IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRADLEY ALAN GRUBHAM, Appellant.	No. 40170-3-II UNPUBLISHED OPINION

Hunt, J. – Bradley Alan Grubham appeals his jury trial conviction for first degree assault, with a deadly weapon sentencing enhancement. He argues that (1) the evidence was insufficient to establish the intent element or to disprove self defense, (2) the trial court erred in giving a first-aggressor jury instruction, (3) the State committed prosecutorial misconduct in closing argument, and (4) defense counsel provided ineffective assistance in failing to object to the first-aggressor instruction and the State's improper closing argument. In his pro se Statement of Additional Grounds[1] (SAG), he also raises several ineffective assistance of counsel claims and an additional prosecutorial misconduct claim. We affirm.

[1] RAP 10.10.

FACTS

I. The Assault

On July 15, 2009, Bradley Alan Grubham borrowed a tire iron from his neighbor Ron Phillips. That evening, Grubham appeared at Phillips' back door, parroting Phillips' talking with his girl friend inside the apartment. Angry and believing that Grubham was mocking him, Phillips told Grubham to leave, then closed and locked the door.

Several hours later, at about 1:30 am, Phillips was outside his own apartment, painting automobile parts, when he noticed Grubham approach Isabella Armour and Timothy Bautista's apartment, ten to fifteen feet away, and knock on the door. Aware that Armour had just had surgery, Phillips told Grubham that he should come back later because Armour was not feeling well. Phillips and Grubham exchanged words; then Phillips returned to his painting project. Grubham kept talking, Phillips walked back towards Grubham, and Grubham stepped off Armour's porch and stabbed Phillips in the chest with a sharp knife-like object.

The two men struggled, backing up into some trees. As Phillips fell down between the trees, his hand became pinned between a tree and Grubham's foot. According to Phillips, (1) Grubham started stabbing him in the back and in the top of his head; (2) he (Phillips) did not have a weapon and did not punch or threaten Grubham; and (3) when he told Grubham to stop stabbing him, Grubham responded that he was going to kill him.

Hearing the fight, several neighbors came outside. Some heard Grubham saying, "[']Let go of my leg. Let go of my leg.[']" II Verbatim Report of Proceedings (VRP) at 60, 94. It appeared that Phillips was grabbing Grubham's leg. Grubham was holding Phillips' head with one

arm and hitting or stabbing Phillips with his other arm. The neighbors yelled at Grubham to "quit stabbing" Phillips. II VRP at 51. When Bautista pulled Grubham off Phillips, Grubham fell over a two-foot concrete wall and landed on his back. According to Bautista, Grubham tried to hit him (Bautista) as he pulled Grubham off Phillips. None of the neighbors heard anyone yelling that Phillips had a weapon, and neither Phillips nor any of the neighbors actually saw the weapon Grubham used to stab Phillips.

Grubham, who was no longer wearing a shirt, ran from the area. The neighbors carried Phillips to his doorway, applied pressure to his wounds, and called an ambulance. The towels the neighbors had been holding around Phillips were soaked with blood when the ambulance got there five minutes later. Phillips was admitted to the hospital with ten, up to six centimeters (about two inches) deep, "penetrating injuries" to the chest and abdomen (including several near his heart), a penetrating injury "to his scalp, and two abrasions to his left hand." III VRP at 121. Several of the larger wounds were consistent with knife wounds. Although Phillips did not require surgery, if he had been less muscular, these wounds could have been deadly because they were close to his spine, aorta, lungs, and heart.

The police arrested Grubham a short time later and seized a "Swiss-style Army pocketknife" and a "Husky utility knife" from Grubham's home. III VRP at 167-68. The officers also found a T-shirt at the scene of the assault.

II. Procedure

The State charged Grubham with first degree assault with a deadly weapon sentencing enhancement for the assault against Phillips and second degree assault with a deadly weapon

enhancement for the assault against Bautista.

A. State's Evidence

In addition to the facts set out above, Phillips admitted at trial that he told a defense investigator that he had grabbed Grubham's shirt and pulled him off Armour and Bautista's porch although he could no longer recall whether he had grabbed Grubham. Phillips also testified that, before Grubham jumped on him, (1) he (Phillips) had not threatened or touched Grubham; (2) Grubham did not appear frightened when he approached him; and (3) during the altercation, Grubham did not ask Phillips to leave him alone or call for help. Phillips also testified that he did not touch Grubham after Grubham jumped on him.

