom believed Noy was involved in the robbery, because although they no longer had a safe, they had one many years before when Noy lived there. 8RP 81, 90. Tom left to try to find Noy, and Thomas went with him. Tom did not drive his own car, but instead drove a car belonging to one of his customers who had left it at Tom's repair shop. 8RP 92-93. Although they did not know exactly where Noy lived, they knew he lived in Kent. 8RP 92-93. On the way, Tom stopped and bought beer, which he drank. 8RP

101. Tom dialed Noy's cell phone, but Noy did not answer, at least not initially. 8RP 96.

3. Noy's recorded statement about the evening of March 30th.

Noy was taken into custody without incident shortly after the shooting. He gave a recorded statement to the police[3] about that night. He had previously tried to cut off all contact with Tom because Tom was not a good person and had tried to take advantage of him in the past. Several months before he and Tom had a dispute over work Tom had done on Noy's car; Noy believed he had paid for everything but Tom disagreed. Noy had not seen or spoken with Tom for several months before the shooting. Supp. CP __ (Sub No. 152, Phasay Statement, p. 4, 15).

On the night of the shooting Noy was out with friends when he received at least one phone call from Tom but did not answer it. Around 2:00 a.m. on March 30th, Noy received a "distress call" from Thomas saying he had a flat tire and needed help. Noy thought it odd that Thomas did not call Tom for help, particularly because Tom had called Noy out of the blue a short time earlier. Noy thought he was being set up and told Thomas he could not help. Id., at 3-4, 20, 112).

[3] The transcript of the recorded interview prepared by the state (Supp. CP __ (Sub No. 152, Phasay Statement)) is not entirely accurate and does not adequately convey the emotion behind and the contextual meaning of Noy's words. The court is therefore encouraged to view the unredacted video of the interview. Pretrial Ex. 1.

Noy spoke with Tom a short time later and asked if Thomas was okay. Tom was angry and said that he wanted to meet. Id., at 20, 113. Tom said Noy's "nigger friends" from Noy's tattoo shop had robbed him. Id., at 141-43. Noy was worried that if he did not meet with Tom and Thomas, they would come to his house, so he agreed to meet at the Top Food in Auburn. He was worried from the way Tom sounded that Tom might try to beat him up. Id., at 5. He was also concerned that Tom might have a gun. Id., at 115. He therefore brought a Glock 9 mm handgun with him. Id., at 5.

Noy told the investigating officers he brought the gun for protection. He did not intend to do anything to Tom. Id., at 11. He intended to talk to Tom about what Tom was upset about and straighten it out. Id., at 65, 87. He explained to the officers:

> I'm just, I, I want to go down there and just talk to him. Because why would he set me up. That's what I want to figure out. What is it, you know that was so important for him to have his son call and lie to me about his son having a tire broken and you know, he was baiting his son to me, to get to me you know. Like to me that's a lot.
> ...
> You know that's a lot if someone you know, if someone is going to want you, want to meet you that bad to get to you, you know, I'm the type of guy that I need to you know, straighten things out. I need to go straighten out you know, with Tom. That's why I went down there and said hey, man I'm going to talk you. You know. I didn't expect him to want to kidnap me. I didn't expect him to attack me...

Id., at 66. Detective Jordan confirmed that Tom was a stocky man and outweighed Noy by 70 pounds. 2RP 40.

Noy did not want to park in the middle of the Top Food lot, so he parked near some apartments across the street. When he walked into the lot a car sped toward him. Tom drove fast and stopped suddenly near Noy as if he was trying to intimidate Noy. Tom opened the door to the backseat and yelled at Noy to get in. Noy refused, afraid of what might happen to him. Id., at 6, 10, 23-25, 68, 95-97.

Tom was angry and swore at Noy, accusing Noy of involvement in the robbery earlier in the evening and told Noy "some of your nigger friends came to my house and robbed me." Id., at 6-7, 23-24, 143. Noy said he didn't know what Tom was talking about, and again refused to get in the car. When he started to leave, Tom got out of the car and attacked him. Id., at 6-7, 25-26, 67-69. Tom beat and choked him, and continued trying to get Noy into the car. Id., at 8-9, 25-26. Noy yelled at Thomas for help because Tom was choking him. Id., at 11, 26. Noy told the police Thomas might have broken up the fight, but was not sure. Id., at 30, 59-61, 97-98. Noy did not have a good memory of the entire event because everything happened so fast. Id., at 144-45.

After Thomas got Tom to stop attacking Noy, Tom got back into the driver's seat. Noy told the officers that he walked up and hit Tom in

the back of the head and then stepped back. Id., at 121-22. Noy had his gun out and he may have "racked" it at least once to put a bullet in the chamber. Tom then lunged toward Noy and the gun, which is when Noy shot him. Id., at 8, 34-35, 102-03, 118. Noy was not sure where the bullets hit Tom; Noy told the officers he just pointed the gun at him and pulled the trigger. Id., at 34-35. Noy could not remember if Tom said something before he lunged at Noy. Id., at 79-80. Noy told the officers Tom lunged for the gun with his right hand. Id., at 135.

When Noy pulled the trigger, he was concerned that Tom might take the gun and shoot him because Tom was bigger than Noy. Id., at 79-80. If Tom had taken another two steps he would have been able to grab the gun. Id., at 82, 134-36. Noy was also concerned that Tom might further assault or try to kidnap him again. Id., at 32. Noy believed both of Tom's feet were outside the car when Noy pulled the trigger. Id., at 111. Noy told the officers he believed he pulled the trigger twice. Id., at 12, 35.

After the shooting, Noy walked around the back of the car to the passenger side and saw Thomas crouching there. He told Thomas something to the effect of, "Man, I'm out of here, don't say nothing" and went back to his car. Id., at 35, 37-38, 52. At no time did he point the gun at Thomas. Id., at 49-50. He could not believe what had just happened, and drove to the Tacoma Narrows Bridge to kill himself. He threw the gun off

the bridge, but could not bring himself to commit suicide, and went back home, where he surrendered to police several hours later. Id., at 3, 12-13.

During the detectives' interrogation, they repeatedly suggested Noy had a duty to retreat. Id., at 58, 71, 77, 84-86, 104, 118, 119. Although the defense objected that these statements were inadmissible and contrary to Washington law, the trial court refused to redact the statements. 7RP 36-41. The jury watched the video that contained other redactions, but the statements suggesting Noy had a duty to retreat remained in the video. 7RP 41, 56; Ex. 64.

