Filed
Washington State
Court of Appeals
Division Two

September 27, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DOMINIQUE JAMES AVINGTON, Appellant.	No. 55222-1-II PART-PUBLISHED OPINION

LEE, C.J. — Dominique J. Avington appeals his convictions for one count of first degree murder and three counts of first degree assault. Avington argues that the trial court erred in refusing to give a jury instruction on first degree manslaughter as a lesser included offense of first degree murder. Avington also argues that he received ineffective assistance of counsel when his defense counsel failed to renew his motion to sever. And Avington filed a Statement of Additional Grounds (SAG)[1] raising numerous issues.

In the published portion of this opinion, we address Avington's claim that the trial court erred in refusing to give an instruction on first degree manslaughter, which requires a finding of recklessness, as a lesser included offense of first degree murder, which requires a finding of extreme indifference. We hold that in light of the video evidence showing Avington standing square and shooting straight towards the direction of the bar entrance, where the victim and others were gathered, and Avington's stipulation that a photo admitted into evidence shows him standing

[1] RAP 10.10.

square and firing multiple rounds from a semi-automatic handgun straight towards the direction of the bar entrance where the victims and others were gathered, no reasonable jury would have been able to rationally find that Avington was acting recklessly as required for first degree manslaughter rather than with extreme indifference as required for first degree murder. Thus, the trial court did not err in failing to give the lesser included jury instruction on first degree manslaughter. We address and reject Avington's ineffective assistance of counsel and SAG claims in the unpublished portion of the opinion. Accordingly, we affirm.

FACTS

A. BACKGROUND

On October 20, 2018, Natosha Jackson was bartending at a club in Lakewood, Washington. The club had been abnormally busy and some of Jackson's friends were having a birthday party in the VIP section of the club. Early in the morning on October 21, Jackson got into an argument with some men at the bar. Tired and frustrated, Jackson walked away from the bar. Jackson asked her friend, Perry Walls, to watch out for her because she was being disrespected by a group at the bar. Jackson then went outside and saw her boyfriend, Terrence King, and his friend, Denzel McIntyre, who had come to pick her up. Jackson told King she wanted to go home and went back into the club.

Inside the club, Walls confronted the group of men that Jackson had identified as being disrespectful to her. This group included Avington, Darry Smalley, and Kenneth Davis. Some of Walls' friends from the party followed Walls over to the group. After a short verbal confrontation, punches were thrown, and both groups were involved in a short fight. The fight was pushed toward

the door and people began leaving the club. Walls was still upset about the fight and followed the group outside.

Outside the club, King recognized Walls and moved toward him. McIntyre followed King. Moments later, 30 shots were fired toward the club. King, Walls, McIntyre, and many other patrons of the club tried to rush back inside. King was struck by two bullets, one of which was a fatal shot to the upper back, and died inside the club. Walls was shot in the foot. McIntryre was shot in the buttocks. Pearl Hendricks, a woman inside the club, was shot four times, twice in the back. Hendricks was left permanently paralyzed from the chest down.

The State charged Avington with one count of first degree murder for King's death. The State also charged Avington with three counts of first degree assault for the injuries to Walls, McIntyre, and Hendricks. Avington was charged as both a principal and accomplice. Later, the State amended the information to include an alternative count of second degree murder for King's death. The State also alleged for each charge the aggravating circumstance of committing an act with a destructive and foreseeable impact on persons other than the victim. Smalley and Davis were also charged, and they were set to be tried jointly with Avington.

B. STIPULATION

All three defendants moved to exclude any gang evidence. During the motion hearing, the State offered to withdraw the gang evidence if the defendants would stipulate to their identities as the shooters and rely on self-defense. The defendants agreed to the State's suggestion, and the State agreed to sanitize any reference to gang related evidence. The parties entered a comprehensive written stipulation identifying the defendants, as well as several other people, in various surveillance videos used as trial evidence. The stipulation included several "still

photographs taken from surveillance video" that the defendants stipulated were photographs of Smalley and Avington firing multiple rounds from semi-automatic handguns. Clerk's Papers (CP) at 67.

C. TRIAL

The trial court admitted the stipulation into evidence. Jackson, Walls, and McIntyre testified to the background facts above. Jackson explained that she told Walls, "I need you to watch my back tonight," because people were being disrespectful. 9 Verbatim Report of Proceedings (VRP) at 1381. Walls asked her who he should watch out for and she indicated the group by the bar.

Walls explained that after Jackson told him she was being disrespected, he went over to the bar and "made a general announcement" asking who was being disrespectful. 11 VRP at 1725. Nobody responded to the announcement. A few minutes later, the group was "getting riled up" and looked to be "squaring off" to fight. 11 VRP at 1727. Walls began pulling up his pants, preparing for a fight, and then got blindsided by a punch. Walls explained that the fight moved outside the club as people were pushed out the door. Walls went outside and continued arguing with the guys outside. While Walls was arguing, he heard shots fired, ran inside, and fell. Inside the club, Walls realized he had been shot in the foot. Walls testified that he never had a firearm in his possession.

Detective Jeff Martin of the Lakewood Police Department was assigned as the lead detective to investigate the shooting at the club. Based on forensic examination of fired shell casings at the scene, Detective Martin determined there were three shooters firing from three areas. In total, forensics collected 30 shell casings from outside the club. Through his investigation,

Detective Martin also identified Avington, Smalley, and Davis as part of a group that had been together at a different club before going to the club in Lakewood.

1. Avington's And Smalley's Testimony

Avington and Smalley testified in their own defense. They both testified that they were friends. Avington explained that he had known Smalley for years. Although neither of them intended to meet the night of the shooting, they ended up at the same club earlier in the night. Then the entire group went to the club in Lakewood.