Armour and Bautista both testified that they never left knives or "knife-like" objects anywhere on their porch because they had several young children. II VRP at 84. Armour also commented that when Grubham stood up after Bautista pulled him off Phillips, Grubham looked "startled," and she thought that "he might not have actually known" what had happened. II VRP at 88.

B. Defense Evidence

1. Stoops

Shaun Stoops, Phillips' girl friend's son, testified that before the fight broke out, (1) he saw Grubham, who was then wearing a shirt, knocking on Armour and Bautista's door; (2) heard Phillips tell Grubham not to knock because Armour had just "had a procedure," III VRP at 181; (3) heard the two men exchange a few words, including Phillips' saying, "Just let it go," before returning to his painting project, III VRP at 181; (4) next heard Grubham say, "That's what I thought," III VRP at 181; and (5) then saw Phillips return to the porch, approach Grubham, grab

his shirt, and throw him off the porch.

Stoops then saw the men "wrestling on the ground" and Phillips "swing at" Grubham "a couple times" (but he could not tell if Phillips actually punched Grubham) before they ended up near some trees about ten feet away. With Phillips on his hands and knees, "pinned" between Grubham and a tree, Grubham "[took] one knee and [made what] looked like stabbing motions." III VRP at 183, 182. Phillips said, "Stop stabbing me"; Grubham replied, "Let go of my leg." III VRP at 184. The neighbors pulled Grubham off Phillips. Grubham, who was no longer wearing a shirt, fell over the concrete wall, then stood up and ran away.

2. Grubham

Grubham took the stand and denied having mocked Phillips on July 15. Grubham testified that (1) the day before the fight, he had commented to Phillips that he might buy a pair of glasses with a chain after hearing Phillips say something to Phillips' girl friend about losing his contacts; (2) Phillips had accused him of "dipping in his conversation or something" and responded with profanities and calling him "stupid," III VRP at 223; (3) on his way to Bautista's apartment later that night to borrow some tools, he (Grubham) had walked past Phillips and commented, "Stupid, huh," which he intended to refer to Phillips' earlier comment to him, III VRP at 223; (4) in an aggressive tone, Phillips responded, "Yeah, you know what, you got a problem homeboy, you know, just like, you know," saying that he did, in fact, have a problem with Grubham, III VRP at 223; (5) they "exchanged" words, III VRP at 195, but Phillips did not tell Grubham not to knock on Armour and Bautista's door; (6) when Grubham approached Armour's apartment, he saw Phillips approaching him in an aggressive manner and then start walking away; and (7) when

Grubham started to knock, Phillips turned, took something from his tool chest, and "tackled into" him, slamming him into the door. III VRP at 196. Grubham believed that Phillips may have pulled his shirt off during this initial struggle and that he (Grubham) may have grabbed "something" ("no idea" what)[2] off the top of a nearby air conditioner during the initial struggle. III VRP at 197, 211.

According to Grubham, Phillips then "stabbed [him (Grubham)] in the back," and threw him to the ground. III VRP at 198. When Phillips then moved towards him, Grubham "thrust[] up at [Phillips] with what [he] had" in his hand, III VRP at 198; Phillips hit him (Grubham) in the back and the arm with a "tool" he was holding; and the two men struggled with each other, ending up in the nearby trees. III VRP at 198. Grubham asserted that during this struggle, he yelled at Phillips three times to let him go. Grubham admitted that Phillips was yelling at Grubham to stop stabbing him, but Grubham claimed that it was not until Phillips said this that he (Grubham) realized that he had been stabbing Phillips; instead, he thought he was "gouging" Phillips with his thumb. III VRP at 210. When Grubham started to get on his hands and knees, Phillips "swung" at him (Grubham) again, so Grubham yelled, "Let go of my leg; let go of my leg," hit Phillips again, and then ran away. III VRP at 202. Grubham did not recall but said it was "possible" that he had told Phillips he (Grubham) would kill him (Phillips) if he (Phillips) did not let go, because he (Grubham) was trying to get Phillips to let go of him. III VRP at 237.

Grubham also testified that he was aware Phillips had a swastika tattooed on his back,

[2] According to Grubham, Armour sometimes put barbequing tools on the air conditioner to keep them out of the children's reach and other neighbors also put objects that might be dangerous to the children on the air conditioner.

which he (Grubham) knew meant Phillips had stabbed someone in prison. Because of Phillips' tattoo, Grubham knew Phillips was dangerous and believed that he needed to defend himself against Phillips, even though Phillips was generally nice and they had been to each other's homes. When the State asked Grubham why he would invite someone dangerous like Phillips to his home, Grubham responded that he was familiar with people "like that" from his time in prison, that he understood they "aren't necessarily bad people," and that the tattoo was just an indication of what Phillips was "capable" of doing. III VRP at 224.

