NO. 46533-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM CHARLES HORTON JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend

No. 12-1-04021-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

On October 25, 2012, the Pierce County Prosecutor's Office charged WILLIAM CHARLES HORTON JR., hereinafter "defendant", with one count of murder in the first degree and one count of unlawful possession of a firearm in the first degree. CP 1-2. The case proceeded to trial before the Honorable Stephanie Arend. 1RP[1] 6.

During motions in limine prior to trial, defendant argued that the State could not meet the elements of unlawful possession of a firearm in the first degree because the prior conviction the State was relying upon

[1] For purposes of simplicity and clarity, the State will refer to the Verbatim Report of Proceedings the same as defendant in his opening brief so they are designated as follows: 1RP – 3/18/14; 2RP – 3/19/14; 3RP – 3/24/15; 4RP – 3/25/14; 5RP – 3/26/14; 6RP – 4/8/14; 7RP – 4/14/14; 8RP – 5/12/14; 9RP – 5/14/14; 10RP – 5/27/14; 11RP – 5/28/14; 12RP – 5/29/14; 13RP – 6/2/14; 14RP – 6/3/14; 15RP – 6/4/14; 16RP 6/5/14; 17RP – 6/9/14; 18RP – 6/10/15; 19RP – 6/11/14; 20RP – 6/12/14; 21RP – 6/13/15; 22RP – 7/11/14.

was a robbery in Florida with an "adjudication withheld" disposition.[2] 1RP 144-168. The trial court denied defendant's motion after it found the Florida robbery qualified as a prior conviction under Washington law. 4RP 3-4.

A CrR 3.5 hearing was held on March 18, 2014, where defendant moved to suppress several of his statements arguing amongst other things that he made an unequivocal demand for an attorney during the interrogation. 1RP77-81; CP 3-30. After hearing arguments from both parties, the court admitted all of defendant's statements. 1RP 80-85, 97-104; CP 202-07.

After several days of trial and deliberations, the jury was unable to reach a verdict on the first count of murder, but convicted defendant of unlawful possession of a firearm as charged in count II. 6RP 16-17. The court declared a mistrial as to count I. 6RP 15. A second trial on the murder charge began in mid-May. 9RP 15. After the evidence was presented, the jury was instructed on self-defense, but not the lesser included offenses of first and second degree manslaughter that defense requested. 19RP 1635-1646.

Defendant was found guilty of murder in the first degree, and the jury found by special verdicts that defendant was armed with a firearm at

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[2] Defense counsel initially framed the issue as a motion in limine to exclude defendant's Florida adjudication under ER 609, but conceded it was really a ***Knapstad*** motion without the briefing. 1RP 166.

the time of the crime, and that the crime involved a gang aggravator. 21RP 1851-52; CP 407-09. The court sentenced defendant to an exceptional sentence of 421 months with an additional 60 months for the firearm enhancement for a total of 481 months confinement on count I, and a concurrent sentence of 34 months on count II. CP 439-52. The court also entered findings of fact and conclusions of law for the exceptional sentence. CP 467-70. Defendant filed a timely notice of appeal. CP 453-63.

2. Facts

On the evening of October 23, 2012, Baron Johnson was hanging out at his apartment at the Williamsburg Apartment complex in Lakewood, Washington with his friends Greg Borja, Anthony Ross, Alonzo Williams and defendant. 13RP 371, 384; 16RP 989, 994, 1051. Greg Borja is Mr. Ross' father. 16RP 985, 1047. At some point in the evening, police responded to Mr. Johnson's apartment regarding an argument between the defendant and his girlfriend, but no one was arrested. 13RP 387-391; 16RP 1017, 1052-53. After having a few drinks, everyone went to the nightclub Latitude 84 and drank there until about 1:30 am before returning to Mr. Johnson's apartment. 13RP 370, 384, 391-393; 16RP 991-97, 1052-55, 1061. Shortly thereafter, Charles Pitts, a neighbor of Mr. Johnson's who was also known as "Shottie", also showed up. 13RP 373-74, 393-96; 16RP 998-99.

Everyone went into the living room of Mr. Johnson's apartment to hang out and watch tv. 13RP 396; 16RP 999. After a little bit, defendant took off his shirt and said he wanted to slap box[3] with Mr. Pitts. 13RP 397; 17RP 1080. Both were intoxicated and began to slap box as Mr. Johnson went to his bedroom to begin a breathing treatment for COPD. 13RP 397-400. Mr. Ross watched Mr. Pitts and defendant rough house and get in each other's faces, while Mr. Pitts motioned with his hands and told defendant he did not want to get into it. 16RP 1004-05. Defendant continued to provoke Mr. Pitts and get in his face by trash talking as Mr. Pitts told him to back off. 16RP 1006-08. Mr. Ross then went back into Mr. Johnson's room to talk with him. 16RP 1009-10.

Mr. Borja remembered Mr. Pitts and defendant slap boxing two different times, both initiated by the defendant. 17RP 1080-81. The second time, Mr. Pitts started to get angry because he did not want to continue. 17RP 1080-83. At one point, Mr. Borja tried to talk to both of them to tell them to stop and cool off. 17RP 1081. It was clear to Mr. Borja that Mr. Pitts "won" the second round by getting more slaps on defendant's face. 17RP 1085. Defendant then started talking about being a Chicago BGD (Black Gangster Disciple) and member of the Folk Nation gang. 17RP 1086, 1089. Mr. Borja had a bad feeling, so he and his son

[3] Mr. Johnson and Mr. Borja testified that "slap boxing" is open hand boxing where the goal is to touch the other person's face. 13RP 397, 437; 17RP 1082.

told Mr. Johnson they were leaving to go to his girlfriend's house. 13RP 402; 16RP 1011-13; 17RP 1090.

After they left, Mr. Johnson walked out of his room to go to the bathroom and could hear Mr. Pitts and defendant speaking to one another. 13RP 403. He heard Mr. Pitts say that he did not want to play anymore because the defendant was drunk. 13RP 427. Mr. Johnson heard the defendant respond "[t]his is what drunk niggers do" followed by a gunshot. 13RP 427-28.

Mr. Johnson ran out of his bathroom and saw defendant pointing a gun at Mr. Pitts who had smoke coming from his abdomen. 13RP 429. Mr. Pitts collapsed and defendant ran over, pointed the gun at Mr. Pitts and mumbled "[y]ou can't do nothing to me now. You're dead" before shooting him what Mr. Johnson believed was three more times. 13RP 429-31; 14RP 630. As Mr. Johnson stood yelling at defendant, defendant told him he did not have to worry about it and began to drag Mr. Pitts' body outside the apartment into the street. 13RP 431.

Officers responded to the report of shots fired at the Williamsburg Apartments around 3:20am on October 24, 2014. 12RP 203-205, 233, 254; 13RP 314, 334-5. As they approached the scene, they observed a large object, later identified as Mr. Pitts' body laying in the middle of the parking lot. 12RP 208-210; 13RP 318. The officers witnessed defendant run out of the apartment with a gun in his hand, stand over Mr. Pitts' body and yell "I'm going to kill you, motherfucker." 12RP 208-211, 256, 260.

The officers yelled at defendant to get on the ground and drop the firearm. 12RP 212, 256.

Defendant complied, officers secured defendant in handcuffs and secured the gun. 12RP 237, 261-63. While other officers secured the scene and began talking with people who were standing near the apartment, defendant said "[t]hey're not involved. I'm the only suspect." 12RP 237. He also looked at Mr. Pitts and while laughing said "[t]hat motherfucker is dead." 12RP 238, 261. Defendant was being placed in the back of a patrol car when he told police Mr. Pitts "was part of the Hilltop Crips and that's what did it." 13RP 355. Defendant was read his *Miranda* rights and transported to the police station for an interview. 13RP 356; 17RP 1186-87. A list of emergency contact numbers was found on him entitled "man down emergency numbers." 19RP 1500.

At the scene, officers observed Mr. Pitts had his t-shirt pulled up over his head, there was blood on the shirt over his mouth and he was not breathing. 12RP 213. A black bag was found near his body which contained a bottle, baggies of marijuana and blue pills and a pair of socks. 15RP 712-713. A blood stain trail led from the apartment along the walkway near where Mr. Pitts body lay. 15RP 754-758.