4. Thomas's testimony about the shooting and the events leading up to it.

According to Thomas, Tom wanted to meet Noy so he could ask if Noy was involved in the robbery and "look him in the eye" to see if he was telling the truth. 8RP 95. Thomas tried to talk him out of it, but Tom was too angry to listen. 9RP 15-16. Tom called Noy several times but Noy did not answer. 9RP 19. They eventually went looking for Noy and Thomas called several more times with no success. 9RP 19. They stopped at a Circle K in Kent to use a pay phone hoping that Noy would answer if he did not recognize the number. 8RP 95-96. Thomas called Noy from the pay phone and Noy answered. Thomas lied and told Noy he had a flat tire and asked if Noy could help. Noy, who did not believe Thomas, said no.

Thomas said Noy told him "Business is business, don't F with the wrong people." 8RP 97.

Thomas testified that after he told Tom what Noy purportedly said, Tom was convinced Noy was involved with the robbery and they began to head home. Tom decided to call one more time and this time Noy answered. Thomas heard Tom ask to meet up with Noy, after which Tom told him about the home invasion, and told him he just wanted to talk to Noy face to face and look him in the eye and ask him if he was involved. Noy agreed to meet at the Top Food. 8RP 100.

According to Thomas, they got to the Top Food, parked on the street, and waited. He said he saw someone drop Noy off in the parking lot, and Tom drove straight at Noy at high speed, stopped quickly, and told him to get in the car. 8RP 104, 128-29.

Thomas testified that Tom was as mad as he had ever seen and said "Get in the fucking car" several times. 9RP 39, 54-55. Tom asked why Noy had sent people to his house and Noy denied involvement. Thomas remembered Noy kept asking, "What's the deal?" 8RP 129; 9RP 54-56. Tom's voice was loud and he continued swearing at Noy and accused him of sending his "nigger friends" to attack his family. 9RP 55. He also yelled at Noy, "You're nothing but a gook, same as your brother." 9RP 51. Tom

got out of the car and approached Noy at the back of the car, continuing to loudly swear and accuse Noy. 8RP 132; 9RP 56-57.

Noy continued to deny involvement and, according to Thomas, the two began fighting. Tom was more aggressive than Noy. 8RP 134. Noy, who was much smaller than Tom, begged Thomas to get Tom off of him and Thomas eventually got in the middle and stopped the fight, pulling his dad away. 8RP 135; 9RP 58-59. Thomas and Tom then got back into the car and Noy walked up and "sucker punched" Tom in the back of the head. 9RP 69. Although Thomas initially testified the driver's side window was open, he admitted that if the police said the window was closed he must be mistaken on that point and the door must have still been open. 9RP 47, 69.

Thomas testified Tom said "You did not just do that" and started to get back out of the car. 8RP 141; 9RP 71. Thomas saw Noy pointing a gun at Tom and started to get out of the car himself to take cover. 9RP 70-71. He heard two or three gunshots and the passenger window shattered. 8RP 142. He was on the ground, and as he started to get up he saw Noy walk toward him. 8RP 143. According to Thomas, Noy pointed the gun and Thomas asked him not to shoot. 8RP 144; 9RP 79. Noy then said, "Don't say a word" and ran off toward some nearby apartments. 8RP 145; 9RP 78, 81.

When Thomas and Sally initially spoke with the investigating officers about that evening's events, they did not mention the robbery or that Tom wanted to "look [Noy] in the eye." Instead they said Tom went to collect money for work Tom had done on Noy's car. 9RP 6-8, 17. Thomas did not initially tell officers that Noy pointed the gun at him. 9RP 79. Thomas also told Sergeant Williams that Tom and Noy struggled over the gun before Tom was shot (Ex. 78; 12RP 10-11), but at trial he said he did not remember. 9RP 32.

5. Additional witnesses.

Auburn Police investigated the shooting and found no direct eyewitnesses, but did find people who had additional information. Helena Poortvliet was near the Top Food around 3:00 a.m., waiting in her car for the nearby financial aid office to open in the morning. 9RP 100-02. She saw a car park nearby, then the man inside walked over to the parking lot where he met two other people. 9RP 103. While she watched she did not see any scuffling or fighting, but the people appeared to be talking. 9RP 105. Eventually she heard several "pops" and the man came back to his car, got in, and left quickly. 9RP 105. What little she was able to see of the interaction between the three people she saw from her rearview mirror. 9RP 105, 110-11.

Vernon Styles lives in the apartments across from Top Food. In the early morning hours of March 30, 2010, he got up as he normally did and made a pot of coffee before going to work. He went out to his patio to smoke, when he heard loud voices. 11RP 7-8.

Styles could not see the people because his view was obstructed by bushes, so he walked around the bushes to see what was happening. He saw a large vehicle in the lot with its lights on and the driver's door open. He could see silhouettes of people moving around rapidly. He heard at least two voices and testified one sounded louder and angrier than the others. The person with the loud and angry voice yelled "gook" and "Mark." After reviewing his statement to police, Styles clarified that the person with the loud and angry voice called one of the people there a gook and also said "your brother too." Styles also heard that person say both "Give me the gun" and "Get me the gun." 11RP 9-16; Ex. 90-91.

When Styles heard the man mention the gun he went to call 911. On the way inside he heard three gunshots "one right after the other" in rapid succession – "bang bang bang." 11RP 17-19.

6. The police investigation.

About 3:00 a.m., Auburn Police Officer Luke Goethels responded to the Top Food parking lot. He saw Thomas pacing around a silver SUV, talking on the phone. 5RP 14-15. Tom was on the ground by the SUV with his right foot still inside the vehicle. 5RP 32. Goethels rolled Bennett onto his back and started chest compressions, though he saw significant gunshot wounds to Tom's head and chest and did not believe life-saving efforts would succeed. 5RP 20-24. Firefighters eventually took over and discovered a bullet slug between Tom's right arm and abdomen. 5RP 37, 43.

Sergeant Brian Williams confirmed that Tom's right foot was "partially" inside the vehicle and the left side of Tom's head was lying against the pavement. 5RP 81. The SUV passenger window was shattered. 5RP 97. Officer Joseph Vojir testified the officers collected 3 bullet casings and 2 live cartridges at the scene. 6RP 118. Officer Andrew Gould explained a live cartridge can be ejected from a Glock 9 mm if the gun is "racked" while a cartridge is in the firing chamber. 6RP 38-40.

King County Medical Examiner Dr. Micheline Lubin testified that one of the bullets entered Tom's left upper back and exited his right upper chest, but did not exit his clothing. 6RP 135-36. She found unburned gunpowder on the back of Tom's jacket, which indicated that it was

possibly within two feet of the gun at the time the shot was fired. 6RP 184-85.

There was also a wound on the right side of Tom's head. 6RP 127. The bullet from this wound was found in the left part of Tom's neck. 6RP 145. Based on a lack of soot and no stippling on the right side of Tom's bald head, Dr. Lubin opined "it was not a close-range gunshot wound." 6RP 146.

There was also what appeared to be a fresh wound at the base of Tom's right index finger. 6RP 141. Dr. Lubin thought it was possible this wound came from a bullet. 6RP 153. On cross-examination she admitted she could not say with certainty where the finger injury came from. 6RP 176.