Smalley testified that while they were at the club, Walls started yelling at and threatening Smalley's group. Smalley recognized that the confrontation was turning into an argument and people in both groups were getting ready to fight. Smalley was trying to stay out of the fight. One of Walls' friends threw a punch that did not hit anyone and the fight erupted. During the fight, Smalley was grabbed and thrown to the ground. The man who slammed Smalley to the ground ran out the door. Smalley believed the man went to get a gun and tried to get out of the club. Smalley ran out into the parking lot to his car and grabbed his gun from the passenger door. As Smalley headed back toward the club, he saw Avington in an aggressive confrontation with Walls. Although the confrontation appeared aggressive, Smalley could not hear any words being spoken. Smalley also saw two other men behind Walls that Smalley believed were involved in the confrontation.

Smalley testified that during the confrontation outside, Walls displayed a firearm. As soon as Walls showed his firearm, Smalley began firing. According to Smalley, Walls' firearm was a black, semi-automatic. When Smalley saw Walls' firearm, he was scared that Walls would shoot him or Avington. Smalley felt that

> if I let [Walls] pull that gun out, then not just my life but my friend's life is in danger and that we will be shot, so I shoot first.

15 VRP at 2375. Avington also started shooting at the same time, but Smalley claimed that there was no communication between them before the shooting began.

Smalley admitted that he believed he shot King, although he was not sure who shot Hendricks because there were three people shooting. Smalley also admitted that he was shooting at Walls. Smalley testified that he fired 16 or 17 time at Walls, King, and McIntyre.

Avington testified that he had never been to the club before, but he assumed it was a biker bar. Avington had a firearm with him and brought it inside the club.

Avington first noticed Walls yelling and being belligerent while he was at the bar. At first, Avington was not sure who Walls was directing his comments to, but then it became apparent to Avington that Walls was addressing his group. The confrontation began to escalate and people began pushing. Avington testified that a punch was thrown and then he ended up involved in the fight. Avington attempted to leave the club and walk away from the situation, but the argument continued outside.

Avington also testified that Walls confronted him outside the club. According to Avington, Walls threatened to kill him, pulled up his shirt, and displayed a firearm. Avington stated that he fired only to scare Walls and to keep Walls from shooting at him. Avington explained that

> I wasn't aiming at anything in general. I didn't even want to aim at [Walls]. I just shot to scare him away from me and the people who were around me at the time.
>
> . . . .
>
> I aimed away from him, actually. I just wanted to prevent him from doing anything further, for him getting a chance to shoot me or anybody I was around.

16 VRP at 2501. Avington specifically testified that he fired high and to the right. Avington claimed that he purposefully shot away from all of the people. Avington admitted that his rounds could have struck the club, but they could not have struck people. Avington explained he only wanted to scare Walls away from him.

After the shooting, Avington left the scene because he was scared. Avington also explained that he did not trust the police and had no intention of dealing with them. Avington denied that any discussion occurred between him and Smalley prior to the shooting. He explicitly testified that he only knew what he did, he did not know what anyone else was doing.

2. Surveillance Videos

Videos from the surveillance system at the club, as well as surveillance videos from a neighboring business, were admitted into evidence. The club's security video captured the fight inside the club.

Prior to the fight, Walls can be seen posturing, pulling up his pants, and beginning to square off with a group. Then Avington threw a punch at someone standing next to Walls. As multiple people ended up on the ground, Avington began throwing punches at someone on the ground. Avington then punched Walls several times, and Walls fought back. Punches continued to be thrown as several people involved in the fight began running out of the club.

Video of the front entrance area of the club show the fight getting pushed outside. Walls and others continued yelling and posturing at the entrance of the club. The pushing and shoving continued before Walls exited the club. Walls exited the club, and less than a minute later, the shooting began.

Video outside the club shows Avington leaving the club and walking away, but then he turns around and returns to the club entrance. Avington got into some type of altercation with others outside the entrance and the people still inside the club entrance. Avington and others move away from the club entrance and into the parking lot as Walls exits the club.

The video behind Walls shows him pulling up his pants and walking in Avington's direction. Walls is on the video for the entire time leading up to the shooting, and it appears both of his arms are at his sides the entire time. As soon as the shooting starts, Walls turns and runs back into the club. Avington is not in the frame of this video.

However, a surveillance video from a neighboring business shows Avington and Smalley at the time of the shooting. Avington stipulated that a still photo from the video showed him firing multiple bullets while standing square, facing forward with his arm almost parallel to the ground and pointing forward. Smalley is to Avignton's left, standing slightly behind him. The surveillance video also shows Smalley in the same stance as Avington and firing 17 shots. The video further shows that after the shooting, Avington and Smalley ran away in the same direction.

3. Jury Instructions

Avington proposed jury instructions for first degree manslaughter as a lesser included offense. After the off the record discussion on jury instructions, Avington took exception on the record to the trial court's refusal to instruct on the lesser included offense. Avington argued that the jury could find that his actions were just negligent or reckless. The trial court provided an extensive ruling on its decision to not include the proposed lesser included offense instruction. The trial court stated that

> Mr. Avington's assertion, his testimony that he aimed away from people, in my view is not credible. The video evidence shows Mr. Avington holding the gun that he fired in a level fashion. It does not demonstrate that Mr. Avington was aiming that gun upwards and away from individuals as he testified he aimed up and to the right. The video evidence doesn't support that assertion.

17 VRP at 2628. Ultimately, the trial court concluded that the jury could not rationally conclude that only first degree manslaughter was committed.

The trial court also instructed the jury that Avington was guilty of all charges if the crime was committed by either Avington or an accomplice. The trial court's instruction on accomplice liability stated:

> A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
>
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.
>
> A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP at 199.

D. VERDICTS AND SENTENCING

The jury found Avington guilty of first degree murder, second degree murder, and three counts of first degree assault. The jury also found that Avington or an accomplice was armed with a firearm for all offenses. The jury further found that the State proved aggravating circumstance on all charges. The jury entered the same verdicts against Smalley. The jury found Davis not guilty of all charges.

The trial court determined that a standard range sentence was appropriate despite the jury's findings on aggravating circumstances. The trial court imposed a high end range sentence on each count.[2] The trial court also imposed the mandatory firearm sentencing enhancements. All terms of confinement were ordered to be served consecutively because all charges were serious violent offenses. Avington was sentenced to a total of 929 months total confinement.

Avington appeals.