When officers entered Mr. Johnson's apartment, they observed blood on the floor by the entryway. 13RP 321-22. A blood stain and a fired cartridge casing was found on the carpet in the living room. 15RP 697. The blood was later determined to have swipe patterns consistent

with an object moving through the blood stain inside to outside of the apartment. 15RP 698. Officers also found blood on the wall between the kitchen and the living room and on the back wall of the kitchen. 15RP 707-709. Officers did not find anything that appeared to be displaced, knocked over or in disarray in the apartment. 15RP 699-700. When officers moved a rolling chair from the kitchen, they found an additional shell cartridge. 15RP 716-17.

An autopsy was performed on Mr. Pitts' body. 15RP 824. He was shot two times and two bullets were removed from his body. 15RP 830; 16RP 906-911. One gunshot entered on the left side of his abdomen near his belly button and the bullet was recovered from his pelvis. 15RP 830-31. The medical examiner testified that it was likely that that wound would have caused pain and caused Mr. Pitts to react by holding his abdomen or trying to protect his abdomen. 15RP 837. The other gunshot entered the left side of Mr. Pitts' chest, struck his heart and lodged in his right lung. 15RP 841-42. It was this shot that caused internal bleeding and death within a matter of minutes. 15RP 843-44.

The medical examiner was unable to determine which gunshot occurred first, but knew they both occurred within a small number of minutes. 15RP 830; 16RP 914. He could also tell that Mr. Pitts was shot from at least two feet away and the abdominal wound likely occurred when both individuals were standing up. 16RP 912-17. The angle of the

chest wound was steeper making it likely that the shooter was in a higher position or the victim was bending over. 16RP 917-18.

A toxicology report revealed Mr. Pitts had an alcohol concentration of .33[4], four times the legal limit to drive. 15RP 838. The medical examiner testified this made it likely he was impaired with slurred speech and would have been obviously intoxicated. 15RP 838; 16RP

The gun defendant had was a Fire Star .45 caliber semi-automatic pistol. 15RP 714, 729-31; 17RP 1153. The magazine was capable of firing six cartridges and the gun had three unfired cartridges in the magazine. 15RP 714, 729-31, 43; 17RP 1141-42. The three unfired cartridges were jacketed hollow point which makes them able to penetrate the body, but less likely to exit out of the body. 15RP 751-52. The gun also had a fired cartridge case that did not extract properly after it had been fired and meant the gun would no longer fire at that point until the malfunction was cleared. 15RP 736-37; 17RP 1149. If someone had attempted to fire after the casing had not been properly extracted, it would make a metal on metal clicking sound, but would be unlikely to be confused with someone firing a gun. 15RP 759-61; 17RP 1149. A third projectile was never recovered during the police investigation. 15RP 775.

The shell casing found in the living room and the cartridge found in the kitchen were .45 automatic caliber and a firearms expert determined

[4] The medical examiner testified this number is .33 percent, the same as used in breathalyzers.

that they were fired from defendant's gun. 15RP 718-19, 730-39; 17RP 1156. The two bullets found in Mr. Pitts' body were also determined to be fired from defendant's gun. 17RP 1157-59. Although they were examined, police were unable to find fingerprints on any of the casings. 15RP 779-80.

During the trial, a recording of defendant's interview with Investigator Conlon was played for the jury and a transcript of the interview was given to them. 17RP 1202; Ex. 141. In the interview, defendant said Mr. Pitts was a Crip gang member who "slapped the shit out of" him when they started wrestling and Mr. Pitts was beating him up. Ex. 8-A; Ex. 141. He said Mr. Pitts was putting his hands on him and testing his "gangsta" and the next thing defendant knew, he had shot Mr. Pitts. Ex. 8-A; Ex. 141. He said he then "drug [Mr. Pitts'] ass out into the middle of the street...and laughed." Ex. 8-A; Ex. 141. Defendant told Investigator Conlon the gun was his and asked Investigator Conlon to keep his people and friends out of the investigation. Ex. 8-A; Ex. 141.

Jurors also saw photographs Investigator Conlon had taken of defendant the day of the shooting. 17RP 1203-14. Defendant had no visible injuries on him and had several Gangster Disciple related tattoos on his body. 17RP 1203-14. Defendant was never treated for any injuries before or after being taken to the jail. 17RP 1216-18.

The jury also saw photographs of Mr. Johnson's apartment after the shooting during the trial. 13RP 438-42. Mr. Johnson described how

nothing appeared to be damaged or in disarray and it looked the same as it did before he went to bed aside from the blood on the floor and a chair that was moved. 13RP 438-42, 466. He said the black bag found near Mr. Pitts was not his and he believed it belonged to defendant. 14RP 587.

Mr. Johnson was interviewed by police the day of the shooting and a second time about a week later. He admitted during the trial that in his first interview with police, he left out the names of several people who were with him that night in an effort to keep them from being involved. 13RP 445-449; 14RP 631-32. He also admitted he left out several statements defendant said to him and held back some information during the interview because defendant was his friend. 13RP 445-450, 546-48; 14RP 631-34. He said that after he was contacted by two women and a man who were friends with Mr. Pitts and upset about the shooting, he told police the full story in the second interview. 13RP 450-51 14RP 631-34.

Mr. Ross testified during the trial that defendant showed him a gun he had in his back pocket earlier in the night when they were at Mr. Johnson's apartment. 16RP 1015. Mr. Borja also testified that when people inside Latitude 84 started talking smack to him, defendant told him he had his back and showed him a black gun tucked in the back of his pants. 16RP 1059. Mr. Borja said one could have definitely gotten a gun past security at the bar that night because were doing minimal pat downs. 16RP 1056.

Mr. Ross and Mr. Borja both stated they never returned to Mr. Johnson's apartment that night because when Mr. Borja called Mr. Johnson to say they were on their way back, they learned someone had been shot. 16RP 1014; 17RP 1093. They did not talk to the police because they had not seen the shooting and no one contacted them. 16RP 1018; 17RP 1095. They eventually talked to the police in May of 2014 when Mr. Johnson asked them to come forward and tell the police what they saw because the defendant was saying the gun was Mr. Johnson's. 16RP 1018, 1041; 17RP 1096.

A neighbor who called 911 recalled hearing only one shot the night of the shooting. 18RP 1361. He went to his window and observed a man stumbling back out of the apartment before collapsing and being followed by another man. 18RP 1361-62. Shortly thereafter, he said he saw a shirtless black man dragging a body around the corner. 18RP 1361-63.

Defendant chose to testify during the trial. 19RP 1451. He denied ever slap boxing with Mr. Pitts and said that Mr. Ross and Mr. Borja were never in Mr. Johnson's apartment that night at the same time as Mr. Pitts. 19RP 1473-75. Defendant said the gun was not his, but Mr. Johnson's. 19RP 1471-74. He said Mr. Ross and Mr. Borja came back from the bar with him so Mr. Johnson could show him the gun he was trying to sell. 19RP 1471-74. Defendant testified Mr. Ross and Mr. Borja left within 15-20 minutes. 19RP 1473. He said he was alone in the living room watching TV in the recliner when Mr. Pitts walked in demanding alcohol

and calling him "cuz.[5]" 19RP 1475-79. Defendant stated he refused to give Mr. Pitts alcohol because he was already intoxicated. 19RP 1479-80. Mr. Pitts got very upset and started yelling about defendant's orange and blue jacket and how those were "snoover[6]" colors in his neighborhood. 19RP 1480-81. Defendant said Mr. Pitts continued saying "cuz" to indicate to defendant that he was a Crip. 19RP 1482-83.

Defendant testified that Mr. Pitts started to flinch at him, ball up his fist and approach like he was going to punch him before he actually punched him harder than he had ever been hit in his life. 19RP 1483-84. Defendant said he had seen Mr. Pitts beat up another gang member a week earlier and Mr. Johnson had to stop Mr. Pitts during that fight. 19RP 1476-78. Defendant said he got up and grabbed Mr. Pitts around his waist as Mr. Pitts continued punching him. 19RP 1484-86. They got into a struggle where Mr. Pitts was punching and choking defendant. 19RP 1484-87. Defendant testified Mr. Pitts was punching him saying "[o]n the set, Cuz; on the set Cuz. I'm going to kill you, Cuz. I'm going to kill you." 19RP 1485-86. Defendant got free, ran to the kitchen, grabbed the gun off the counter and shot Mr. Pitts twice. 19RP 1487-88. He testified he believed Mr. Pitts was going to kill him and he just wanted Mr. Pitts to stop attacking him. 19RP 1489.

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[5] Investigator Conlon testified that "cuz" is a common term used in gangs when one Crip member is referring to another Crip member. 17RP 1190-91.
[6] Investigator Conlon testified that calling someone a "snoover" is a term used in gangs to disrespect someone who is part of the Hoover Crips.