Finally, on Tom's head was a rectangular-shaped abrasion and a triangle-shaped abrasion. 6RP 155.

Dr. Lubin testified that Tom's blood alcohol level at the time of his death was .13. During the autopsy her office also found the presence of o-desmethylvenlavaxine, a common anti-depressant. 6RP 151.

7. The court prohibits Mark from testifying about the argument with Tom.

The state moved to exclude Mark's testimony about the incident between he and Tom approximately 24 hours before the shooting. The

state theorized the argument was not *res gestae* of the shooting, and incorrectly stated the argument took place two days prior to the shooting. 4RP 18. The argument occurred March 29, after midnight, roughly 24 hours before the shooting after midnight on March 30. 13RP 5-6.[4]

The defense argued the conflict, and Tom's "bullets will fly" threat, were *res gestae* and relevant under ER 402. 4RP 30-33. As discussed above, right before the shooting Vernon Styles heard Tom mention Mark's name, heard him call Noy and Mark "gooks," and heard him say "Give me the gun" and "Get me the gun." 11RP 9-16; Ex. 90-91. A reasonable juror could believe the incidents were intertwined, the argument between Mark and Tom leading to the robbery, which in turn led to Tom's attack on Noy and Noy's use of the gun in self-defense.

The court disagreed and ruled as follows:

> My ruling is that the altercation between Tom Senior and Mark Phasay does not fit within the *res gestae* meaning under 404(b). ***While time is not determinative, here it is somewhat relevant. Mark Phasay indicated in his Auburn police interview that the incident between him and Tom Senior occurred on Sunday, and the Defense investigator notes he indicated it occurred two days prior to the shooting***.
>
> The incidents contained different individuals. The one with Mark Phasay included him and Melissa and Tom Senior. And then obviously the incident where the shooting

[4] This court can take judicial notice of the fact that March 28, 2010 was a Sunday, March 29 a Monday, and March 30 a Tuesday.

> occurred included the Defendant when Tom Junior was present.
>
> There were different precipitating events. Mark Phasay's treatment of Melissa was what precipitated the altercation between him and Tom Senior. And the belief that the Defendant was somehow involved in the home invasion incident is what appeared to precipitate the incident between the Defendant and Tom Senior.
>
> Also, I don't find that the Defendant and his brother were targeted by Tom Senior for the same reasons or having anything to do with them being brothers. There was perhaps a mention of the incident with Mark Phasay by Tom Senior, but it certainly wasn't a motivating factor and seemed to be only side information. I also don't find that it's relevant under 401 or 402. It really just goes to Tom Senior's character, and it's not appropriate to be used in that way.

5RP 3-4 (emphasis added). After the defense renewed the motion and clarified the "bullets will fly" threat happened the day before the shooting, the court would not change its ruling. 13RP 2-15.

a. Dr. Gerlock's testimony related to her diagnosis of post traumatic stress disorder (PTSD).

i. Direct examination.

Dr. April Gerlock holds a Ph.D. in Nursing, and is a board certified psychiatric nurse practitioner with a specialty in PTSD. 11RP 109. The defense sought her evaluation of Noy to see whether he had any major mental health disorders and if so, the extent to which they contributed to his behavior. 11RP 119. Gerlock met with Noy several times and

concluded he suffered from chronic and severe PTSD as well as major depression that was long-standing and recurrent, related in part to his and his family's escape from Laos and his time in refugee camps as a young child. Ex. 93; 11RP 139. Noy was born in Laos. In Noy's youth his family fled the country because his father was a political target of the Communists. 11RP 137-40. Before they arrived in the United States they lived in refugee camps in Thailand and the Philippines. 11RP 114-16.

Noy described to Dr. Gerlock his experience in Laos and in the camps. He was young and did not have a clear memory of everything that happened, but remembered gunshots and screaming. He had nightmares since he was a boy, where he heard gunshots, laughter and screaming. He associated these with the Communists coming into his village and shooting people while laughing. 11RP 130-31; 146-48.

Dr. Gerlock testified that people like Noy who have gone through severe trauma and developed PTSD have overactivity in the part of the brain that is responsible for handling and reacting to dangerous situations. The overactivity is easily triggered, causing anxiety, sweating, and a higher heart rate and blood pressure. In essence, the body gets ready for "fight or flight." While this happens, the prefontal cortex – the brain's rational and thinking part – does not function as it should. A person with PTSD therefore may have difficulty rationally responding to a perceived

threat, reappraising the threat, and considering alternative responses. A person with PTSD can also have problems with memory. 11RP 127, 134-35.

Dr. Gerlock explained to the jury how PTSD affected Noy on the night of the shooting. Noy's "alarm response" was triggered when Tom and Thomas called him, because he believed they were trying to trick him. Noy thought if he did not meet them, they would come to his home and attack him. 11RP 159-61; 12RP 17. His response was fear-based, as his ability to reason was diminished. 12RP 24. Based on her conversations with Noy and the evidence she reviewed, Dr. Gerlock believed Noy brought the gun to protect himself, not because he intended to use it against Tom. 12RP 24. Dr. Gerlock opined, based on a review of all the evidence and meetings, that when Noy shot Tom "he truly thought his life was in danger." She explained:

> He feared that he was going to be kidnapped, he didn't know what was going to happen if Tom, Sr. kidnapped him. He did believe, at a minimum, he was going to get beat up, but he didn't know exactly what was going to happen, but he believed that something very bad was going to happen to him.

12RP 39. In her opinion, Noy believed Tom was going to seriously injure or kill him when Tom lunged at him. 12RP 40-41.

ii. Cross examination.

The prosecutor asked Dr. Gerlock many questions designed to cast doubt on the PTSD diagnosis. The prosecutor focused Dr. Gerlock's attention on November 4, 2010 and referred her to notes from the jail's psychiatric staff about things Noy told them that day. When the notes were marked for identification as Ex. 99, defense counsel did not object, but instead said, "Excuse me, may I please see the exhibit that has been marked, and the prior one, please?" 12RP 71-72.

The state then had Dr. Gerlock read some of Noy's statements to the jail staff, including statements related to his meeting with his attorneys: "He says that he went to court yesterday and was told that his attorney will have a mental health professional from the outside come and talk with him. He discussed with his attorney some painful experiences he had as a child, include leaving Laos for a refugee camp in Thailand." 12RP 73. There was no defense objection.

The prosecutor then asked more questions about Noy's meeting with his attorneys:

> Q ...So on November 4, he comes back from court and he is told two things, right? My lawyer is going to get a person to come and evaluate want [*sic*] me, right?
>
> A Yes.
>
> Q And that's you? And it ends up being you, right?

A It ends up being me.

Q And the second thing that is related is that they then start engaging him in a conversation about his experiences in Laos, his childhood experiences from Laos?