C. Jury Instructions

The trial court instructed the jury on self-defense as follows:

> It is a defense to a charge of Assault in the First Degree as charged in Count I that the force used, attempted, or offered to be used was lawful as defined in this instruction.
>
> The use of, attempt to use, or offer to use force upon or toward the person of another is lawful when used, attempted, or offered by a person who reasonably believes that he or she is about to be injured . . . *and when the force is not more than is necessary*.
>
> The person using or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State of Washington has the burden of proving beyond a reasonable doubt that the force used, attempted, or offered to be used by the defendant was not lawful. If you find that the State of Washington has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 38 (Jury Instruction 16) (emphasis added).

The trial court further instructed the jury:

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

lawful purpose intended.

CP at 39. (Jury Instruction 17). The trial court also instructed the jury that Grubham had no duty to retreat:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.
>
> The law does not impose a duty to retreat. Notwithstanding the requirement that lawful force be "not more than is necessary", the law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonable effective alternative."

CP at 41 (Jury Instruction 19).

At the State's request, the trial court gave the jury a "first aggressor instruction":

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

CP at 42 (Jury Instruction 20). Defense counsel agreed that, given the conflicting evidence of how the fight started, this instruction was appropriate.

D. Closing Argument and Verdict

In closing, the State argued that Grubham had not acted in self defense because his response was not "necessary and reasonable"[3]; he was the first aggressor; and his alleged fear of Phillips was not reasonable because, despite Phillips' tattoos and the dangerousness they implied, he had thought that Phillips was a good person and had invited Phillips to his house. The State

[3] IV VRP at 257.

also argued that (1) Grubham's comments to Phillips were "'reasonably likely to provoke a belligerent response'"[4] and established that Grubham was the first aggressor; (2) the jury should focus on the evidence rather than make presumptions about credibility based on the "type of person"[5] a witness might be; (3) a self-defense claim was Grubham's only option because so many people had witnessed the assault; (4) Grubham's motive to lie contrasted with the witnesses' lack of motive to lie; (5) Grubham's failure to flee rather than to stay to fight made Grubham's version of the events "illogical"[6] and not credible; (6) Grubham's eventual flight was evidence of his "consciousness of guilt"[7]; and (7) he (the prosecutor) believed that Grubham had committed first degree assault.[8] Grubham did not object to any of the State's closing argument.

Grubham argued that the evidence showed Phillips had first attacked him and that he, Grubham, had fought back because he had a reasonable fear of being injured. The jury found Grubham guilty of first degree assault of Phillips, committed while armed with a deadly weapon.[9] Grubham appeals.

ANALYSIS

I. Sufficient Evidence

[4] IV VRP at 265 (quoting CP at 42 (Jury Instruction 20)).

[5] IV VRP at 269.

[6] IV VRP at 271.

[7] IV VRP at 274.

[8] We set the relevant portions of these arguments out in full below.

[9] The jury found Grubham not guilty of second degree assault against Bautista.

Grubham first argues that the evidence was insufficient to prove that he acted with intent to inflict great bodily harm because the evidence showed that he was acting in self defense. We disagree.

We review the sufficiency of the evidence to determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from that evidence. *Thomas*, 150 Wn.2d at 874. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). And we defer to the fact finder on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

To establish first degree assault, the State had to prove that Grubham assaulted Phillips with "intent to inflict great bodily harm." RCW 9A.36.011(1); *see also* CP at 37 (Jury Instruction 14). "'Great bodily harm' means bodily injury which creates a probability of death, or which causes significant permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c); *see also* CP at 34 (Jury Instruction 12). Grubham argues that, because the evidence shows he acted in self defense, it cannot also show that he acted with intent to inflict great bodily harm. We disagree.

Taken in the light most favorable to the State, the evidence shows that (1) Grubham

attacked Phillips as Phillips approached Armour and Bautista's porch the second time; (2) Grubham had a sharp, knife-like object with him, before Phillips reached the porch, and immediately stabbed Phillips in the chest; (3) Grubham continued to stab Phillips even after it appeared that Phillips had ceased trying to defend himself; (4) when Phillips told Grubham to stop stabbing him, Grubham responded that he was going to kill him; and (5) the wounds Grubham inflicted could have been fatal had Phillips not been so muscular.