Defendant dropped the gun on the floor as Mr. Johnson came out of the room hysterical. 19RP 1488-90. Mr. Johnson told defendant to get Mr. Pitts out of the house. 19RP 1488-90. Defendant said he moved the body, with the help of Mr. Johnson, to the parking lot and went back inside and grabbed the gun. 19RP 1490-91. Defendant testified the bag found next to Mr. Pitts was not his. 19RP 1494.

Defendant said he lied several times during his interview with Investigator Conlon. He said he lied about the gun being his to protect Mr. Johnson. 19RP 1532-33. He said he lied when he said he met Mr. Pitts for the first time that night because he had met him when he saw him fighting a week earlier. 19RP 1540-45. He said he lied when he told Investigator Conlon that Mr. Pitts liked his orange and blue jacket. 19RP 1540-45. He also said he lied when he told Investigator Conlon that they slap boxed before the shooting, other people were present and that Mr. Pitts had "slap boxed the shit out of [him]". 19RP 1563-67.

C. ARGUMENT.

1. DEFENDANT'S STATEMENTS DURING THE INTERVIEW WITH INVESTIGATOR CONLON WERE PROPERLY ADMITTED IN ACCORDANCE WITH THE FEDERAL AND WASHINGTON CONSTITUTIONS AND RELEVANT LAW.

Under the Fifth Amendment to the United States Constitution, no person "shall be compelled in any criminal case to be a witness against himself." Under article I, section 9 to the Washington Constitution, "[n]o

person shall be compelled in any criminal case to give evidence against himself." To secure the privilege against self-incrimination, a person in custody must be advised before questioning that he has the right to the presence of any attorney. ***Miranda v. Arizona***, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). A waiver of this right by the suspect must by knowing, voluntary and intelligent. ***State v. Radcliffe***, 164 Wn.2d 900, 905-06, 194 P.3d 250 (2008). Even after they are waived however, a suspect can invoke the right to an attorney at any point during the interview and the interrogation must cease. *Id.* at 906.

In 1982, the Washington Supreme Court held:

> [W]henever even an equivocal request for an attorney is made by a suspect during custodial interrogation, the scope of that interrogation is immediately narrowed to one subject and one only. Further questioning thereafter must be limited to clarifying that request until it is clarified.

State v. Robtoy, 98 Wn.2d 30, 39-40, 653 P.2d 284 (1982) (*quoting* ***Thompson v. Wainwright***, 601 F.2d 768, 771 (5th Cir.1979)(alteration in original)). The Court made that decision "based only on the Fifth Amendment and in the absence of a direct United States Supreme Court ruling on the issue." ***State v. Radcliffe***, 164 Wn.2d 900, 906, 194 P.3d 250 (2008)(*citing* ***Robtoy***, 98 Wn.2d at 41). Twelve years later in ***Davis v. United States***, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), the United States Supreme Court held that if a defendant makes an equivocal request for an attorney, the police may continue questioning

unless or until the defendant explicitly and unequivocally requests an attorney. ***Davis***, 512 U.S. at 461. All other courts must follow the United States Supreme Court when it decides an issue under the United States Constitution. ***Radcliffe***, 164 Wn.2d at 906 (*citing* ***In re Habeas Corpus of Scruggs***, 70 Wn.2d 755, 760, 425 P.2d 364 (1967)). As a result, in 2008, the Washington Supreme Court explicitly stated that ***Davis*** was the law under the Fifth Amendment and thus, it was the law when applying the Fifth Amendment and ***Miranda*** in Washington. ***Radcliffe***, 164 Wn.2d at 906-07.

Defendants may challenge the voluntariness of the waiver of their rights before trial during a CrR 3.5 hearing. Appellate courts review the trial court's decision after a CrR 3.5 hearing by determining whether substantial evidence supported the trial court's findings of fact. ***State v. Broadaway***, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). They review conclusions of law de novo to determine whether they are properly derived from the findings of fact. ***State v. Pierce***, 169 Wn. App. 533, 544, 280 P.3d 1158 (2012). Unchallenged findings of fact are considered verities on appeal. *Id.*

Defendant in the present case does not challenge any of the findings of fact and they are therefore verities on appeal. *See* Brief of Appellant at 1-2. They establish that after defendant was found standing over Mr. Pitts' body with a handgun saying "that motherfucker is dead", he was arrested and placed in the back of Lakewood Police Officer Mark

Holthaus' patrol car. CP 203 (Findings of Fact No. 2-6). Defendant was read his *Miranda*[7] rights, did not express any confusion about them and did not ask to speak with an attorney. CP 204 (Findings of Fact No.7). He was then transported to an interview room at the police station where Investigator Conlon again orally advised the defendant of his *Miranda* rights, defendant expressed no confusion and did not ask to speak with an attorney. CP 204 (Findings of Fact 8-9). Defendant also signed the advisement of rights form acknowledging that he had been read his rights and understood them. CP 204 (Findings of Fact 9).

Defendant asked whether Mr. Pitts had died and after Investigator Conlon answered that he thought he had, the following exchange took place:

CONLON: Yeah, I think he died, yeah.

HORTON: He did?

CONLON: I think so. How you know him?

HORTON: I don't know him. Why all...if I knew him I woulda said his name...well, I know (unintelligible)... frickin lawyer, man.

CONLON: Huh?

HORTON: I do have a lawyer?

CONLON: You do have a lawyer?

HORTON: I don't' have a lawyer...yeah, but,,, that cat was

[7] ***Miranda v. Arizona***, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

(unintelligible) for fuck shit, man.

CONLON: What was that for? What'd you have a lawyer for?

HORTON: Why would I have a lawyer?

CONLON: For a previous case?

HORTON: Huh?

CONLON: For a previous case? Is that what you're sayin?

HORTON: Ah...nah, I ain't got no lawyer for a previous case, but I do have lawyers, you know what I'm sayin? But I'm just sayin what this guy right here, man...it's fucked shit, man. Nah...

CONLON: Before you were into that kinda stuff, what...like...are you...you're not from here, though, right?

HORTON: Hell no.

See CP 205 (Findings of Fact No. 11).[8] At no other point during the interview did defendant reference an attorney or otherwise suggest that he was invoking his right to remain silent. CP 205 (Findings of Fact No. 10).

On appeal, defendant challenges the trial court's conclusion of law which stated:

> The defendant's comments regarding a "lawyer," set forth in finding of fact 10, were not an unequivocal request for an attorney that invoked his right to counsel. The defendant's comments were unclear, contradictory, and required clarification. The court reaches this conclusion based on the entire context and totality of the defendant's

[8] The findings of fact incorporates Exhibit 8, the recording of the interview between defendant and Investigator Conlon, and this exchange is taken from Exhibit 141, the transcript of that interview.

> actions. This includes but is not limited to his repeated eagerness to talk to law enforcement that night, his express statement to Investigator Conlon that he knew he could "shut up" and not talk about what happened, and the fact that he could not be referring to an attorney he had secured on this matter since he did not have an opportunity from the time of the shooting to retain counsel.

CP 202-207 (Conclusion of Law No. 4).

Defendant does not challenge the voluntariness of his waiver. He also does not argue that his statement "nah, I ain't got no lawyer for a previous case, but I do have lawyers, you know what I'm sayin?" was an unequivocal request for an attorney that violated his Fifth Amendment rights. *See* Appellant's Opening Brief at 23. Rather, defendant engages in an analysis under ***State v. Gunwall***[9], and argues that article I, section 9 of the Washington Constitution provides greater protection than the Fifth Amendment to the U.S. Constitution. Given this, he argues the court should apply the ***Robtoy*** rule which held that whenever there was an equivocal request for counsel, the protections in article I, section 9 require that law enforcement officers may only continue to question an individual to clarify whether they are requesting an attorney. Using this analysis, defendant argues that his rights under article I, section 9 were violated when Investigator Conlon continued to question him without clarifying whether his equivocal request for counsel was in fact an invocation of his rights and a request for counsel.

[9] 106 Wn.2d 54, 720 P.2d 284 (1986).

However, this analysis and interpretation of the law is wrong for many reasons.

a. The court does not need to reach the issue of whether article I, section 9 provides greater protection than the Fifth Amendment because even if the court were to apply the rule articulated in ***Robtoy***, under the facts of this case, the defendant's statements would be admissible.