A Okay. The question is?

Q That's the second thing that you discussed with them on that date, correct?

A Yes, that he discussed with the PES staff or related that to them.

Q And isn't that when he started to make other complaints to PES then about memories and experiences from his childhood? It was after he'd been to court, after he had talked to his lawyers, and after they had engaged him in a discussion about his childhood experiences?

...

Q ...He starts to make more chronic complaints, though, about his experiences from Laos after that date, the 4th of November, and those are documented, aren't they?

A In the medical record?

Q Yeah. The jail psychiatric records.

A They do document more, yes.

12RP 74-75.

The prosecutor continued questioning Dr. Gerlock about the jail psychiatric notes, and defense counsel eventually asked to speak to the court outside the jury's presence. 12RP 88. During that discussion,

counsel mentioned that Ex. 101 included a note from September 17, 2010, and a discussion of Noy's interaction and unhappiness with his prior attorney. 12RP 88. The defense objected that such information was irrelevant and prejudicial, and the state agreed not to ask questions about that statement. 12RP 90.

After the jury returned, the state went further through the jail staff notes and asked Dr. Gerlock about a statement that said "he is in jail because of his brother..." 12RP 96-97. The state asked Dr. Gerlock whether she had asked him about that statement and what he said, and Dr. Gerlock testified, "Well, you know, what we talked about was the conflict that his brother had with Tom, Sr. and just that whole belief system around who was responsible around the break-in or the house – what do they call it – house invasion." 12RP 97.

The state then questioned Dr. Gerlock regarding statements Noy made on December 4, 2010 regarding his unhappiness with his prior attorney, the same subject area about which it had previously agreed not to inquire:

> Q ...So he is angry about some of the legal aspects of it, am I right? He goes on to say that he had done some of his own research, correct?
>
> A He had gone to the law library.
>
> Q And he is frustrated?

A Yes.

Q He feels like he's getting some bad information or something?

A Those aren't the exact words.

Q All right.

A But he went to the law library.

Q Okay. Can you pick it up where it says, "This is entirely incongruent?

A Yes. They say, "This is entirely incongruent with [inmate's] self description and current presentation of himself. [Inmate] would not endorse any feeling of hope related to the idea that he might be able to get a better deal or work better with his new attorney."

12RP 98-99. Again there was no objection from the defense.

Outside the jury's presence, defense counsel did not refer to Noy's statements about his attorney, but argued that when the state questioned Dr. Gerlock about what Noy said about Mark's involvement, it opened the door to more information about the Mark/Tom conflict the previous night. 12RP 100-01. The court ruled it would permit Dr. Gerlock to testify to the details of the conversation between she and Noy, and then adjourned for the day. 12RP 105.

The next morning the defense renewed its motion to recall Mark to testify about his interaction with Tom the night before the shooting, and

discussed Mark's March 30, 2010 recorded statement and March 18, 2011 interview notes (Ex. 102, 103). 13RP 2-3. The defense argued that evidence regarding the interaction with Tom should come in because it was *res gestae*, showing in part why Tom targeted Noy and thus was part of the events leading to the shooting. 13RP 5-8. The new information changed the analysis and the court should reconsider its pretrial ruling. Counsel said she had an "aha" moment during Dr. Gerlock's testimony about Noy's statements to jail staff about his brother because she did not have the notes, "and that was what got me thinking about this, to put it together." The court refused to change its ruling. 13RP 15.

Dr. Gerlock's cross-examination then continued. While asking about additional statements Noy made to jail staff, the prosecutor remarked, "Now, this is the 27th of December, this is after he's gone to court and talked to his lawyers about having your visit?" Defense counsel objected and asked that the jury be excused. 13RP 23.

Defense counsel discussed the state's repeated comments about Noy's meetings with his lawyers and objected that these comments suggested the defense had fabricated a mental health defense. This was unfairly prejudicial and had no probative value, and constituted misconduct. 13RP 24.

The state argued Ex. 99 was already admitted and had been read to the jury, and in that exhibit the jail staff discussed the meeting with Noy in which Noy said he discussed being evaluated by a mental health professional, and also told the staff he spoke with his attorney about painful experiences he had as a child in Laos and Thailand. 13RP 24-25. The state argued these were "predicate facts upon which the State gets to make an argument that he was being cued toward figuring out how to sort of present himself in a certain way to be diagnosed with PTSD." 13RP 25.

The defense argued this was misconduct and this colloquy followed:

> [The defense]: ...Your Honor, I think that is mistrial if it's allowed to go further than this.
>
> [The state]: I don't know what going further means. It's already in evidence. This happened yesterday.
>
> [The court]: And that is what I was going to ask you. What happened right before you asked that we dismiss the jury that you thought was going to come in that concerns you?
>
> [The defense]: Your Honor, more about this yesterday. Yesterday I did not object – first of all, I didn't have these pages. I don't have this in the order that Mr. Larson has, so don't have this page to read and look at. I'm hearing it after the jury has heard it. So my choice strategically was not to start objecting in front of the jury and making these arguments in front of the jury. I don't think that is appropriate. But then I asked that they be excused. And I made the request that he not go into

information about the lawyer. And then he asked her to read, and she read information about the lawyer, and that's why today I asked that he do cross-examination in a leading fashion so it didn't go into anything about the lawyer. And then he brought up, well, this is after, you know, you – so it didn't occur to me that he would be this obvious, this, you know, that this is what he was going to do until he did it again today, just right now.

[The court]: Well, certainly, there shouldn't be any intimation that there was collusion between the defense and the defendant. I think there is a fine line here. Certainly, the fact that he was told or he told Dr. Gerlock or the jail medical staff that he would be having a mental health evaluation, and he discussed traumatic childhood events, doesn't suggest collusion. It's a problem that until it's out there, it's difficult for me to assess whether or not we're getting in that area. But I think that it should be clear that statements that he made to the jail staff about what he knows are permissible. The fact that he's getting that information from his lawyer is not relevant and I think it does lead to an impression that should not be in front of the jury.

[The state]: Well, nobody else set up that appointment. He only knows about the appointment because his lawyers said we're going to get an expert to come in and see you. I assume the court is not saying that is problematic?

[The court]: No, that's already in.

...

[The defense]: Your Honor, is that the ruling, that Mr. Larson won't go into anymore about the lawyer and what

> Noy was told by his lawyers, he won't ask that in that way or –
>
> [The court]: Right, there shouldn't be any information that – the jury shouldn't have knowledge that information was coming from his attorneys because that, I think, puts that logical leap there, illogical leap, however you want to look at it, possible leap, that is not appropriate.

13RP 27-30. Despite this admonition, the prosecutor later brought up the subject in his closing argument. 16RP 53-54.

b. The reconstruction by Dr. Jon Nordby and the defense motion to exclude.