ANALYSIS

Avington argues that the trial court erred by refusing to give his proposed instruction on first degree manslaughter as a lesser included offense of first degree murder by extreme indifference. We disagree.

[2] At sentencing, the trial court dismissed the second degree murder conviction to prevent a double jeopardy violation with the first degree murder conviction.

A. LEGAL PRINCIPLES

A defendant has a statutory right to have the jury instructed on a lesser included offense. *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015); RCW 10.61.006.[3] Washington courts use the two-pronged test in *State v. Workman* to determine whether a defendant is entitled to an instruction on a lesser included offense:

> [A] defendant is entitled to an instruction on a lesser included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged [legal prong]. Second, the evidence in the case must support an inference that the lesser crime was committed [factual prong].

90 Wn.2d 443, 447-448, 584 P.2d 382 (1978) (internal citations omitted). Although *Workman* is the well-established test for determining whether a defendant is entitled to an instruction on a lesser included offense, our Supreme Court has recently recognized that some of the case law interpreting the *Workman* test have caused some confusion regarding the second prong (the factual prong) of the *Workman* test—specifically, the language in *State v. Fernandez-Medina*.[4] *State v. Coryell*, 197 Wn.2d 397, 415, 483 P.3d 98 (2021).

In *Fernandez-Medina*, our Supreme Court explained the application of the factual prong of the *Workman* test as follows:

> The purpose of this test is to ensure that there is evidence to support the giving of the requested instruction. If interpreted too literally, though, the factual test would impose a redundant and unnecessary requirement because all jury instructions must be supported by sufficient evidence. Necessarily, then, the factual test includes a requirement that there be a factual showing more particularized than that required

[3] RCW 10.61.006 states, "In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that which he or she is charged in the indictment or information."

[4] *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000).

> for other jury instructions. Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense.

141 Wn.2d at 455 (internal citation omitted). Although not incorrect, our Supreme Court has recognized that this language has resulted in courts weighing evidence and mistakenly believing that evidence is required to show that the greater charged crime was not committed.[5] *Coryell*, 197 Wn.2d at 414-15.

Our Supreme Court has now clarified the standard for determining whether the factual prong of the *Workman* test is satisfied. *Id*. at 415. In order for a defendant to be entitled to an instruction on a lesser included offense there must be some evidence presented which affirmatively establishes the defendant's theory of the crime. *Id*. "If the evidence permits a jury to rationally find a defendant guilty of the lesser offense, a lesser included offense instruction should be given." *Id*.

[5] In part, Avington argues that the trial court applied the incorrect standard by relying on the exclusion language in *Fernandez-Medina*. In *Coryell*, our Supreme Court noted:

> Read in isolation, we might agree that the language in *Fernandez-Medina* departs from *Workman*. But in context, it is an attempt to state more clearly a principle that is simple in the abstract and often complicated in the specific: a defendant is entitled to a lesser included instruction based on the evidence actually admitted.

197 Wn.2d at 406. Therefore, the issue is not one of whether the trial court applied the wrong legal standard but whether the trial court erred in determining that the factual prong was not satisfied.

B. FIRST DEGREE MANSLAUGHTER INSTRUCTION

Avington argues that the trial court improperly weighed evidence and made credibility determinations.[6] We disagree.

If the trial court's decision on a lesser included offense instruction is based on a factual determination, we review the decision for an abuse of discretion. *Id*. at 405. Conflicts in evidence are questions of fact for the jury, not the trial court. *Id.* at 414. It is improper for the trial court to weigh evidence when ruling on jury instructions. *Id.* at 415. "When the appellate court determines if the evidence at trial is sufficient to support an instruction, it views the 'supporting evidence in the light most favorable to the party that requested the instruction.'" *Id*. (quoting *Fernandez-Medina*, 141 Wn.2d at 455-56). If a jury can rationally find the defendant guilty of a lesser offense based on the evidence, then a lesser included offense instruction should be given. *Id*.

First degree murder by extreme indifference requires that a person act with extreme indifference, an aggravated form of recklessness, which creates a grave risk of death to others, and

[6] Avington also argues that he was entitled to an instruction on the lesser included offense of first degree manslaughter because, from the evidence, the jury could find that Avington reasonably believed that he needed to act in self-defense but recklessly used more force than was warranted. This specific argument is raised for the first time on appeal.

Under RAP 2.5(a), we may refuse to consider arguments raised for the first time on appeal. Although Avington objected to the trial court's decision to decline the first degree manslaughter instruction, he did not argue that he was entitled to the instruction because he recklessly used more force than necessary to defend himself. And the trial court's ruling was not based, in any way, on the theory that a first degree manslaughter instruction was appropriate because the use of force was recklessly more than necessary. Further, Avington does not address RAP 2.5(a)(3) or any exception to waiver in his briefing. *See State v. Cox*, 109 Wn. App. 937, 943, 38 P.3d 371 (2002) (when an appellant fails to provide argument or authority, this court is not "required to construct an argument on behalf of appellants"). Therefore, we decline to consider Avington's argument raised for the first time on appeal that the trial court should have given the lesser included offense instructions because he recklessly used more force than necessary in self-defense.

causes the death of a person. RCW 9A.32.030(1)(b). On the other hand, first degree manslaughter requires that a person recklessly cause the death of another. RCW 9A.32.060(1)(a). "A person . . . acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c).

In distinguishing between extreme indifference and recklessness, case law shows that a defendant charged with first degree murder is entitled to a first degree manslaughter instruction if there is some evidence that the defendant shot at an object rather than at a group of people. *See State v. Henderson*, 182 Wn.2d 734, 745-46, 344 P.3d 1207 (2015); *In re Pers. Restraint of Sandoval*, 189 Wn.2d 811, 823, 408 P.3d 675 (2018). For example, in *Henderson*, the defendant fired several shots toward a house party and our Supreme Court held that a rational jury could have found that the defendant acted with recklessness because of

> (1) testimony from the party's hosts that only three people were outside the house at the time of the shooting, (2) police testimony that no bullets or bullet strikes were found inside the house, where the majority of the partygoers were located, (3) the fact that most of the shots hit the side of the house or cars on the street and did not appear to land near people, and (4) testimony that Henderson shot from the street rather than closer to the house.