Defendant in the present case argues that the court should return to applying the ***Robtoy*** rule because article I, section 9 of the Washington constitution provides broader protection than the Fifth Amendment. However, under the facts of this case, the court need not determine whether the Washington Constitution requires a return to the ***Robtoy*** rule, because the result would be the same regardless of whether the court were to apply ***Robtoy*** or ***Radcliffe,*** *supra,* which does not require questioning to cease unless there is an unequivocal assertion of the right to an attorney. *See* ***City of Seattle v. Williams***, 128 Wn.2d 341, 347, 908 P.2d 359 (1995) (There is a "well-established policy that if, in order to resolve an issue before us, it is not necessary to reach constitutional question, an appellate court should decline to do so.").

The ***Robtoy*** rule required that once an equivocal assertion of the right to counsel is made, any questioning must be strictly confined to clarifying the suspect's request. ***Robtoy***, 98 Wn.2d at 39. In this case, even if the court were to apply the ***Robtoy*** rule, the facts of the case show

that Investigator Conlon's questions were directed at clarifying that defendant was not requesting an attorney. Once Investigator Conlon understood that and defendant believed he understood that, it was the defendant himself who initiated further questioning.

Defendant argues that his singular statement "nah, I ain't got no lawyer for a previous case, but I do have lawyers, you know what I'm sayin?" was an equivocal statement about defendant's right to counsel. He argues that because Investigator Conlon's next question asked defendant where he was from, that violated defendant's right to counsel under the ***Robtoy*** rule. However, the court must evaluate the statement in the context of the conversation that occurred before to understand what defendant was saying as Investigator Conlon understood it.

Defendant initially made mention of a lawyer by saying "frickin lawyer, man." Exhibit 141 at 5. It is really this statement when applying the ***Robtoy*** rule which is the equivocal assertion of an attorney that requires the remaining questioning to cease except to clarify what defendant meant. The subsequent exchange between the two shows that that is exactly what Investigator Conlon did. Investigator Conlon responded to defendant's statement with "Huh?" to either clarify what defendant meant or because he could not understand defendant. *Id.* Defendant responded with a question "I do have a lawyer?" to which Investigator Conlon asked "You do have a lawyer?" in an attempt to ascertain whether defendant did in fact have a lawyer. *Id.* Defendant

stated "I don't have a lawyer...yeah, but... that cat was (unintelligible) for fuck shit, man." *Id.* Investigator Conlon's next response, "What was that for? What'd you have a lawyer for?" and the following few exchanges are an attempt to clarify if defendant was discussing a lawyer from a previous case. Investigator Conlon specifically says "For a previous case? *Is that what you're sayin*?" *Id.* (emphasis added). It was after this that defendant states "nah, I ain't got no lawyer for a previous case, but I do have lawyers, you know what I'm sayin?". *Id.*

That statement was not an equivocal assertion of an attorney. At that point in the conversation, it was clear between defendant and Investigator Conlon that defendant did not have an attorney and was not asking for one. Defendant's comment "but I do have lawyers, you know what I'm sayin?" is saying he does not have an attorney from a previous case, but he knows them. *Id.* But that comment is not an equivocal assertion of the right to an attorney because the previous conversation clarified that that was not what defendant was asking for.

Furthermore, it was defendant who initiated the remaining questioning. After saying "nah, I ain't got no lawyer for a previous case, but I do have lawyers, you know what I'm sayin?" defendant continues "But I'm just sayin what this guy right here, man...it's fucked shit, man. Nah..." and only then does Investigator Conlon proceed with asking defendant where he was from. Exhibit 141 at 5. The fact that defendant changes the subject and starts talking about the murder further shows that

in the context of the conversation, it was understood that defendant was not asking for an attorney by his previous statements. Thus, even if the court were to apply the ***Robtoy*** rule, it is evident that Investigator Conlon complied with it because once the mention of an attorney was made, he clarified that defendant was not asking for and did not have an attorney he wanted to talk to. Once that was understood, the conversation continued by defendant's own accord. Therefore, the court need not reach the issue of whether article I, section 9 provides greater protection than the Fifth Amendment in this case because under either the ***Robtoy*** or ***Radcliffe*** analysis, the statements would be admissible.

b. A ***Gunwall*** analysis shows that article I section 9 and the Fifth Amendment are coextensive.

Even if the court were to reach the issue of whether article I, section 9 of the Washington Constitution provides greater protection than the Fifth Amendment, a ***Gunwall*** analysis shows that they are coextensive with one another.

In 1986, the Washington Supreme Court addressed the increased reliance by state supreme courts on their own constitutions rather than the federal constitution, and the criticism and perils such jurisprudence produced. ***State v. Gunwall***, 106 Wn.2d 54, 720 P.2d 808 (1986). The Court carefully considered when it should resort to independent state constitutional grounds to decide a case, rather than relying on decisions of

the Supreme Court construing comparable provisions of the federal constitution. *Id.* at 61-62. The Court recognized that unprincipled reliance on the state constitution when repudiating federal precedent threatens to undermine the credibility of the Court. *Id.* at 60 (noting criticisms of such decisions generally as "result oriented," "constitution shopping," courts as "superlegislatures," and "all sail no anchor" (original citations omitted)). They wanted lawyers to be able to predict the direction of the law and provide guidance for analyzing issues on independent state constitutional grounds. *Id.* at 60-62. The Court also wanted to ensure that its decisions were made "for well founded legal reasons and not merely by substituting [their] notion of justice for that of duly elected legislative bodies or the United States Supreme Court." *Id.* at 62-63.

In light of these goals, the Court established six factors to ensure principled determinations of whether the state constitution affords broader protections than its federal counterpart. The six factors are: 1) the textual language of the state constitution; 2) significant differences in the texts of the parallel provisions of the two constitutions; 3) state constitutional and common-law history; 4) preexisting state law; 5) differences in structure between the federal and state constitutions; and 6) whether the subject

matter of the particular provision presents a matter of particular state interest or concern. *Id.* at 61-62.

In regard to whether article I, section 9 provides greater protection than the Fifth Amendment, the Washington State Supreme Court has consistently answered that they are coextensive and that no ***Gunwall*** analysis is required. On at least thirteen occasions, the Washington State Supreme Court has examined whether the protections provided by article I, section 9 are broader than those provided by the Fifth Amendment. Each time, the Court has concluded that the protections are the same. Seven of those cases were decided before ***Gunwall***. In ***State v. Miles,*** the Court held that the rights guaranteed by the parallel provisions are identical. 29 Wn.2d 921, 926, 190 P.2d 740 (1948). Then, over the next forty years, the Court adhered to that same position every time it was asked to reconsider the issue.[10]

After the Court provided the ***Gunwall*** framework for analyzing whether a state constitutional provision provides greater protection than its federal counterpart, the Court continued to conclude that the rights

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[10] *See* ***State v. James***, 36 Wn.2d 882, 897, 221 P.2d 482 (1950); ***State v. Moore***, 79 Wn.2d 51, 57, 483 P.2d 630 (1971) ("The Washington constitutional provision against self-incrimination envisions the same guarantee as that provided in the federal constitution. There is no compelling justification for its expansion."); ***State v. Mecca Twin Theater & Film Exch., In.,*** 82 Wn.2d 87, 91, 507 P.2d 1165 (1973); ***State v. Foster***, 91 Wn.2d 466, 473, 589 P.2d 789 (1979); ***Dutil v. State***, 93 Wn.2d 84, 87-89, 606 P.2d 269 (1980); ***State v. Franco***, 96 Wn.2d 816, 829, 639 P.2d 1320 (1982).

protected by article I, section 9 and the Fifth Amendment are the same.[11] In essence, every Washington court to consider the question - whether applying the ***Gunwall*** factors, pre-***Gunwall*** analysis, or simply principles of stare decisis – has concluded that article I, section 9 and the Fifth Amendment provide identical protections. An examination of the six ***Gunwall*** factors demonstrates that these conclusions were correct.

i. The text of the Washington and United States Constitutions.

The first two ***Gunwall*** factors require an examination and comparison of the parallel provisions of the state and federal constitutions. The Fifth Amendment of the United States Constitution provides that an accused shall not "be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington Constitution provides that an accused shall not "be compelled in any criminal case to give evidence against himself." The only difference between the two is that the Fifth Amendment uses the language "be a witness" whereas the

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[11] *See* ***State v. Earls***, 116 Wn.2d 364, 374-78, 805 P.2d 211 (1991) (engaging in at least a partial ***Gunwall*** analysis despite concluding that "resort to the ***Gunwall*** is unnecessary because this court has already held that the protection of article 1, section 9 is co-extensive with, not broader than, the protection of the Fifth Amendment"); ***State v. Russell***, 125 Wn.2d 24, 57-62, 882 P.2d 747 (1994) (concluding after a full ***Gunwall*** analysis that article I, section 9 provides no greater protection than its federal counterpart); ***In re Ecklund***, 139 Wn.2d 166, 172 n.6, 985 P.2d 342 (1999) (*citing* pre-***Gunwall*** cases); ***State v. Easter***, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996) (*citing* ***Earls***); ***State v. Templeton***, 148 Wn.2d 193, 207-08, 59 P.3d 632 (2002) (*citing* pre-***Gunwall*** cases); ***State v. Unga***, 165 Wn.2d 95, 100, 196 P.3d 645 (2008) (*citing* ***Earls***).