Dr. Jon Nordby testified for the state as a crime scene reconstructionist, although he initially had been retained by the defense. Dr. Nordby prepared an April 2012 report for the defense, and among his conclusions was that some of the abrasions on Tom's head were made when Noy hit Tom with the butt of the Glock. 10RP 52; Ex. 85 at pp. 107-12. The report also showed the possible positioning of Noy and Thomas at the time of the shooting. Ex. 85 at pp. 137-45. In that report Dr. Nordby stated, "I am not able to account for the relative positions of either the decedent or the suspect when the blow from the Glock butt struck his head." Ex. 85 at approximately p. 144; Ex. 88.[5]

[5] The pages of Ex. 85, Dr. Nordby's first report, apparently were somewhat shuffled. During the defense cross examination of Dr. Nordby, page 142 of his report was not in its place; Ex. 88 is that single page. 10RP 133. When one reviews Ex. 85, however, page 142 is located after page 144, though the page is folded and obscures the page number.

The state interviewed Dr. Nordby and he opined, based upon his examination of the evidence, that Noy struck Tom with his Glock while Tom was sitting in the driver's seat, before the shots were fired. He told the prosecutor during the interview he was "willing to bet that it happened ... before the bullets were fired." Supp. CP __ (Sub No. 163 at p. 5).

Following this interview the defense decided not to use Dr. Nordby as an expert because of cost (3RP 43) and the state retained him. During pretrial proceedings on October 31, 2012, the defense discussed that Dr. Nordby had apparently prepared a new reconstruction after additional conversations with the prosecutor. The state had not provided the new reconstruction. The prosecutor said he was trying talk to Dr. Nordby over the weekend (November 3-4) and get more information, but the state would call Dr. Nordby regardless of whether a new reconstruction had been prepared. 3RP 44.

During the discussion the following colloquy took place:

> [The state]: I will say this, I'm very willing in advance of him testifying to put him on and make sure we do lay a proper foundation.
>
> [The court]: Am I to take it from your statement, he has not done new illustrations?
>
> [The state]: No.
>
> [The court]: Alright, then certainly it seems as if we will need him to testify before so that we can get some sense

> of what he intends to testify to and how it may be different from what he put in his report, his testimony previously, due to the different information concerning the bullet.

3RP 45-46.

At some point before opening statement took place on November 6th, the prosecutor spoke with Dr. Nordby on the phone and asked him to reconsider his opinion. 10RP 4-5. Dr. Nordby had already been working on a new theory based upon evidence he did not consider in his original report. 10RP 7. He told the prosecutor there would likely be a second possibility. 10RP 8.

During opening statement on November 6th, the prosecutor took the position that Noy might have hit Tom with the gun after the shooting. 9RP 127, 136-37. The defense told the jury no evidence supported such a position. 9RP 127.

Following opening statement, Dr. Nordby produced the second report in which he concluded it was possible Noy hit Tom with the Glock before the shooting. It also was possible Noy hit Tom with the Glock after Tom had been shot and was lying on the ground. Ex. 87 at p. 3. He made clear, however, that these were only possibilities:

> But, one might ask, is it ***possible*** that the blow was inflicted before the shooting – in a struggle between two combatants, one of whom retreats into the driver's seat of the SUV with the other remaining outside the driver's side

> door? Yes, that is ***possible***. And then the shooting events unfold as reconstructed below? Yes, that is ***possible***. The question asked, then is if it's ***possible***, then how ***probable*** is it? Often, to the frustration of those needing exact answers, the reply must be "we don't have sufficient data to tell."

Ex. 87 at p. 3 (emphasis in original). Even though he stated this was only one possibility, his illustrations showed Noy hitting Tom as he was lying on the ground. He did not provide illustrations of any other possibility. Ex. 87 at pp. 8-9.

The defense moved to exclude any testimony from Dr. Nordby regarding when the blow to the head took place, arguing it was speculation and not helpful to the jury. Supp. CP __ (Sub No. 164); 9RP 123-25. The state acknowledged the speculative nature of Dr. Nordby's opinion in its response to the defense motion, stating: "...it is clear that there is no definitive answer to the question when this blow to the head came in such close temporal proximity to the death of Mr. Bennett." Supp. CP __ (Sub No. 163 at p. 5).

In the alternative, the defense moved for a mistrial, arguing that it had been prejudiced by not having been provided with Dr. Nordby's new "opinion" prior to the trial and opening statement, when the state was aware Dr. Nordby was going to be changing his opinion. 9RP 129.

The court denied the defense motion to exclude Dr. Nordby's new opinion, ruling:

> I can appreciate the fact that he's not coming down definitively with regard to one position or another may seem as if it's not helpful to the jurors, but in fact it's information that they would have that the probability that either of those two scenarios is possible is information that is relevant for them and relevant to the facts of this case. And so I do believe that it is appropriate testimony.

9RP 173.

With respect to the motion for mistrial, the court stated:

> The only way that there, in my mind, could be a mistrial with regard to this would be if Mr. Larson became aware of the fact that Dr. Nordby was going to change his opinion prior to, and using that information prior to giving it to the defense ... And the way to really get a final determination is to have Dr. Nordby testify with regard to that conversation that happened on Friday ... If there is no evidence that there was a conversation where Dr. Nordby gave information to the State that he was going to be changing his opinion, then the testimony will be allowed.

9RP 173-74.

The court heard testimony from Dr. Nordby outside the jury's presence regarding his new opinion and when he spoke with the prosecutor about it. Dr. Nordby testified that at the time the prosecutor spoke with him about revising his opinion, he was already working on a new report and a new set of trajectories, and he told the prosecutor at that time there was going to be a supplemental report and likely a new possibility. 10RP 8.

Despite that testimony from Dr. Nordby, the court in its final ruling mistakenly stated, "And it doesn't appear to me, even in the phrasing that was brought out by testimony, that there was ever a point when Dr. Nordby told Mr. Larson that there would be a change in the findings. And so for those reasons, I will allow the testimony." 10RP 13.

During his testimony before the jury, Dr. Nordby testified no evidence showed when the gun butt hit Tom's head. 10RP 83. One possibility was that he was hit on the head before he was shot. 10RP 84. Another was that he was hit on the head after he was shot and lying on the ground. 10RP 85. As he stated, "the notion of possible is very broad." 10RP 114.

During Dr. Nordby's testimony the state used a powerpoint that showed the new possibility and no other possibilities. Ex. 89. That powerpoint shows three pictures of Noy hitting Tom with the Glock while Tom was on the ground. Ex. 89 at slides 19-21.