182 Wn.2d at 745. Based on this evidence, our Supreme Court determined that "the jury could have concluded that Henderson intended to scare those in the house by erratically firing his gun rather than aiming at the security people in the yard." *Id*. at 745-46. Our Supreme Court applied the same reasoning in *Sandoval*, in which the defendant was charged as an accomplice for a drive-by shooting of a van. 189 Wn.2d at 822-23.

Here, although Avington testified that he fired high and to the right, which could support giving an instruction on first degree manslaughter, the trial court correctly determined that no reasonable jury would have been able to rationally find that Avington acted recklessly rather than with extreme indifference. *Coryell*, 197 Wn.2d at 415. Avington's testimony was directly contradicted, not only by video evidence showing that he stood square and fired straight towards the direction of the bar entrance where the crowd was gathered, but by Avington's own stipulation that the photo still from the video showed him standing square and firing straight ahead. Generally, it would be improper for a trial court to weigh evidence when determining whether a jury instruction should be given. However, the fact that 30 shots were fired at the crowd at the bar entrance and given Avington's stipulation to photo evidence that clearly shows that Avington was firing straight ahead at the bar entrance where the crowd was gathered and not high and to the right, no jury could rationally determine that Avington acted recklessly rather than with extreme indifference. Therefore, in this case, the trial court did not abuse its discretion by declining to give the instruction on first degree manslaughter as a lesser included offense.

We affirm.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

A. SEVERANCE

Prior to trial, Avington moved to sever his trial from his co-defendants, Smalley and Davis. Avington argued that he was not associated with his co-defendants and that his culpability was

less than his co-defendants. At the hearing on the motion to sever, Avington argued generally that he would be prejudiced by "lumping him together" with the co-defendants and attributing their actions to him when he was maintaining that he acted completely independently of his co-defendants. 1 VRP at 50. Avington did not identify any specific evidence that he claimed would be unfairly prejudicial to him in a joint trial. The State argued that there were no grounds for severance because all the evidence in the trial would be cross-admissible in a trial against Avington and the defenses were not mutually antagonistic.

The trial court ruled that whether Avington acted independently from his co-defendants was a question for the jury. The trial court concluded that Avington had failed to show that any of the legal factors supported severance because the defenses were not mutually antagonistic and the evidence would be cross-admissible. The trial court denied Avington's motion to sever.

At trial, the State presented evidence regarding Smalley's behavior before and after the shooting. Erica Johnson, a friend of Smalley's, purchased the firearm used in the shooting for Smalley. Johnson stated that she did not know Avington, had never met Avington, and had never even seen him before.

Smalley testified that he spent the night at a hotel after the shooting. In the morning, he stopped at a gas station and gave his firearm to a friend. Smalley did not see the firearm after that. Another friend of Smalley's, who was on GPS monitoring for parole, was at Redondo Beach after the shooting. A portion of the firearm that Johnson purchased for Smalley was recovered at Redondo Beach.

Johnson testified that Smalley was at her home the morning after the shooting. While at the house, Smalley told Johnson's fiancé what had happened the night before. Johnson testified

that she heard Smalley say he called a girl a "bitch," the girl called someone over, and a fight broke out. 12 VRP at 1882. The State confronted Johnson with previous statements she had made where she stated that she overheard Smalley say he also fired shots from the parking lot and that Smalley was bragging about the shooting. However, in her testimony at trial, Johnson denied Smalley made the statements, claimed she did not remember, and stated that she was only telling authorities what they wanted to hear.

Several days later, after learning that one person had been killed and three others had been shot, Smalley bought a friend's identification and debit card. Then Smalley traveled through California to Hawaii, where he was arrested.

B. SELF-DEFENSE JURY INSTRUCTION

Avington proposed jury instructions on self-defense for both the murder charges and the assault charges. Avington's proposed self-defense instruction for the assault charges stated:

> A person is entitled to act on appearances in defending himself or another, if that person believes in good faith and on reasonable grounds that he or another 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 at 78. A similar instruction was proposed for self-defense on the murder charges, but the proposed instruction stating that a person is entitled to act on appearance in defending himself as it related to self-defense for the murder charges stated that a person must believe there is "actual danger of great personal injury," which is a higher standard than the assault self-defense instruction in which the person must believe there is only an "actual danger of injury." CP at 78, 80. The trial court did not give Avington's proposed instruction regarding the right to act on appearances of actual danger of injury.

The trial court conducted an off-the-record discussion of the jury instructions. But the trial court took exceptions to the court's instructions on the record. Avington did not take exception to any of the self-defense instructions that the court intended to give to the jury. Avington also did not take exception to the trial court not including Avington's proposed instruction regarding the right to act on appearances in defending from injury.

C. CLOSING ARGUMENTS

The State's theory of the case was that all three defendants chose to act together to "make a statement." 18 VRP at 2658. The State argued that the defendants were acting as accomplices because all three were working together from the beginning of the fight in the club and had the same objective and mindset.

The State also argued that the defendants failed to prove that they acted in self-defense. First, the State contended that the defendants initially claimed identity as a defense but had to switch their defense to self-defense: "The reality is, the defendants' initial defense must have been identity; what we call identity; 'it wasn't me.'" 18 VRP at 2660. However, once the defendant's learned that there were multiple videos showing their participation in the crime they "had to switch to plan B, self-defense." 18 VRP at 2661.

The State went on to argue that there was no evidence to support the claim of self-defense because Walls did not have a gun and Walls did not threaten anyone with great bodily harm or death. When the State began discussing Walls' testimony, the State argued:

> You heard defense try to vilify Perry Walls. Why? They have to. They've got to. In order to make a self-defense claim, the defendants have to be able to point to evidence of a specific and deadly threat. If there's no evidence of a real threat, then their claim—and the threat has to be of death or great bodily harm—then their claim just falls; it's not available.