Washington Constitution uses the language "give evidence." This textual difference is insignificant. A "witness" is one "whose declaration under oath or affirmation is received as evidence for any purpose." BLACK'S LAW DICTIONARY 1603 (6th ed. 1990).

Furthermore, the Washington Supreme Court has "already held that this difference in language is without meaning." ***State v. Russell***, 125 Wn.2d 24, 59, 882 P.2d 747 (1994) (*citing* ***State v. Moore***, 79 Wn.2d 51, 55-57, 483 P.2d 630 (1971)). The Court has determined that the two constitutional provisions have an identical purpose "to prohibit the compelling of self-incriminating testimony from a party or witness." ***Russell***, 125 Wn.2d at 59. There is no significant difference between the language of the parallel provisions of the Washington and United States Constitutions. The first two ***Gunwall*** factors do not support an independent state interpretation.

ii. State Constitutional and Common-Law History.

The third ***Gunwall*** factor examines whether state constitutional history evidences an intent for the Washington Constitution to provide greater protection than that afforded by the federal constitution. The language of article I, section 9 was adopted with no change from the

originally proposed language.[12] There was no reported debate regarding its provisions. It appears to have been modeled on both the Federal Constitution and Oregon's Constitution.[13] Arthur S. Beardsley, SOURCES OF THE WASHINGTON CONSTITUTION (1939), reprinted in STATE OF WASHINGTON 2011-2012 LEGISLATIVE MANUAL 390. The lack of support in constitutional history for reading the Washington Constitution as providing greater protection than its federal counterpart was explicitly recognized in ***Russell***. 125 Wn.2d at 59-60. The constitutional history also does not reflect an intention by the framers to provide greater protection than the federal constitution.

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[12] THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889 at 498 (Beverly P. Rosenow ed. 1962, reprint 1999). A proposal to change the language to "No person shall ... be compelled in any criminal prosecution to testify against himself" was rejected. *Id.* This proposed change would have made this clause identical to Oregon's parallel provision. *See* ORE. CONST. art. I, section 12.

[13] To the extent that article I, section 9 was based on the Oregon Constitution – and it appears impossible to tell from which constitution the relevant clause was specifically drawn – there does not appear to be any evidence that the framers of either state constitution intended any different result than that reached under the federal constitution. ***Russell***, 125 Wn.2d at 60. Moreover, the Washington Supreme Court has previously expressed its opinion as to the origin of article I, section 9:

> Candidly speaking, it is most unlikely that those who drafted our constitution, and the people who adopted it, greatly concerned themselves with the constitutional provision under discussion, or had any clear or fixed idea of its technical meaning. It is more likely that the provision was inserted in Article 1, entitled "Bill of Rights," [sic] because it was in the Federal bill of rights and had been included in the constitutions of practically all of the states that had theretofore entered the Union.

State v. Gocken, 127 Wn.2d 95, 103, 896 P.2d 1267 (1995) (*quoting* ***State v. Brunn***, 22 Wn.2d 120, 139, 154 P.2d 826 (1945) (discussing double jeopardy)) (alteration in ***Gocken***).

iii. Pre-Existing State Law.

The fourth ***Gunwall*** factor examines pre-existing state law, particularly the law in existence at the time of the adoption of the Washington Constitution. ***State v. Smith***, 150 Wn.2d 135, 152-54, 75 P.3d 934 (2003) (noting that laws not enacted until after the Constitution was adopted could not have influenced the framers' intent). A review of the law in existence at the time of the adoption of the state constitution in 1889 and shortly thereafter does not demonstrate an intent that our constitution provide greater protection than the federal constitution with respect to a criminal defendant's privilege against self-incrimination.

Before 1889, Washington law had no special provision for the right to remain silent. The act of Congress that established the territorial government of Washington made no reference to individual rights. Organic Act 1853. When Washington's territorial government adopted its first legislation involving the rights of persons accused of criminal offenses, there was no provision made for the privilege against self-incrimination. Wash. Terr. Laws of 1854, §§ 1-10, at 75-77. Rights to confront witnesses face to face, to a speedy and public trial, against double jeopardy, and many others were explicitly adopted in the first legislative session, but the right not to incriminate oneself was not among them. *Id.* The first session of the new Washington legislature, meeting after the admission of Washington to statehood in 1889, also did not codify a

privilege against self-incrimination independent of the constitutional provisions. Laws of 1889-90.

Washington case law on the issue also does not support a broader reading of the state constitution. To the contrary, our courts have acted more sparingly than the Supreme Court in defining the scope of the privilege against self-incrimination. For example, three years before ***Miranda*** mandated that police advise arrestees of their constitutional rights prior to questioning, the Washington Supreme Court affirmed the admission of a defendant's confession obtained during a custodial interrogation even though the defendant had not been advised that "she was under arrest; that she did not have to make a statement; that anything she said might be used against her; and that she had a right to consult a lawyer." ***State v. Moore***, 61 Wn.2d 165, 169, 377 P.2d 456 (1963); *see also* ***State v. Brownlow***, 89 Wn.582, 582-83, 154 P. 1099 (1916). In fact, the Washington Supreme Court has never actually held that the *Miranda* warnings are required by the State Constitution.[14] ***Russell***, 125 Wn.2d at 61-62.

Similarly, when the Court examined whether an individual can waive the right to counsel during an interrogation after the right had already been asserted, the Court held:

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[14] As late as 1951, the Court held that the Washington Constitution had nothing to offer on the topic of the admissibility of confessions at all. ***State v. Winters***, 39 Wn.2d 545, 549-50, 236 P.2d 1038 (1951).

> The police may question a suspect who has once cut off questioning by requesting an attorney as long as (1) the right to cut off questioning was scrupulously honored (2) the policed engaged in no further words or actions amounting to interrogation before obtaining a valid waiver or assuring the presence of an attorney, (3) the police engaged in no tactics which tended to coerce the suspect to change his mind, and (4) the subsequent waiver was knowing and voluntary.

State v. Pierce, 94 Wn.2d 345, 352, 618 P.2d 62 (1980). The following year however, the United States Supreme Court provided broader protection under the Fifth Amendment when they held that once "having expressed his desire to deal with the police only through counsel, [a suspect] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." ***Edwards v. Arizona***, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981).

Defendant relies on the ***Robtoy*** case to support his argument under the fourth ***Gunwall*** factor that preexisting state law favors stronger individual protections under article I, section 9. However, the Washington Supreme Court's decision in ***Robtoy*** was founded upon what rule it believed the United State Supreme Court would apply if an individual's request for an attorney was equivocal. ***State v. Robtoy***, 98 Wn.2d at 38-40. After examining ***Miranda***, ***Edwards***, ***Michigan v. Mosley***[15], and other

[15] 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

federal cases, the Washington Supreme Court followed the rule in ***Thompson v. Wainwright***, 601 F.2d 768, 771 (5th Cir. 1979), that any questioning after an equivocal request for an attorney must be strictly limited to clarifying the suspect's request. In doing so, the Court stated "[t]he Fifth Circuit rule, cited with seeming approval by the United States Supreme Court in ***Edwards***, appears to us to be the most reasonable approach to dealing with an equivocal request for counsel." ***Robtoy***, 88 Wn.2d at 39 (internal citations omitted).

In other words, the Court's decision in ***Robtoy*** was not predicated upon an interpretation of article I, section 9, but rather on how they believed the United States Supreme Court would interpret the protections in the Fifth Amendment. ***Robtoy*** has no relation to and is in no way supportive of an argument that state law favored stronger individual protections under article I, section 9. The Court was acting in accordance with how they believed federal law would be shaped, not on the basis of what they believed the Washington Constitution intended. *See* ***Radcliffe***, 164 Wn.2d at 906 (the decision in ***Robtoy*** was "based only on the Fifth Amendment and in the absence of a direct United States Supreme Court ruling on the issue). Defendant's reliance on ***Robtoy*** in support of this argument is misplaced.