We hold that this evidence was sufficient to allow the jury to find that Grubham intended to inflict great bodily harm on Phillips when he first attacked Phillips; that Grubham was not acting in self defense; and that, even if he had been acting in self defense, Grubham's continued stabbing of Phillips exceeded the necessary and reasonable degree of force. *See* RCW 9A.16.010(1); RCW 9A.16.020(3).

II. First Aggressor Instruction

Grubham next argues that (1) the trial court erred in giving the first-aggressor jury instruction because the only evidence that he precipitated the fight was the assault itself; and (2) despite defense counsel's failure to object to this instruction, he may raise this issue for the first time on appeal because it is a manifest error affecting a constitutional right. These arguments fail.

Grubham cannot challenge the first aggressor instruction on appeal because he failed to object to it below and because he does not show that it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3). He does not show any error, manifest or otherwise, because, in light of the evidence, the trial court did not err in giving the first aggressor instruction.

"Where there is credible evidence from which a jury can reasonably determine that the

defendant provoked the need to act in self-defense, an aggressor instruction is appropriate." *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). A first aggressor instruction is appropriate even if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. *Riley*, 137 Wn.2d at 910. An aggressor instruction is inappropriate, however, if the defendant simply used belligerent language, *Riley*, 137 Wn.2d at 911, or if the defendant's conduct that allegedly provoked the need to act in self defense was the assault itself.[10] *State v. Brower*, 43 Wn. App. 893, 901-02, 721 P.2d 12 (1986). Thus, Grubham is correct that the State would not have been entitled to a first aggressor instruction had the only evidence of assault been Grubham's initial attack on Phillips. *Brower*, 43 Wn. App. at 901-02. But this was not the case here.

We disagree with Grubham's assertion that the first aggressor instruction was inappropriate because the only evidence showing him to have been the aggressor was the assault itself. Putting aside Grubham's arguably provocative language, the following evidence showed that Grubham was the first aggressor: (1) Phillips' testimony that he had not touched or threatened Grubham before Grubham first attacked him; (2) Phillips' testimony that he did not fight back once Grubham started attacking; and (3) evidence that after "pinn[ing]" Phillips against a tree, Grubham stabbed him repeatedly. III VPR at 183. In other words, there is evidence that after Grubham made the initial, unprovoked attack on Phillips, Grubham continued attacking Phillips, even after Phillips stopped fighting, and then escalated the fight by stabbing Phillips

[10] An inappropriate first aggressor instruction may deprive a defendant of his right to argue self defense and, thus, deny him his right to a fair trial. *See Riley*, 137 Wn.2d at 910 n.2; *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). This is not what happened here, however.

repeatedly after pinning him against a tree. This evidence would have allowed the jury to find that Grubham initiated the incident and then assaulted Phillips, thus justifying a first aggressor instruction.

Accordingly, we hold that the trial court did not err in giving the first aggressor instruction.[11] Having failed to object to and to show instructional error below, Grubham has failed to show manifest constitutional error. Therefore, not only was there was no error below to challenge, even if there were, Grubham does not meet the threshold test for challenging the trial court's first aggressor instruction for the first time on appeal. Either way, his argument fails.

III. Prosecutorial Misconduct

Grubham next asserts that the State engaged in prosecutorial misconduct when, in closing argument, it (1) expressed personal opinion that Grubham "was a liar"[12]; (2) advised the jurors that they "could not rely on their common sense and perceptions of the witnesses to assess the

[11] Because the trial court did not err in giving this instruction, Grubham's ineffective assistance of counsel argument based on his counsel's failure to object to this instruction also fails. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (to establish ineffective assistance of counsel, the appellant must show deficient performance and prejudice) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

[12] After discussing why Grubham's version of the fight was not credible given inconsistencies in his testimony and his "illogical" story, the State commented,

> . . . *If there's anybody here who's got a motive to lie in this case, it's the defendant*. Every prosecutor in every courtroom across the country says that. But it's not just a motive to be dishonest. This is a motive to claim it is self-defense. What other options does he have? You just stabbed somebody, you have got a bunch of witnesses, they all know you, so they're all going to be able to identify you, there's no claim of it wasn't me, I didn't do it. You don't have many options at that point. Your option is self-defense.