18 VRP at 2665-66. The State then went on to discuss in detail the evidence it believed showed that Walls had no gun and was not a threat to the defendants. The State also argued that the video evidence showed that Avington, Smalley, and Davis were preparing for the shooting before Walls even exited the club. And the State argued that the defendants' actions and body language show they were intending to shoot toward the entire crowd at the club rather than trying to specifically defend themselves against Walls. The State also reviewed the defendants' testimony in detail to show that it did not support the claim of self-defense.

In rebuttal argument, the State discussed its burden of proof. The State recognized that beyond a reasonable doubt was a difficult concept that is not encountered in daily decision making. The prosecutor offered an analogy to help explain the concept of reasonable doubt:

> Let me offer an analogy for you that may make sense and may be helpful, and that's to consider it in the way you do a puzzle . . . . You sit down and put that puzzle together, and you might find as you go along that there are pieces of the puzzle you don't know what to do with and so you set them aside; you can't find the right place for them.
>
> There are pieces of the puzzle that are broken or warped, chipped, cracked, whatever. There are pieces of the puzzle that maybe they were gone before you even sat down, and nevertheless, if you have enough pieces of the puzzle, there will come a point at which, and it's personal for each of you, there will come a point at which you are certain as to the image you are seeing despite the fact that there are warps in the puzzle pieces, despite the fact that you have missing pieces.
>
> Now think of a trial in much the same way. You are given pieces of evidence like pieces of a puzzle. Some of those pieces of evidence you may not know what to do with. Maybe it's one thing a witness said. Maybe it's everything a witness said, and so you set that piece aside. Maybe there are pieces of evidence that have warps or cracks or chips, but you can still put them into their place. Maybe there are pieces of the evidence that you could conjure up as having existed somewhere out in the ether that just were never presented to you, like those missing puzzle pieces.

> And the question for you all as jurors is—and, again, it's a personal decision for each of you—the question is whether you have enough pieces of evidence warps and all, holes and all, with what you put into place, does it meet the elements of the crime and are you confident beyond a reasonable doubt as to the image you are seeing. I offer that as an analogy as you move forward.

18 VRP at 2835-36.

The State then clarified the burden of proof:

> This is important, too. These defendants when they testified—or, sorry—these defendants have no burden of proof. Let's be clear about that. If you choose to put on a case, that's your right. If you choose not to put on a case, that's your right. If you don't put on a case, like for example, Mr. Davis, you can't hold that against Mr. Davis. You have a right to remain silent, so on and so forth. The burden does at all times remain with the State.

18 VRP at 2881.

The State went on to argue that when a defendant does put on a case, the State is able to question the evidence and the defense presented, including asking why certain witnesses did not testify. The State also argued:

> You heard from [a defense counsel] why the State didn't call Mr. Cooper or Mr. Legend or any of these people. Because they never would have told you the truth. They never would have said: "You know what? I love these guys, but, yeah, what they did wasn't appropriate; what they did was just malicious." And so you're not going to get those witnesses. But if those witnesses who are tight, as you heard from these defendants, are tight with these defendants, where are they to back up what they're saying? That's not burden shifting. That's simply assessing the credibility of what they have to say.

18 VRP at 2882-83. Avington objected and the objection was overruled.

ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Avington argues that he received ineffective assistance of counsel because his defense counsel failed to renew his motion to sever. We disagree.

1. Legal Principles

Issues related to severance are waived if the defendant fails to renew a motion for severance before or at the close of all the evidence. CrR 4.4(a)(2). Because Avington failed to renew his motion to sever during trial, any issues related to the joint trial are waived. However, Avington argues that defense counsel's failure to renew the motion constituted ineffective assistance of counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Vazquez*, 198 Wn.2d 239, 249, 494 P.3d 424 (2021). To establish ineffective assistance of counsel, a defendant must show that their attorney's performance was deficient and prejudicial. *Id*. at 247-48. . An ineffective assistance of counsel claim fails if the defendant fails to establish either deficient performance or prejudice. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014).

Our Supreme Court has explained what must be shown to establish ineffective assistance of counsel based on waiving a motion for severance:

> To demonstrate deficient performance, a "defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." [*State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)]. To establish prejudice based on an improper joint trial, a defendant must show [1] that a competent attorney would have moved for severance, [2] that the motion likely would have been granted, and [3] that there is a reasonable probability he would have been acquitted at a separate trial.

State v. Emery, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). There is a strong presumption that counsel is effective. *Vazquez*, 198 Wn.2d at 247. "The defendant has the burden to show that defense counsel's performance was deficient based on the trial court record." *Id*. at 248. "Specifically, 'the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *Id*. (quoting *McFarland*, 127 Wn.2d at 336).

2. Legitimate Strategic Or Tactical Reason For A Joint Trial

Avington argues that his defense counsel had no strategic reason to waive severance. We disagree.

Avington asserts that there was no strategic reason for a joint trial, but the record indicates that defense counsel may have decided there were potential strategic advantages of a joint trial once the original motion to sever was denied. *See id*. at 255, 258, 261 (assuming defense counsel's strategy and evaluating whether strategic choices were reasonable). For example, Avington's defense was that he did not act as an accomplice to his co-defendants and was not responsible for the shooting. Defense counsel may have determined that this defense may be more successful if Avington could point directly to his co-defendants at trial as the parties responsible. And defense counsel also may have determined that if the jury heard evidence that Smalley bragged about the shooting, tried to dispose of his weapon, and tried to evade arrest in Hawaii, the jury would conclude that Smalley was the guilty party and absolve Avington of guilt for the shooting. Defense counsel's strategy may have been ultimately unsuccessful, but Avington cannot show that there

was no legitimate strategic or tactical reason for defense counsel to waive issues related to severance by failing to renew the motion.

Also, because none of the evidence introduced about Smalley's behavior implicated Avington, defense counsel's strategy was reasonable. *See id*. at 255 (noting the relevant question is whether counsel's strategic choices were reasonable). Johnson specifically testified that she did not know Avington, and there was no evidence that Avington was involved in the purchase of the firearms. And Avington was not with Smalley when Smalley got rid of his firearm, went to Johnson's house, bought someone else's identification, and fled to Hawaii. Because none of the evidence against Smalley implicated Avington, there is nothing in the record that shows it was an unreasonable trial tactic to choose not to renew the motion to sever. Therefore, Avington cannot show that counsel's performance was deficient.