In essence, neither the law existing prior to the adoption of the Washington Constitution nor any law since reveals any basis to read

article I, section 9 of the state constitution more broadly than the Fifth Amendment to the federal constitution.

iv. Differences in structure between the federal and state constitutions.

The fifth ***Gunwall*** factor directs a reviewing court to examine the differences in structure between the Washington and federal constitutions. The United States Constitution is a grant of limited power to the federal government, while the state constitution limits the otherwise plenary power of the state. ***State v. Ortiz***, 119 Wn.2d 294, 320, 831, P.2d 1060 (1992). This difference in structure generally supports an independent state constitutional analysis in every case. *Id.* Therefore, analyzing this factor does not shed any light on whether the state constitution is more protective than the federal constitution except in the most general sense.

v. Particular state interest or local concern.

The last ***Gunwall*** factor examines whether the constitutional provision at issue addresses an area of particular state interest or local concern. There is nothing unique about Washington's interest in protecting an accused's privilege against self-incrimination that sets it apart from the national interest in protecting that privilege.

In essence, although the language of the state and federal constitutions vary slightly, the ***Gunwall*** factors do not provide a principled basis for interpreting the Washington Constitution as more protective of

the right to remain silent than its federal counterpart. The court should hold that the protected rights are the same.

c. Even if the court were to somehow find that defendant's statements were erroneously admitted, any error was harmless given the overwhelming amount of untainted evidence against him.

A constitutional error is presumed to be prejudicial and the State bears the burden of proving the error was harmless. ***State v. Guloy***, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *Id.* Under the "overwhelming untainted evidence" test, the court looks only at the untainted evidence to determine if it is so overwhelming that it would necessarily lead to a finding of guilt. *Id.* at 426. A conviction will be reversed under this test where there is any reasonable chance that the use of inadmissible evidence was necessary to reach a guilty verdict. *Id.*

In the present case, even if the court were to find defendant's constitutional right against self-incrimination was somehow violated and the trial court erred in admitting defendant's statements, any error was harmless given the overwhelming amount of evidence that was presented

against defendant. There was no question that defendant killed Mr. Pitts as he himself testified he had. The primary issue was whether he had done so in self-defense. The State's primary evidence disputing that came from the testimony of Mr. Johnson, Mr. Borja, Mr. Ross and the police officers who arrived at the scene. They all testified about defendants' actions before, during and after the shooting and the statements he made throughout the evening.

Many of the statements made by defendant during the interview with Investigator Conlon were in addition to and reflective of statements defendant had already made to officers during his arrest. Other statements made by the defendant reiterated his claim of self-defense that he testified to on the stand. The State used the interview to attack the credibility of defendant and dispute his claim of self-defense, but this was also done to a larger extent through the testimony of several other witnesses who contradicted defendant's version of events. Thus, the statements made by defendant during the interview merely added to the already overwhelming amount of evidence which proved defendant did not kill Mr. Pitts in self-defense. Any error in admitting defendant's statements was harmless.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT DEFENDANT'S PLEA OF GUILTY WITH AN "ADJUDICATION WITHHELD" IN FLORIDA CONSTITUTED A CONVICTION UNDER WASHINGTON LAW.

In 1994, defendant pleaded guilty to armed robbery in Florida. Pursuant to Fla. Stat. Ann. § 948.01(2)[16], the Florida court withheld adjudication and placed defendant on probation. Exhibit 10-A. The State notified defendant it intended to use defendant's plea to armed robbery in Florida as a prior conviction to prove defendant committed the crime of unlawful possession of a firearm in the first degree. CP 38. Prior to trial, defense counsel moved to dismiss the unlawful possession of a firearm charge because the Florida plea resulted in a negotiated sentence where it stated "adjudication withheld". They believed it did not qualify as a conviction under Washington law, and there was therefore no evidence of a prior conviction as required to meet the elements of unlawful possession of a firearm in the first degree. 2RP 148-152, 155-161.

After hearing argument, the trial court denied what defense conceded was a ***Knapstad*** motion they failed to brief in time. 1RP 161. Relying on ***State v. Heath***, 168 Wn. App. 894, 279 P.3d 458 (2012),

[16] Fla. Stat. Ann. § 948.01(2) reads in relevant part: "If it appears to the court upon a hearing of the matter that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law, the court, in its discretion, may either adjudge the defendant to be guilty or stay and withhold the adjudication of guilt. In either case, the court shall stay and withhold the imposition of sentence upon the defendant and shall place a felony defendant upon probation."

review denied, 177 Wn.2d 1008, 302 P.3d 180 (2013), the court found that Florida's "adjudication withheld" was essentially the same thing as a conviction. Defendant now makes this same argument after his conviction in a sufficiency of the evidence claim alleging that Florida's "adjudication withheld" should not be considered a prior conviction under Washington law and thus, there was insufficient proof of a prior conviction to establish defendant unlawfully possessed a firearm.

a. The record is insufficient to raise a sufficiency of the evidence claim.

A ***Knapstad*** motion is essentially a summary judgment procedure to avoid a "trial when all the material facts are not genuinely in issue and could not legally support a judgment of guilt." ***State v. Freigang***, 115 Wn. App. 496, 501, 61 P.3d 343 (2002)(*quoting* ***State v. Knapstad***, 107 Wn.2d 346, 356, 729 P.2d 48 (1986)). A defendant who goes to trial cannot appeal the denial of a ***Knapstad*** motion. ***State v. Jackson***, 82 Wn. App. 594, 608, 918 P.2d 945 (1996). This does not bar a defendant from a subsequent challenge to the sufficiency of the evidence, but such a claim is analyzed as a challenge to the evidence produced at trial. *See* ***Jackson***, 82 Wn. App. at 608.

The rules of appellate procedure provide that "[a] party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review." RAP 9.2(b). A party presenting an issue for review has the burden of providing

an adequate record and should seek to supplement the record when necessary. ***State v. Wade***, 138 Wn.2d 460, 464, 979 P.2d 850 (1999); ***State v. Sisouvanh***, 175 Wn.2d 607, 619, 290 P.3d 942 (2012). The appellate court may seek to supplement the record on its own initiative when appropriate, may "decline to address a claimed error when faced with a material omission in the record," or may affirm the challenged decision if the incomplete record is sufficient to support the decision. ***Sisouvanh***, 175 Wn.2d at 619 (*quoting* ***Wade***, 138 Wn.2d at 465).

Defendant in the present claims there was insufficient evidence to convict him of unlawful possession of a firearm arguing that the Florida "withheld adjudication" did not qualify as a conviction. However, because he chose to proceed to trial after the trial court's denial of that pre-trial motion to dismiss, the sufficiency of the evidence is analyzed based on the evidence that was produced at trial. In his designation of clerks' papers and verbatim record of proceedings, defendant fails to provide the relevant transcript from the first trial where he was convicted of that crime. The transcript may reveal that defendant stipulated that he had a prior conviction for a serious offense or that the State discovered defendant had additional criminal history and presented that to the jury as proof of the prior conviction. If defendant stipulated that he had been convicted of a serious offense, he has waived any challenge to the sufficiency of that evidence. *See* ***State v. Stevens***, 137 Wn. App. 460, 466, 153 P.3d 903 (2007), *review denied*, 162 Wn.2d 1012, 175 P.3d 1094

(2008); *see also* ***State v. Wolf***, 134 Wn. App. 196, 199, 139 P.3d 414 (2006). Without knowing what evidence was presented to the jury, the State is unable to argue the issue. There is an insufficient record to challenge the sufficiency of the evidence of defendant's conviction for unlawful possession of a firearm. The court should decline to address this issue.

b. The most defendant may challenge given this record is that the trial court abused its discretion by committing a legal error.

Despite framing the issue as a sufficiency of the evidence claim, it appears defendant is really arguing that the trial court erred in denying defendant's pre-trial motion to dismiss because it erred as a matter of law in finding that the Florida "adjudication withheld" constituted a conviction under Washington law. The distinction is important because if defendant were to prevail on an insufficiency of the evidence claim, the remedy is reversal and the State is barred by double jeopardy from retrying the defendant. ***State v. Hickman***, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). However, a ruling based on an error of law constitutes an abuse of discretion by the trial court. ***Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.***, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). If this court were to find the trial court erroneously ruled as a matter of law that the Florida "adjudication withheld" qualified as a conviction in Washington, the appropriate remedy would be to remand for retrial. Regardless, a

review of the legal analysis shows the trial court properly held that the "adjudication withheld" out of Florida qualified as a conviction in Washington and thus, did not abuse its discretion in denying defendant's pre-trial motion to dismiss.