IV VRP at 271-72 (emphasis added).

witnesses [sic] credibility, but rather were required to just listen to [the witnesses'] statements"[13]; (3) commented on Grubham's failure to flee the scene rather than continue to fight and Grubham's later flight[14]; and (4) expressed personal belief that Grubham was guilty.[15] Br. of

[13] The State commented on how to examine witness credibility issues, directing the jury to focus on the witnesses' testimonies rather than character traits of which the jury likely knew nothing:

> . . . And when you are looking at all of these witnesses, you should consider—you can consider what they say and how they say it, but what I want you to make sure you don't do is overweigh one thing versus the other. People have a tendency to think, well, you know, I saw that witness, I think I know something about that witness, kind of play Dr. Phil. If you go back to the jury room and say, wait, I don't think Witness X is the type of person to do Y, then I think you have overplayed demeanor and not considered what was said. You have seen a very small portion of each one of these people. You don't know them. You can't sit there and say I don't think this is the type of person to lie, I don't think this is the type of person to lie. You don't know them. I want you to consider what they say.

IV VRP at 268-69.

[14] Noting that Grubham was entitled to act on a reasonable belief that he was in danger, the State also commented on the no duty to retreat instruction (Jury Instruction 19), stating,

> You cannot consider flight as an option. When we talk about the definition of necessary, necessary says do you have any other options. Flight is not one of those. You cannot consider that as an option. But, clearly, the defendant had other options, other things he could have done besides flight. But let's talk about flight.
>
> He says Phillips wasn't fighting back; I was just trying to get away. Phillips has got me by the shirt and I slip out of the shirt. Do you believe that? What do you do when you slip out of the shirt? You get the hell out of there. So do you believe this story?
>
> Mr. Phillips has got me by the waist. Phillips is bleeding, barely fighting back. Do you think maybe you can push him off, pull him off, twist out? He says I was just trying to get away. Well, he could have gotten away. He had ways to get away, and he didn't do that.
>
> So Mr. Phillips was holding a weapon in one hand, holding a shirt in another hand, holding Mr. Grubham in another hand. He could have gotten away at that point. He claims he couldn't have. He could have.

IV VRP at 272-73. The State later referred to Grubham's flight when the fight ended as evidence of "consciousness of guilt." IV VRP at 274.

Appellant at 31 (citing IV VRP at 268-285). This argument also fails.

To establish prosecutorial misconduct, Grubham must show that the prosecutor's conduct was both improper and prejudicial, namely that there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Where, as here, "the defendant has failed to either object to the impropriety at trial, request a curative instruction, or move for a mistrial, reversal is not required unless the misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice." *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994) (citing *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)). Grubham has the burden of showing that the misconduct was so flagrant and ill-intentioned that any prejudice was incurable. *See Brown*, 132 Wn.2d at 561.

Even presuming, without deciding, that the closing arguments Grubham now challenges were error, Grubham does not show that these potential errors were so flagrant and ill-intentioned that they could not have been cured by proper objection and a timely curative instruction. Furthermore, given that the evidence clearly showed that Grubham continued to stab Phillips even though Phillips was doing nothing more than possibly holding onto Grubham's leg, Grubham

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[15] And, when discussing the lesser included offense of second degree assault, the State commented:

> To complicate things even more, on Count I (the first degree assault charge), you first look at assault in the first degree. I think you should find the defendant guilty of assault in the first degree. *I think that's what he did.* But if you think he's not guilty of assault in the first degree or if you can't agree, then you say, okay, well, is it assault in the second degree?

IV VRP at 285 (emphasis added).

cannot show that there is a reasonable probability that the jury found his continued stabbing of Phillips necessary or reasonable in light of the surrounding circumstances. Thus, Grubham also fails to show that there is a substantial likelihood that any of these possible errors affected the jury's verdict, and his prosecutorial misconduct argument fails.[16] *See Stenson*, 132 Wn.2d at 718-19.

IV. Statement of Additional Grounds for Review

In his SAG, Grubham asserts that he received ineffective assistance of counsel on several grounds and presents an additional prosecutorial misconduct argument. Either these arguments fail or we cannot address them because they rely on matters outside the appellate record. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

A. Ineffective Assistance of Counsel

To establish ineffective assistance, Grubham must establish that his counsel's performance was deficient and prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)).