In closing, the prosecutor used Dr. Nordby's new theory to argue that this act showed that Noy was driven by personal anger: "The only thing that really makes sense is that he went up and did so afterwards as a gratuitous extreme personal act of violence against Tom Bennett after he'd already been shot three times." 15RP 71. The prosecutor made this

argument even though he admitted that Dr. Nordby was speculating. 15RP 69.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO ALLOW MARK TO TESTIFY ABOUT HIS ARGUMENT WITH TOM THE NIGHT BEFORE THE SHOOTING, AND TOM'S THREAT THAT "BULLETS WILL FLY."

a. The Evidence was Admissible as Res Gestae.

The conflict between Mark and Tom the night before the shooting was just as much *res gestae* as the invasion of Tom's home by masked men the night of the shooting. Tom's reference to Mark, while he accused Noy, showed Tom's belief that both incidents were related. The conflict between Mark and Tom, including Tom's threats, was a necessary part of the story the jury needed to hear to fully understand the context of the events leading up to the shooting.

Under the *res gestae* exception to ER 404(b), evidence of other acts is admissible "'[t]o complete the story of the crime on trial by proving its immediate context of happenings near in time and place.'" State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), quoting Edward M. Cleary, McCormick's Evidence § 190, at 448 (2d ed. 1972)), aff'd, 96 Wn.2d 591, 637 P.2d 961 (1981); see also, State v. Thompson, 47 Wn. App. 1, 11–12, 733 P.2d 584, review denied, 108 Wn.2d 1014 (1987).

Each act must be "a piece in the mosaic necessarily admitted in order that a complete picture be depicted for the jury". Tharp, 96 Wn.2d at 594.

The justification for the *res gestae* rule is that the jury needs to have a complete picture of how the alleged crime came to occur. State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Although courts use the phrase "immediate context," this is a relative term, interpreted to include events that may have happened several days prior to the crime charged against the defendant, if necessary to complete the story. State v. Grier, 168 Wn. App. 635, 646-47, 278 P.3d 225 (2012); State v. Powell,126 Wn. 2d 244, 263-64, 893 P.2d 615 (1995) (events and statements on last two days of decedent's life); State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995) (evidence of a series of crimes the defendants committed together during the 48 hours before and after the murder was admissible under the res gestae exception); State v. Boot, 89 Wn. App. 780, 790, 950 P.2d 964 (1998) (activities happening several days prior to a murder were part of "the immediate context of happenings near in time and place.")

The purpose of *res gestae* evidence is not to demonstrate a person's character but to show the "sequence of events surrounding the charged offense." State v. Hughes, 118 Wn. App. 713, 725, 77 P.3d 681 (2003). In Grier, which also involved a prosecution for murder, the

evidence included information from a week before the killing. The Grier court found these separate but connected acts of the defendant to be *res gestae* of the alleged crime because they were part of the continuing events leading to the murder in that case and thus not "prior misconduct" that must be excluded under ER 404(b). 168 Wn. App. at 646-47.

The same rule should control here. The jury was entitled to hear the defense theory that Tom and Mark had a heated argument 24 hours before Tom was killed, that Tom believed the subsequent home invasion and beating of his wife and son was related to that argument, that Tom believed Noy was also involved in the home invasion, and that Tom went looking for Noy as a result. These facts were intertwined and the trial court erred in excluding the evidence related to Tom and Mark's argument, and Tom's threat that "bullets will fly." 5RP 3-4; 13RP 2-15.

This evidence was particularly probative in the context of self-defense. The depth of Tom's anger, the reasons for it, and Tom's threat to use a firearm were all probative on the key question at trial – whether Noy reasonably believed he remained in imminent danger from Tom. Where unbiased witness Vernon Styles heard Tom say "get me the gun" or "give me the gun,"[6] Tom's threat that "bullets will fly" was particularly

[6] 11RP 9-16; Ex. 90-91.

probative evidence to explain the context of this altercation. The trial court erred in excluding the evidence.

b. Exclusion of the Evidence Violated Noy's Right to Present a Defense.

The right to present a defense is a fundamental element of due process. U.S. Const. Amends. VI, XIV; Wash. Const. Art. 1, §§ 3, 22; State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010) (citing, inter alia, Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973)). The right to present a defense includes the right to present relevant evidence.

> "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 622. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." Id. We must remember that "the integrity of the truthfinding process and [a] defendant's right to a fair trial" are important considerations. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). We have therefore noted that for evidence of high probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." Id. at 16.

Jones, 168 Wn.2d at 722. "[T]he more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational

matters." Darden, 145 Wn.2d at 619 (citing State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987)).

Appellate courts owe no deference to a trial court when the question involves Sixth Amendment violations, which are reviewed de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012); Jones, 168 Wn.2d at 719. A trial court's decision to exclude evidence should be reversed where the trial court abuses its discretion. State v. Johnson, 90 Wn. App. 54, 69-71, 950 P.2d 981 (1998).

As shown in section 1a, *supra*, the evidence was probative on the reasonableness of Noy's use of force. This was the key question at trial and as the supreme court held in Darden, this is the precise circumstance where the defense must be given more latitude in cross-examination, not less. Darden, 145 Wn.2d at 619. Neither the trial court nor the state identified any unfair prejudice from the evidence. The trial court did not find that the state met its burden "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). For these reasons as well, the trial court erred in excluding the evidence, and the state cannot show the error is harmless beyond a reasonable doubt. Noy's convictions should be reversed.

2. THE TRIAL COURT ERRED IN ALLOWING DR. JON NORDBY TO OFFER A SPECULATIVE, UNHELPFUL, AND UNFAIRLY PREJUDICIAL EXPERT OPINION.

As the defense prepared for trial, reconstructionist Dr. Jon Nordby was going to testify, consistent with his prior report, that he believed Noy hit Tom on the head with the Glock before the shots were fired. The defense was surprised when the prosecutor took the position during opening statement that Noy might have struck Tom after the shooting, while Tom was lying on the ground defenseless and dying. 9RP 127, 136-37. The defense countered in its opening statement that no evidence supported the state's position. 9RP 127. The state had not notified the defense that Dr. Nordby told the prosecutor he would be preparing a new report and would likely present a new theory at trial. 10RP 8.

The new theory, that Noy struck Tom as he lay dying on the ground, was not founded on any evidence the jury heard. It was speculation, and Nordby admitted he did not know what happened. Under the circumstances, the court erred in allowing this new opinion. The manner in which this cold-blooded, imaginary act was presented to the jury through Nordby's one-sided illustrations was unfairly prejudicial. Ex. 89. The court should have excluded the new opinion or granted the defense motion for a mistrial.

ER 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"Expert testimony on scientific, technical or specialized knowledge is admissible under ER 702 if it will assist the trier of fact to understand the evidence or a fact in issue." Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App. 722, 734-35, 959 P.2d 1158 (1998), citing Queen City Farms, Inc. v. Central Nat'l Ins. Co., 126 Wn.2d 50, 102, 882 P.2d 703 (1994). ER 702 requires the court to make two inquiries. First, does the witness qualify as an expert? And second, would the proposed testimony be helpful to the trier of fact? State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024, 1029 (1999); State v. Janes, 121 Wn.2d 220, 235-36, 850 P.2d 495 (1993).