RCW 9.41.040(1)(a) reads that a person "is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm *after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.*" (emphasis added).

This issue turns on RCW 9.41.040's statutory definition of conviction. When interpreting a statute, the court first looks to the plain language of the statute. ***State v. Bunker***, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). If the plain language is subject to only one interpretation, the inquiry ends because the plain language does not require construction. ***State v. Wentz***, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). RCW 9.41.040(3) holds that:

> a person has been "convicted", whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentence or disposition, post-trial or post-fact-findings motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state.

The plain language of RCW 9.41.040 clearly provides that a "conviction" in Washington state occurs when "a plea of guilty has been accepted". The certified documents presented by the State in the present case show that defendant pleaded guilty to armed robbery on February 25, 1994. Exhibits 10, 10A, 10B. The clerk of the court writes of the disposition "[o]n February 25th, 1994 as to count I the defendant plead guilty...". Exhibit 10A. The certified document defendant signed which discusses the rights he is giving up and his sentence is entitled "[p]lea of guilty and negotiated sentence" and reads "I hereby enter my plea of guilty to armed robbery for the reason that I am guilty." Exhibit 10A. Throughout the document, it continually references that this is a "plea of guilty" and that defendant is "pleading guilty." Exhibit 10A. It is clear from the certified documents presented by the State that defendant entered a plea of guilty. Under the plain language of RCW 9.41.040(3), that plea of guilty constitutes a conviction in the State of Washington.

While this statute is not part of the Sentencing Reform Act ("SRA"), the courts' analysis of the similarly worded language in cases involving the SRA is consistent with the trial courts conclusion in this case. The SRA states that " '[c]onviction means an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilt, and acceptance of a plea of guilty." RCW 9.94A.030(9). Several cases have held that even where other courts have entered deferred or

withheld adjudications, the plea of guilty is what makes it a conviction under the SRA in Washington. *See* ***State v. Cooper***, 176 Wn.2d 678, 685, 294 P.3d 704 (2013) (pleas of guilty where defendant received deferred sentences in Texas were convictions in Washington under SRA); ***State v. Morley***, 134 Wn.2d 588, 597-98, 952 P.2d 167 (1998) (finding defendants' guilty plea and finding of guilt in court martial cases are considered convictions under the SRA); ***State v. Partida***, 51 Wn. App. 760, 762, 756 P.2d 743 (" 'Conviction' [under RCW 9.94A.030] means an adjudication of guilt and includes acceptance of a plea of guilty."), *review denied*, 111 Wn.2d 1016, 1988 WL 632125 (1988). While each of those cases discussed the SRA, the definition of conviction under the SRA and RCW 9.41.040(3) are very similar. The courts' analysis in those cases should shed light on the analysis of the plain language of RCW 9.41.040(3) and the clear expression that a guilty plea, regardless of a withheld or deferred adjudication, constitutes a conviction in Washington.

Specifically in ***State v. Heath***, 168 Wn. App. 894, 895, 279 P.3d 458 (2012), Division I considered whether "a 'nolo contendere' plea followed by a 'withheld adjudication' of guilt in Florida [is] a 'conviction' under Washington law for sentencing purposes?" The court, looking to many of the cases discussed above, held that "[t]he trial court correctly concluded that a sentence of "withhold adjudication" does not negate the existence of a conviction created by a no contest or guilty plea." *Id.* at 901. While ***Heath*** involved the SRA and a conviction that was being used

for offender score purposes, the analysis is the same. Both the SRA and RCW 9.41.040(3) define conviction upon a plea of guilty, regardless of whether it is followed by a withheld adjudication or deferral. The intent of the legislature in both of these situations is to use comparable out of state convictions in Washington law. The ***Heath*** court stated:

> the statutory definition of the term 'conviction' should not be blindly applied to exclude a Florida no contest plea followed by a withheld adjudication. To do so would frustrate the obvious legislative intent to count out-of-state dispositions of criminal charges that are genuinely comparable to Washington convictions even though obtained by slightly different procedures.

Id. at 900. (*citing* ***State v. Morley***, 134 Wn.2d 588, 597, 952 P.2d 167 (1988)). As in ***Heath*** where the court found the "adjudication withheld" in Florida constituted a conviction, the trial court in the present case properly found defendant's "withheld adjudication" was a conviction under RCW 9.41.040(3).

Furthermore, as evidenced in the cases above, Washington courts do not analyze the issue in terms of what the foreign jurisdiction defines or considers the conviction or offense to be. Washington courts look to what the relevant Washington statute or case law is. For example, in ***State v. Stevens***, despite the fact that defendant's conviction for rape in Oregon did not prohibit him from owning a firearm, the court held that because the comparable first degree rape in Washington did, defendant was prohibited from owning a firearm in Washington. 137 Wn. App. 460, 153 P.3d 903

(2007), *review denied*, 162 Wn.2d 1012, 175 P.3d 1094 (2008). Essentially, an analysis of the law in Washington is what controls, not how the law is interpreted or defined in another jurisdiction. Following this principle, defendant's argument that the court should look to Florida's law regarding withheld adjudications is not persuasive. What matters is how Washington defines conviction, and because defendant pleaded guilty to armed robbery in Florida, he was convicted of a serious offense as defined in the relevant Washington statute RCW 9.41.040(3). The trial court did not abuse its discretion in finding that defendant's plea of guilty in Florida constituted a prior conviction for purposes of RCW 9.41.040(1)(a).

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT IRRELEVANT PREJUDICIAL EVIDENCE OF MR. PITTS' GANG STATUS WHEN IT STILL ALLOWED DEFENDANT TO ARGUE HIS THEORY OF SELF-DEFENSE AND TESTIFY THAT HE BELIEVED MR. PITTS WAS A MEMBER OF THE HILLTOP CRIPS.

Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without it. ER 401. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. ER 404(b). Gang evidence falls within the scope of ER 404(b). ***State v. Yarbrough***, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). Gang evidence may be

admissible to prove motive, intent or identity under ER 404(b), but before the trial court may admit such evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect. ***State v. Embry***, 171 Wn. App. 714, 287 P.3d 648 (2012), *review denied*, 177 Wn.2d 1005, 300 P.3d 416 (2013). Courts consider evidence of gang affiliation prejudicial. ***State v. Asaeli***, 150 Wn. App. 543, 579, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001, 220 P.3d 207 (2009) (noting "the inflammatory nature of gang evidence generally").

An appellate court will not disturb a trial court's ruling under ER 404(b) absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did. ***State v. Mason***, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007), *cert. denied*, 553 U.S. 1035, 128 S. Ct. 2430, 171 L.Ed.2d 235 (2008). A trial court abuses its discretion when there is a clear showing that the trial court's decision was manifestly unreasonable, based on untenable grounds, or made for untenable reasons. ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

During motions in limine prior to trial[17], defendant sought to introduce evidence of Mr. Pitts' gang affiliation with the Lakewood Crips

[17] Although this argument occurs prior to the first trial, the court relies on this ruling in the second trial. 10RP 42-43.

arguing it was relevant to show defendant's motive and/or to corroborate defendant's version of events. 2RP 75-78. The State clarified that it was not going to dispute the fact that Mr. Pitts was in a gang, but the only relevant issue about Mr. Pitts' involvement in a gang was whether defendant believed he was in a gang. 2RP 75-78. The court agreed stating:

> All that's relevant, really, is what Mr. Horton thought. And Mr. – if Mr. Horton thought [Mr. Pitts] was a Crip and that somehow played into it, that's all that matters. Whether he was a Crip or wasn't a Crip, I'm not sure that that's really relevant, but that's where I'm sitting right now.

2RP 78.

Throughout the trial, defense counsel attempted to elicit from various witnesses what Mr. Pitts' specific gang affiliation was. Defense counsel asked Mr. Johnson about Mr. Pitts' specific gang affiliation arguing it was relevant to show defendant misidentified Mr. Pitts as a Hilltop Crip[18] because that contradicted the State's theory that the shooting occurred because of a gang rivalry. 13RP 472-79. The State explained that their theory did not revolve around a specific rivalry, only that defendant shot Mr. Pitts to advance his position in the gang by gaining respect. 13RP 472-81. The court ruled that what Mr. Johnson knew about Mr. Pitts' gang status was irrelevant. The only relevant issue was what

[18] Investigator Conlon testified Mr. Pitts was a Lakewood Crip and defendant made a statement shortly after arrest that Mr. Pitts was a "Hilltop Crip" and that's why he shot him. 2RP 9-10; 13RP 355.

defendant believed about Mr. Pitts' gang status because that went to his claim of acting in self-defense. 13RP 479-80.