Grubham argues that defense counsel was ineffective in failing (1) to subpoena a defense investigator who took a statement from Phillips in which Phillips admitted to having been the

[16] Furthermore, because Grubham does not establish prejudice, his ineffective assistance of counsel claim based on his counsel's failure to object to the prosecutor's argument also fails. *See Thomas*, 109 Wn.2d at 225-26.

first aggressor; (2) to photograph his (Grubham's) wounds or document his scars[17]; (3) to subpoena a corrections officer to testify about Grubham's wounds even though the corrections officer had agreed to testify; (4) to point out inconsistencies in Phillips's and other witnesses' statements and trial testimony; (5) to argue that Grubham did not use a deadly weapon because Phillips was only in the hospital a short time; and (6) to object to the prosecutor's misstating the record when he represented that Grubham had stated he had threatened to kill Phillips during the fight, when the evidence actually showed that he (Grubham) had said, "[T]ell him to let me go or I will kill the mother f[***]er," which supported his self defense claim.[18] SAG at 3. Grubham's first three grounds for asserting ineffective assistance of counsel relate to matters outside the record; therefore, we cannot address them on direct appeal. *McFarland*, 127 Wn.2d at 335. As to the fourth argument, the record shows that defense counsel attempted to impeach various

[17] At trial, Grubham testified that he had bruises around his elbow and his spine and scars on his back from where Phillips hit him with "a screwdriver." III VRP at 216. He showed the jury a scar that he asserted came from Phillips stabbing him during the initial altercation at Armour's door. He also asserted he was injured when he was "slammed into" the wall or bulkhead. III VRP at 220. Although he did not contact a doctor or tell the arresting officers about these injuries, he testified that he had talked to a doctor or a nurse about his injuries when he was booked into jail.

[18] During its cross-examination of Grubham, the State asked Grubham if he remembered making a call from jail and telling the woman he was speaking to that he had told the crowd that gathered at the time of assault that he would kill Phillips if Phillips did not let go. Grubham testified that he may have made this comment, but he asserted that he did not remember what he had said.

witnesses with their prior statements throughout the course of the trial.[19] To the extent there were other statements available that might have allowed additional impeachment, that information is also outside the record and we cannot address it on direct appeal. *McFarland*, 127 Wn.2d at 335.

As to the fifth argument, a deadly weapon is a weapon, device, or instrument that is "readily capable of causing death." RCW 9A.04.110(6). That Phillips spent little time in the hospital was not relevant to whether the object Grubham used in the assault was "readily capable of causing death"; thus, defense counsel was not ineffective in failing to argue the short hospital stay point.

Finally, Phillips' testimony that Grubham threatened to kill him during the fight supported the prosecutor's reference to Grubham's threat to kill Phillips. That there was other testimony that Grubham may have instructed the witnesses to tell Phillips to let go of him or he would kill Phillips, does not mean that the record did not otherwise support this argument. Accordingly, Grubham's counsel's failure to object to this "threat to kill" characterization of the statement was not deficient performance.

[19] For instance, Bremerton Police Officer Rodney Harker, one of the officers who investigated the assault, III VRP at 159, 164, testified on cross-examination that he had indicated in the statement of probable cause that Phillips told the responding officers "he was initially struck in the back, but [he had] not realized he was stabbed until later." III VRP at 169. This testimony contrasted with testimony suggesting that Grubham first stabbed Phillips in the chest and that Phillips was immediately aware that Grubham was stabbing him.

B. Additional Prosecutorial Misconduct Claim

Finally, Grubham argues that the State engaged in prosecutorial misconduct in repeatedly arguing that his provocative statements to Phillips were sufficient to establish that he (Grubham) was the first aggressor and, therefore, not entitled to claim self defense.[20] Grubham is correct that belligerent language alone does not establish that a defendant was the first aggressor. *Riley*, 137 Wn.2d at 911. But, as we discuss above in section III of this Analysis, such a misstatement of the law could have been cured by a timely objection and curative instruction. But Grubham neither objected nor requested a curative instruction.

As we also discuss in section III, given the facts of this case as a whole, Grubham fails to show a substantial likelihood that this error affected the verdict.[21] Accordingly, this argument

[20] We note that in his argument Grubham refers to statements by jurors after the verdict indicating that gave great weight to this part of the State's closing argument, but these statements are clearly outside the record on appeal and we cannot consider them. *McFarland*, 127 Wn.2d at 335.

[21] To the extent Grubham is also arguing that his counsel's failure to object to this argument amounts to ineffective assistance of counsel, Grubham cannot establish the required prejudice to support this claim. *See Thomas*, 109 Wn.2d at 225-26.

also fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, C.J.

Worswick, J.