Conclusory or speculative expert opinions lacking an adequate foundation should not be admitted. Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 177, 817 P.2d 861, 865 (1991). "Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded." Queen City Farms, 126 Wn.2d at 103. "The factual, informational, or scientific basis of an expert opinion, including the

principle or procedures through which the expert's conclusions are reached, must be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact." Griswold v. Kilpatrick, 107 Wn. App. 757, 761-62, 27 P.3d 246 (2001), citing Sanchez v. Haddix, 95 Wn.2d 593, 627 P.2d 1312 (1981).

The court should also consider whether the issue is one where an expert could express "a reasonable probability rather than mere conjecture or speculation." Davidson v. Municipality of Metropolitan Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569, review denied, 106 Wn.2d 1009 (1986), quoting 5A K. Tegland, Wash. Prac. § 291, at 36 (1982). "[W]hen ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert." Davidson, 43 Wn. App. at 572, citing United States v. Fosher, 590 F.2d 381 (1st Cir. 1979).

The prosecutor kept the defense in the dark about the fact that Dr. Nordby would be presenting a new theory at trial; the prosecutor violated CrR 4.7(2)(ii) when he failed to disclose this information to the defense. See State v. Krenik, 156 Wn. App. 314, 320, 231 P.3d 252 (2010) ("[t]he State has a continuing duty to promptly disclose discoverable information") citing CrR 4.7(h)(2); State v. Greiff, 141 Wn.2d 910, 919,

10 P.3d 390 (2000); State v. Brush, 32 Wn. App. 445, 455, 648 P.2d 897 (1982), review denied, 98 Wn.2d 1017 (1983).

The defense was prejudiced from the state's failure to disclose the new theory when the prosecutor tactically sandbagged the defense in opening statement. The prejudice was compounded when the defense, in its opening, told the jury it would hear no such evidence. The trial court erred when it failed to grant the defense motion for mistrial based upon the state's failure to disclose the new theory to the defense prior to trial. *See* State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994) (mistrial should be granted where defendant has been so prejudiced that nothing short of a new trial will ensure that a defendant will be tried fairly); State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980) (where the state inexcusably fails to act with due diligence and does not timely disclose material facts to the defendant, such facts may result in impermissible prejudice to the defendant).

The court further erred when it allowed Dr. Nordby to present the speculative and extremely prejudicial theory to the jury through his testimony (10RP 85) and his new report (Ex. 89). See O'Donoghue v. Riggs, 73 Wn.2d 814, 822-23, 440 P.2d 823 (1968) (trial court erred in admitting expert testimony that was based upon mere possibilities); State v. Lewis, 141 Wn. App. 367, 388-89, 166 P.3d 786 (2007) (expert

testimony is not relevant under 401, and thus not helpful to the jury, if it does not make a fact of consequence more or less probable); Miller v. Likins, 109 Wn. App. 140, 147-50, 34 P.3d 835 (2001) (trial court properly excluded speculative expert testimony). The prosecutor used Dr. Nordby's testimony about this theory in his closing argument to convince the jury that Noy was a cold blooded killer who should be convicted of murder: "The only thing that really makes sense is that he went up and did so afterwards as a gratuitous extreme personal act of violence against Tom Bennett after he'd already been shot three times." 15 RP 71. The errors related to Dr. Nordby's testimony were unfairly prejudicial to Noy's defense and justify reversal of his convictions.

3. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO OFFER EVIDENCE AND ARGUMENT THAT IMPUGNED DEFENSE COUNSEL AND NOY'S RIGHT TO COUNSEL.

The prosecutor committed misconduct when he introduced evidence of meetings Noy had with his attorneys, and then used the timing of those meetings to suggest that Noy, his attorneys, and Dr. Gerlock were colluding to manufacture a defense related to PTSD. The defense argued these comments constituted prosecutorial misconduct and objected. 13RP 24. The trial court erred to the extent it allowed the prosecutor to make such arguments, though it did warn the prosecutor that such arguments

were improper. 13RP 27-30. However, the prosecutor ignored those warnings and continued. These arguments violated Noy's right to a fair trial, for they could only leave the jury with the impression that Noy and his attorneys falsely presented a defense.

Both the state and federal constitutions guarantee a criminal defendant the right to counsel. U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; State v. Zhao, 157 Wn.2d 188, 204, 137 P.3d 835 (2006). "The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right." State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). Prosecutorial comments regarding the defendant's exercise of his or her right to counsel are improper. United States v. McDonald, 620 F.2d 559, 562-64 (5th Cir.1980); United States ex rel. Macon v. Yeager, 476 F.2d 613, 615 (3d Cir.), cert. denied, 414 U.S. 855, 94 S. Ct. 154, 38 L. Ed. 2d 104 (1973). "It is impermissible to attempt to prove a defendant's guilt by pointing ominously to the fact that he has sought the assistance of counsel." McDonald, 620 F.2d at 564.

> A prosecutor may not imply that an accused's decision to meet with counsel, even shortly after the incident giving rise to a criminal indictment, implies guilt. Neither may she suggest to the jury that a defendant hires an attorney in order to generate an alibi, 'take[ ] care of everything' or 'get . . . [his] story straight.' Such statements strike at the core of the right to counsel, and must not be permitted.

Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990). See also, Bruno v. Rushen, 721 F.2d 1193, 1194-95 (9th Cir. 1983). Further, it is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008); State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011); State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993).

Division Two's recent decision in State v. Espey, __ Wn. App. __, 336 P.3d 1178 (2014), is on point. The court held it was reversible error for the prosecutor to comment on Espey's right to counsel, when the prosecutor argued that Espey's consultation with an attorney discredited him. 336 P.3d at 1179. The defense did not object, but the error was both incurable and substantially likely to affect the jury verdict because the case hinged on witness credibility. *Id*. at 1182.

Because the prosecutor's argument was an impermissible comment on the exercise of a constitutional right, "the State bears the burden of showing the error was harmless." 336 P.3d at 1183, citing State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Where the case turned on credibility, the state bears a "heavy burden." *Id.* Espey had been acquitted of an assault count, which showed the jury did not believe everything the

state's witnesses said. *Id.* The court held: "Absent the prosecution's improper reliance on Espey's meetings with counsel, there is a reasonable doubt that the jury may have reached a different result." *Id.* It therefore reversed and remanded for a new trial. *Id.*, at 1183.