3. Prejudice

Avington also fails to show that the failure to renew the severance motion was prejudicial. Avington cannot show the three factors required to demonstrate prejudice, and his ineffective assistance of counsel claim fails on this basis as well.

As stated above, Avington must show three factors to establish prejudice. First, Avington must show that a competent defense attorney would have moved for severance. *Emery*, 174 Wn.2d at 755. Second, Avington must show that the motion likely would have been granted. *Id*. And third, Avington must show that there is a reasonable probability that he would have been acquitted at a separate trial. *Id*.

a. Would a competent attorney have moved for severance?

Avington argues that a competent defense attorney would have moved for severance because, by the time the State rested its case, it was clear that the evidence against Smalley undermined Avington's case. Avington relies on the following evidence to support this argument: Smalley's purchase of the gun through a straw purchase, Smalley's attempts to have a third party dispose of the gun, Smalley's flight to Hawaii, and evidence that Johnson said Smalley bragged about the shooting. However, we disagree with Avington's argument that this evidence undermined Avington's case and a competent defense attorney would have moved for severance.

The evidence relied on by Avington to support his argument does not directly implicate Avington's guilt; rather, the evidence relates to Smalley's actions and attitudes. Avington argued that he was acting completely independent of Smalley; therefore, evidence of Smalley's actions, including Johnson's testimony, would have had no effect on Avington's case. Further, as explained above, defense counsel may have determined that there were strategic and tactical advantages to a joint trial in which Avington could argue that Smalley's actions proved Smalley was responsible for the shooting and that Avington was only acting independently to defend himself. Therefore, contrary to his argument, Avington's case was not clearly undermined by the evidence against Smalley, and Avington cannot show that a competent defense attorney would have moved for severance based on the discrete evidence relating to Smalley's conduct.

b. Would the motion have likely been granted?

Avington argues that the trial court would have granted a motion to sever because the evidence against Smalley would not have been admissible in a separate trial against Avington. However, a motion to sever is not determined exclusively by admissibility of evidence in a separate

trial. We disagree with Avington's assertion that it is likely a motion to sever would have been granted.

Washington courts do not favor separate trials. *State v. Moses*, 193 Wn. App. 341, 359, 372 P.3d 147, *review denied*, 186 Wn.2d 1007 (2016). Under CrR 4.4(c)(2)(ii), the trial court has the discretion to sever co-defendants' trials when "it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." The defendant moving for severance bears the burden of demonstrating that the prejudice of the joint trial outweighs the concerns for judicial economy. *Moses*, 193 Wn. App. at 359-60.

To show a joint trial was improper, a defendant must show specific prejudice. *Id*. at 359. A defendant may demonstrate specific prejudice by showing:

> "(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculpating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants."

Id. at 360 (internal quotation marks omitted) (quoting *State v. Canedo-Astorga*, 79 Wn. App. 518, 528, 903 P.2d 500 (1995), *review denied*, 128 Wn.2d 1025 (1996)). Ultimately, in order to show that a motion to sever would have been granted, Avington must show that there was specific prejudice that made joint trials improper. *See id*. 359-60.

Here, Avington fails to show any specific prejudice that would necessitate severing his trial from Smalley's. Avington and Smalley did not have antagonistic defenses; they were both arguing they were acting in self-defense from Walls' actions. There was nothing mutually exclusive about their defenses presented at trial. And even assuming, without deciding, that Avington is correct in

his assertion that the evidence regarding Smalley's actions and Johnson's testimony would not be admissible in a separate trial, the evidence was not so complex that it was impossible for the jury to separate out what evidence related to Smalley's guilt and what evidence related to Avington's guilt. Also, there is no specific prejudice based on a co-defendant's statements because Smalley did not make any statements inculpating Avington. Finally, although the additional evidence indicating Smalley's guilt may have created some disparity in the weight of evidence against the co-defendants, there was also a significant amount of evidence against Avington. Therefore, there was not a gross disparity in the weight of evidence against Avington and any prejudice caused by the slight disparity of the evidence against Smalley would be insufficient to outweigh the concerns for judicial economy. Accordingly, Avington cannot show specific prejudice from a joint trial. *See id*. at 360. Because Avington cannot show that there was any specific prejudice from the joint trials, he cannot show that the trial court likely would have granted a motion to sever.

c. Was there a reasonable probability of acquittal in a separate trial?

Avington argues the "jury likely conflated Avington's legitimate fear for his life, and his relatively restrained response to the threat he perceived from Walls, with Smalley's less compelling claims of concern for the safety of his friends, his cavalier attitude towards the incident when talking to Johnson, and multiple acts indicating his consciousness of guilt." Br. of Appellant at 21. Based on this argument, Avington claims that it is likely the outcome at a separate trial would have been different. We disagree.

Here, Avington must establish that there was a reasonable probability that he would have been acquitted at a separate trial. *Emery*, 174 Wn.2d at 755. But the State presented substantial

evidence of Avington's guilt, independent of the evidence related to Smalley's actions; thus, there is not a reasonable probability that Avington would have been acquitted at a separate trial.

Even in a separate trial, the State would have been able to present evidence showing that Avington did not shoot at Walls in self-defense because Walls had a gun. Avington did not dispute that he participated in the shooting. And surveillance video and other witness testimony contradicted Avington's testimony that Walls had a gun. For example, surveillance video showed that Walls did not lift his shirt to reveal a gun as Avington claimed. While Avington testified that he saw a gun before shooting, Walls testified that he did not have a gun. Surveillance video also showed that Avington stood squarely facing Walls and shot multiple bullets straight ahead at Walls, not high and to the right away from Walls as Avington testified. And Avington stipulated that the photo admitted into evidence was a picture of him standing squarely and shooting straight ahead. Given the evidence disputing Avington's claim of self-defense, independent of the evidence regarding Smalley's actions indicating guilt, there is not a reasonable probability that Avington would have been acquitted in a separate trial.

Avington fails to show that a competent attorney would have moved for severance, the motion likely would have been granted, or there is a reasonable probability that he would have been acquitted in a separate trial. Thus, Avington fails to demonstrate that defense counsel's failure to renew the motion to sever was prejudicial.

Avington cannot show that counsel's performance was deficient nor can he show that the failure to renew the severance motion was prejudicial. Therefore, Avington's ineffective assistance of counsel claim fails.

B. SAG

1. Sufficiency Of The Evidence

Avington makes two claims related to his challenge to the sufficiency of the evidence supporting the jury's verdict. First, Avington claims that there was insufficient evidence to support any finding that he was an accomplice. Second, Avington claims that there was insufficient evidence to prove the assault charge related to the shooting of Hendricks.

Evidence is sufficient to support a conviction if any rational trier of fact can find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The evidence must be viewed in the light most favorable to the State and interpreted most strongly against the defendant. *Id*. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "A claim of insufficiency [of evidence] admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

a. Accomplice liability

"A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable." RCW 9A.08.020(1). The person is legally accountable for another person when they are an accomplice in the commission of the crime. RCW 9A.08.020(2)(c). A person is an accomplice when:

> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
>
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) Aids or agrees to aid such other person in the planning or committing it.

RCW 9A.08.020(3)(a). "An accomplice must have actual knowledge that the principal was engaged in the charged crime." *State v. Clark*, 190 Wn. App. 736, 762, 361 P.3d 168 (2015), *review denied*, 186 Wn.2d 1009 (2016). "The statute provides that a person has actual knowledge when 'he or she has information which would lead a reasonable person in the same situation to believe' he was promoting or facilitating the crime." *Id*. (quoting RCW 9A.08.010(1)(b)(ii)). "However, '[w]hile the State must prove actual knowledge, it may do so through circumstantial evidence.'" *Id.* (alteration in original) (quoting *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015)). Further, "[a]n accomplice must associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed." *State v. Jameison*, 4 Wn. App. 2d 184, 204-05, 421 P.3d 463 (2018).

Here, the State presented sufficient evidence to support the jury's finding that Avington acted as Smalley's accomplice. Smalley and Avington were not complete strangers who just happened to be in the same place at the same time. The evidence shows that Avington and Smalley had known each other for a long time prior to the shooting and were together at another club before the shooting. Further, Avington and Smalley acted together as part of a group when fighting with Walls. And the video evidence shows that Smalley and Avington may have had some communication directly before the shooting. These facts, taken together, allow the jury to infer that Avington and Smalley were aiding and encouraging each other's actions. In addition, because Avington and Smalley could see what the other was doing at the time of the shooting and Smalley was standing just slightly behind Avington during the shooting, the jury could infer that they were aiding or encouraging each other in shooting at Walls, King, and McIntyre. Viewing the evidence

in the light most favorable to the State, there was sufficient evidence to support the jury's verdict that Avington acted as an accomplice.

b. Assault against Hendricks

Avington claims that there was insufficient evidence to support his assault conviction relating to Hendricks because there was no evidence regarding whose bullets struck Hendricks. We disagree.

Avington is correct that the State failed to prove who shot Hendricks because there was no evidence of whose bullet struck her. But Smalley testified that he aimed specifically at Walls, King, and McIntyre, firing 17 bullets in that direction. Based on Smalley's testimony, there was sufficient evidence for the jury to find that one of Smalley's bullets was one of the four bullets that struck Hendricks. And because, as explained above, there was sufficient evidence to show that Avington acted as an accomplice to Smalley, there was sufficient evidence for the jury to find Avington guilty of assault against Hendricks.

Moreover, even if we assumed that the third shooter fired all four bullets that struck Hendricks, there is sufficient evidence to support the jury's verdict. The evidence established that Avington and Smalley were at the club with several people and multiple members of their group left the club just prior to the shooting. The evidence also showed that there were three shooters in the parking lot. Although the jury apparently found that the State failed to prove Davis was the third shooter, there was sufficient evidence to allow the jury to infer that the third shooter was a member of Avington and Smalley's group and all three acted based on the aid and encouragement of the others, making Avington liable for the actions of the third shooter as an accomplice.

Because there was sufficient evidence to support the jury's verdict finding Avington guilty of assault against Hendricks, Avington's SAG claim fails.

2. Merger

Avington claims that the trial court erred by merging all of his convictions together and sentencing him on the highest conviction. However, Avington misunderstands his sentence.

Contrary to Avington's assertion, the trial court did not merge all of Avington's convictions together. The trial court dismissed the second degree murder conviction to prevent a double jeopardy violation with the conviction for first degree murder. Thus, the trial court only merged Avington's convictions for first and second degree murder. This merger was proper.

"Multiple convictions and punishments for the same offense imposed in the same proceeding violate the Fifth Amendment prohibition against double jeopardy." *In re Pers. Restraint of Strandy*, 171 Wn.2d 817, 819, 256 P.3d 1159 (2011). When a conviction violates double jeopardy principles, it must be wholly vacated. *Id.*

Here, the convictions for first and second degree murder both resulted from King's death. Therefore, these convictions would have resulted in multiple convictions for the same offense. In order to avoid a double jeopardy violation, the trial court properly vacated Avington's conviction for second degree murder.

None of Avington's other convictions were merged. He received standard range sentences on his remaining convictions, which were ordered to be served consecutively. The trial court did not merge all Avington's convictions together.

3. Self-Defense Instructions

Avington claims that the self-defense jury instruction given was not appropriate for the assault charges, only the murder charges. We disagree.

Here, the trial court correctly instructed the jury on the standard for self-defense to the assault charges. However, the trial court did not give Avington's proposed instruction regarding acting on appearances in defending himself as it related to the assault charges. The record does not contain any explanation for why the additional instruction was not given and there is no objection or exception from Avington's defense attorney. Generally, challenges to a failure to give an instruction are waived if no objection is made at the trial court. RAP 2.5(a). Because Avington did not object to the trial court's not giving the proposed instruction, the challenge is waived.