As in Espey, the state's case against Noy hinged on credibility, primarily that of Noy and Thomas. Although Thomas claimed Noy pointed the gun at and threatened him, Thomas also gave inconsistent statements and undisputedly lied to the police. The jury rejected Thomas' testimony and acquitted Noy of second degree assault, again similar to Espey. Vernon Styles' unbiased testimony about hearing Tom say "get me the gun" or "give me the gun" confirmed Noy's reasonable belief that Tom continued to be an imminent threat, and Noy's statement to police provided reasonable grounds to believe Noy acted in self-defense when the shots were fired, and that he did not intentionally kill Tom without justification.

The courts have repeatedly painted a "bright line" with respect to a prosecutor advancing arguments commenting on a defendant meeting with his or her attorney and suggesting that those meetings resulted in a false defense. The prosecutor repeatedly crossed that line, even after the court's admonition. The prosecutor's argument that Noy and his lawyers worked with Dr. Gerlock to concoct a false defense struck at the core of Noy's

right to counsel. Because the state cannot show that this constitutional violation was harmless, Noy's convictions should be reversed.

4. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE SUGGESTING NOY HAD A DUTY TO RETREAT, AND THE PROSECUTOR COMMITTED MISCONDUCT BY SUGGESTING NOY HAD A DUTY TO RETREAT.

The prosecutor committed misconduct by presenting evidence suggesting Noy had a duty to retreat, and the trial court erred in allowing it. This evidence came in through Noy's videotaped interrogation (Ex. 64) in which the detectives repeatedly argued with Noy that he could have left the scene and the incident would have been over. The trial court erred in overruling the defense objection and request for redaction. 7RP40-41.

The information was improperly submitted and argued. It left the impression that Noy had a duty to retreat, contrary to Washington law. This deprived Noy of a fair trial. To the extent this Court believes that defense counsel failed to timely object, the court should hold that any such failure denied Noy effective assistance of counsel.

A defendant claiming prosecutorial misconduct has the burden of proving that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008); State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006). A prosecutor's improper comments

are prejudicial where there is a substantial likelihood the misconduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

If a defendant fails to object and to request a curative instruction at trial, the defendant waives his prosecutorial misconduct claim unless the comment "was so flagrant [and] ill-intentioned that an instruction could not have cured the prejudice." State v. Corbett, 158 Wn. App. 576, 594, 242 P.3d 52 (2010), citing State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

a. The trial court improperly admitted evidence suggesting Noy had a duty to retreat.

The defense moved to redact parts of Noy's recorded interrogation in which the investigating detectives suggested Noy had a duty to retreat. Supp. CP __ (Sub No. 152, Phasay Statement, pp. 58, 71, 77, 84-86, 104, 118, 119). Because this was contrary to the law in Washington, the trial court erred when it refused to redact such statements. 7RP 36-41.

It has long been Washington law that a person has no duty to retreat when he is assaulted in a place where he has a right to be. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); State v. Hiatt, 187 Wash. 226, 60 P.2d 71 (1936); State v. Lewis, 6 Wn. App. 38, 491 P.2d 1062 (1971). Where the facts are such that a jury might be able to

conclude that retreat was "a reasonably effective alternative to the use of force," the jury must be told the accused had no duty to retreat instead of using force. Redmond, 150 Wn.2d at 494.

b. The prosecutor committed misconduct by improperly submitting evidence and making arguments that suggested Noy had a duty to retreat.

The prosecutor submitted the transcript of the detectives' interrogation of Noy, in which they repeatedly told Noy he should have left the scene. Under clear Washington law Noy had no duty to leave because he was in a public place where he had a right to be. It was improper for the prosecutor to submit and the trial court to allow statements from police telling Noy he should have retreated. Although the jury was later instructed there is no duty to retreat, CP 154, the jury was not specifically informed that retreat was not a reasonably effective alternative to the use of force. CP 148. The wrongly admitted evidence conflicted with settled law. It also likely had an unfairly prejudicial impact on the jurors, who are susceptible to the authority of a seasoned detective. Improper police opinions can be given undue weight by jurors and therefore have been held to be particularly prejudicial. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Lewellyn, 78 Wn. App. 788, 793-94, 895 P.2d 418 (1995).

Because the reasonableness of Noy's use of force was the key issue in the case, and because the state's case was not overwhelming, the state cannot show the error was harmless. This Court should reverse Noy's convictions and remand for a fair trial.

5. IF DEFENSE COUNSEL FAILED TO TIMELY OBJECT TO THE STATE'S ARGUMENTS AND SUBMISSION OF EVIDENCE, THEN INEFFECTIVE ASSISTANCE DENIED NOY A FAIR TRIAL.

Defense counsel repeatedly failed to object to improper evidence and argument that was presented to the jury, most notably with respect to the "no duty to retreat" and right to counsel issues. Counsel's failure to do so constitutes the ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wash.2d 222, 229, 743 P.2d 816 (1987). Under Strickland, the right to effective assistance of counsel is denied where counsel's performance is deficient, and where the defense is prejudiced by the deficiency. Strickland, 466 U.S. at 687. See also, State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001) ("Washington has adopted the Strickland test to

determine whether a defendant had constitutionally sufficient representation.")

Performance of counsel is deficient if it falls "below an objective standard of reasonableness." Strickland, 466 U.S. at 688; State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The presumption of reasonable performance may be rebutted when "there is no conceivable legitimate tactic explaining counsel's performance." State v. Reichenbach, 153 Wash.2d 126, 130, 101 P.3d 80 (2004); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Defense counsel's failure to object to the admission of evidence was not reasonable under any standard, particularly with respect to the admission of Ex. 99, the jail interview notes. It is apparent from the record that defense counsel did not know what Ex. 99 contained and she did nothing to prevent its admission. 12RP 71-75. When she later objected to information contained in that exhibit, it was too late. As the trial court stated, the exhibit was already in evidence. 13RP 29-30.

Defense counsel also failed to act in a timely manner with respect to the *res gestae* issue. As she explained to the trial court, during Dr.

Gerlock's testimony, she had an "aha" moment where she put together the *res gestae* argument she advanced the next day. 13RP 15. With all due respect to defense counsel, she should have had her "aha" moment with respect to that evidence, and made that argument, much earlier in the trial.

The record discussed above contains many other instances where counsel should have objected, but failed to do so. See 12RP 73, 12RP 74-88, 12RP 98-99, 16RP 53-54.

To satisfy Strickland's prejudice prong, there must be "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." Kyllo, 166 Wash.2d at 862, 215 P.3d 177. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. 2052; Thomas, 109 Wash.2d at 226, 743 P.2d 816; Garrett, 124 Wash.2d at 519, 881 P.2d 185.

There is certainly a "reasonable probability" that but for counsel's errors, the outcome of Noy's trial would have been different. This Court should reverse Noy's convictions and remand so that he can have a fair trial.

D. CONCLUSION

For the reasons argued above, this Court should reverse Noy's convictions and remand for a fair trial.

DATED this ____ day of December, 2014.

Respectfully Submitted,
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