4. Prosecutorial Misconduct

Avington claims that prosecutorial misconduct denied him a fair jury trial. We disagree.

a. Legal principles

To prevail on a claim of prosecutorial misconduct, Avington must show that the prosecutor's conduct was improper and prejudicial. *Emery*, 174 Wn.2d at 756. First, we determine whether the prosecutor's conduct is improper. *Id*. at 759. If the prosecutor's conduct was improper, we must then determine whether the conduct was prejudicial. *Id*. at 760. We determine whether the defendant was prejudiced under one of two standards of review. *Id*. "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Id*. If the defendant did not object

at trial, the defendant must show that "the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id*. at 760-61.

In order to show that the prosecutor's conduct was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice, the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id*. at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id*. at 762.

b. Prosecutor's conduct not improper

i. Puzzle reference

Avington claims the prosecutor committed misconduct when the prosecutor referenced a puzzle when discussing the concept of the beyond a reasonable doubt standard.

While references to a puzzle in discussing the "beyond a reasonable doubt" standard may result in prosecutorial misconduct, this has generally been limited to instances where prosecutors have quantified the percentage of the puzzle that needed to be completed in order for a jury to find that a crime was committed beyond a reasonable doubt. *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014). On the other hand, the prosecutor does not commit misconduct where there is "no reference to any number or percentage and merely suggested that one could be certain of the picture beyond a reasonable doubt even with some pieces missing." *Id*. at 436.

Here, the prosecutor used an analogy to a puzzle when discussing the "beyond a reasonable doubt" standard. However, the analogy to a puzzle was not improper because the prosecutor never

told the jury that a certain percentage of the puzzle needed to be completed in order to find that the crimes were committed beyond a reasonable doubt. Because the prosecutor simply used the puzzle as an illustration of reasonable doubt without giving the jury a specific number or percentage, the prosecutor's references to a puzzle were not improper.

ii. Arguing facts not in the evidence

Avington claims that the prosecutor committed misconduct because the prosecutor argued facts that were not in evidence. Specifically, Avington asserts that the prosecutor created a "false narrative" that self-defense was a plan B and Avington had originally claimed that he was not involved in the shooting. SAG at 14 (capitalization omitted).[7] Avington also claims that the prosecutor improperly argued that the missing witnesses would never have told the truth and improperly evaluated their credibility. Both claims fail.

A prosecutor enjoys wide latitude when making a closing argument. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). We review allegedly improper comments in context of the entire argument. *Id*. A prosecutor is permitted to draw reasonable inferences from the evidence. *State v. Robinson*, 189 Wn. App. 877, 893, 359 P.3d 874 (2015). And a prosecutor is permitted to argue reasonable inferences from the evidence including with respect to the credibility of witnesses. *Thorgerson*, 172 Wn.2d at 448. References to evidence outside the record constitutes misconduct. *Fisher*, 165 Wn.2d at 747.

First, the prosecutor here did not argue facts not in evidence by referencing self-defense as a plan B. The record shows that Avington avoided contact with the police after the incident. It is

[7] We note that the page numbers in the SAG are not consecutively paginated. For the purposes of our opinion, we number the SAG's pages 1-17 starting from the first page of the SAG.

a reasonable inference from this evidence that Avington intended to deny involvement in the shooting until he was confronted with video evidence of his involvement in the shooting. Because the prosecutor was arguing reasonable inferences from the evidence, the prosecutor's comments were not improper.

Second, the prosecutor did not argue facts outside the evidence by arguing that witnesses would not have told the truth. Rather, the prosecutor was reiterating an argument made by defense counsel:

> You heard from [a defense counsel] why the State didn't call Mr. Cooper or Mr. Legend or any of these people. Because they never would have told you the truth. They never would have said: "You know what? I love these guys, but, yeah, what they did wasn't appropriate; what they did was just malicious." And so you're not going to get those witnesses. But if those witnesses who are tight, as you heard from these defendants, are tight with these defendants, where are they to back up what they're saying? That's not burden shifting. That's simply assessing the credibility of what they have to say.

18 VRP at 2882-83. A prosecutor is entitled to make a fair response to a defense argument so it was not misconduct for the prosecutor to offer its own assessment of the people who were not called as witnesses in response to the arguments made by the defense. *See State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Furthermore, although it is improper for a prosecutor to offer a personal opinion on the credibility of witnesses, none of the people the prosecutor referred to testified or were called as witnesses. *See State v. Calvin*, 176 Wn. App. 1, 19, 316 P.3d 496 (2013), *rev. granted in part on other grounds and remanded*, 183 Wn.2d 1013 (2015). Accordingly, the prosecutor's argument was not improper.

iii. Burden shifting on theory of self-defense.

Avington claims that the prosecutor committed misconduct because the prosecutor "flipped the burden of proof to the defense to prove that there was 'real threat.'" SAG at 16 (capitalization omitted). This claim also fails.

To obtain a self-defense jury instruction, the defense must produce some evidence demonstrating self-defense. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Once the defendant meets this burden, the burden shifts to the State to disprove self-defense beyond a reasonable doubt. *Id*. "The mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009).

Here, the prosecutor's argument as a whole did not impermissibly shift the burden to the defense. The prosecutor made extensive arguments evaluating the evidence related to self-defense, not just a single statement. The prosecutor also clearly stated that it carried the burden of proof and was evaluating the defendant's evidence, not shifting the burden. Because the argument as a whole did not shift the burden of proof, the prosecutor's argument was not improper.

d. Cumulative error doctrine

Avington claims that the cumulative nature of the prosecutor's misconduct warrants reversal. "Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." *Emery*, 174 Wn.2d at 766. However, the cumulative error doctrine does not apply when no error has occurred. *State v. Hodges*, 118 Wn. App. 668, 674, 77 P.3d 375 (2003), *review denied* 151 Wn.2d 1031 (2004).

Avington has identified no errors based on the prosecutor's conduct. Because Avington has identified no errors, the cumulative error doctrine does not apply.

We affirm Avington's convictions and sentence.

Lee, J.

We concur:

Glasgow, C.J.

Price, J.