Later, defense objected when the State sought to redact the Lakewood Crip tattoo Mr. Pitts had across his chest from the medical examiner's photos. 15RP 807. Defense counsel argued it was relevant to corroborate defendant's account that they did not slap box without their shirts off and defendant's statement that he believed Mr. Pitts was a Hilltop Crip. 15RP 818. The court again ruled that which gang Mr. Pitts was in was irrelevant at that point in the trial. It was only what defendant believed or saw that night that was relevant and that could only come from defendant himself. The court also clarified that if defendant took the stand and claimed self-defense, at that point defense counsel could ask about Mr. Pitts' tattoo as it would be relevant then, but not through the medical examiner. 15RP 820.

After defense counsel interviewed Mr. Borja and Mr. Ross, they asked to be able to question them about Mr. Pitts' gang affiliation. Defense counsel argued it was relevant to corroborate their theory of the case that Mr. Pitts was calling defendant a "cuz" that night. 16RP 948-957. The State pointed out that neither Mr. Borja nor Mr. Ross observed anything gang related during the portion of the slap boxing they witnessed so they could not testify to anything defendant would have seen or heard which was gang related. Further, the State argued that defense counsel's argument was essentially saying because Mr. Pitts was known to be a

Crip, he was more likely to have been making gang related comments that night and that is exactly the type of propensity evidence 404(b) seeks to prohibit. 16RP 971-75. The court ruled that Mr. Borja and Mr. Ross could be asked about whether there was any gang animosity between the parties during the time they were present, but that was the only relevant gang related inquiry those witnesses could testify to. 16RP 982.

Defendant argues that the trial court abused its discretion by precluding inquiry into Mr. Pitts' gang affiliation because it was relevant to corroborate the defendant's claim of self-defense and establish Mr. Pitts' motive for attacking the defendant. Brief of Appellant at 35. However, as described above, what Mr. Johnson, Mr. Borja and Mr. Ross knew about Mr. Pitts' gang affiliation had no bearing on what defendant knew that night or why he felt the need to act in self-defense. The only relevant inquiry was what defendant believed about Mr. Pitts that night and only he could provide that testimony. Likewise, whether the medical examiner observed a gang tattoo on Mr. Pitts was not relevant. Once defendant took the stand, he could testify that he did not observe the tattoo to corroborate his statement that Mr. Pitts' was a Hilltop Crip. But the medical examiner's observation of the tattoo was irrelevant.

Defendant cites several cases in his brief where the courts have found evidence of an individual's gang affiliation relevant for the purpose of establishing motive. Brief of Appellant at 36-37. That misses the point however, as the trial court did not exclude all evidence which discussed

Mr. Pitts' gang affiliation. Rather, the trial court limited the evidence about Mr. Pitts' gang affiliation to what defendant believed it was because that was what was relevant to his claim of self-defense. Defendant was allowed to testify that he believed Mr. Pitts was a Hilltop Crip to explain why defendant reacted the way he did and establish a motive for why Mr. Pitts attacked him.

That limitation excluding irrelevant prejudicial evidence still allowed defendant to fully argue his theory of the case to the jury and claim Mr. Pitts attacked him because he was wearing rival gang colors. Defendant testified throughout direct about how he believed Mr. Pitts was a Hilltop Crip and Mr. Pitt's behavior that night. Defendant testified about a prior incident where he observed Mr. Pitts fighting with another gang member, specifically "another Crip", and how Mr. Pitts beat that person up. 19RP 1477. Defendant testified that Mr. Pitts got upset at defendant's jacket, called defendant a "Snoover" and said he was a Crip. 19RP 1480-82. When Mr. Pitts attacked defendant, defendant stated that Mr. Pitts repeatedly referred to him as a "cuz" and said "I'm going to kill you cuz." 19RP 1476, 1479, 1480-87. The limitation of the evidence did not prohibit defendant from discussing Mr. Pitts' gang affiliation and arguing his theory of the case. It merely narrowed the evidence to what was relevant.

Evidence of what defendant believed Mr. Pitts' gang affiliation to be was presented to the jury because it was relevant to his claim of self-

defense. Whether Mr. Pitts was actually in a gang, whether Mr. Johnson, Mr. Borja or Mr. Ross knew that and whether the medical examiner observed a tattoo on him had no relevance to what defendant believed or saw that night. That evidence had little to no probative value and any probative value it did have was substantially outweighed by the prejudicial effect it would have had given the connotations made with gang associations. The trial court did not abuse its discretion in excluding that irrelevant prejudicial evidence.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF MANSLAUGHTER IN THE FIRST AND SECOND DEGREE WHEN THE SECOND PRONG OF THE ***WORKMAN*** TEST WAS NOT MET AS THERE WAS NO EVIDENCE PRESENTED THAT DEFENDANT ACTED RECKLESSLY OR NEGLIGENTLY IN SHOOTING MR. PITTS.

A defendant is entitled to an instruction on a lesser included offense when (1) each of the elements of the lesser offense is a necessary element of the charged offense (legal prong) and (2) the evidence in the case supports an inference that the lesser crime was committed (factual prong). ***State v. Workman***, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Defendant in the present case was charged with first degree premeditated intentional murder and requested lesser included instructions on first and second degree manslaughter. CP 1-2; 19RP 1636-38. First degree manslaughter and second degree manslaughter occur when a person

recklessly or negligently causes the death of another person. RCW 9A.32.060; RCW 9A.32.070. There was no dispute that the legal prong of the ***Workman*** test was satisfied as manslaughter is a lesser included offense of first degree murder. ***State v. Schaffer***, 135 Wn.2d 355, 357-58, 957 P.2d 214 (1998).

The trial court refused to give the instruction because it found the factual prong of the ***Workman*** test had not been met. 19RP 1646-47. An appellate court reviews the trial court's decision regarding the second prong of the ***Workman*** test for an abuse of discretion. ***State v. Walker***, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). In determining whether there is sufficient evidence to support the instruction under the factual prong, the evidence is viewed in the light most favorable to the party requesting the instruction. ***State v. Fernandez-Medina***, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). The evidence must raise an inference that the defendant committed the lesser crime and only the lesser crime. ***State v. Brown***, 127 Wn.2d 749, 755, 903 P.2d 459 (1995). It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes defendant's theory on the lesser included offense before an instruction will be given. ***State v. Fowler***, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by* ***State v. Blair***, 117 Wn.2d 479, 816 P.2d 718 (1991).

A review of the evidence viewed in the light most favorable to the defendant shows the trial court did not abuse its discretion in refusing to

instruct the jury on manslaughter. Manslaughter is not a specific intent crime and does not require a specific intent to cause a particular result. ***State v. Red***, 105 Wn. App. 62, 66, 18 P.3d 615 (2001), *review denied*, 145 Wn.2d 1036, 43 P.3d 20 (2002). Manslaughter requires that a person causes the death of another by acting recklessly or with criminal negligence. RCW 9A.32.060(1)(a); RCW 9A.32.070(1)(a). A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a death may occur and that disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation. WPIC 10.03. Likewise, a person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a death may occur and that failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation. WPIC 10.04.

Defendant argues because he did not intend to kill Mr. Pitts when he shot him, he should have been entitled to the instructions on manslaughter. Brief of Appellant at 40-42. But the level of injury he intended to inflict on Mr. Pitts when he shot him is irrelevant. The court looks to the theory of the act itself in evaluating whether there was evidence which would support the action was reckless or negligent. Defendant testified that he ran to the kitchen, turned around and shot Mr. Pitts to get Mr. Pitts to stop attacking him. 19RP 1487-89.

In 1936, the Washington Supreme Court stated "where one deliberately and intentionally fires a deadly weapon at a human being, into a crowd, or at a particular point where human beings are known to be, the law assumes that the actor intended to accomplish the natural result of his act and if death results the killing was intentional." ***State v. Hiatt***, 187 Wash. 226, 233, 60 P.2d 71 (1936). This same principle was reiterated in ***State v. Perez-Cervantes*** where the Court stated that regardless of whether one intends to assault an individual or kill them, one "cannot overcome the presumption that an actor intends the natural and foreseeable consequences of his conduct." 141 Wn.2d 468, 481, 6 P.3d 1160 (2000). The court went on to say that "there was no evidence that affirmatively established that Perez-Cervantes acted recklessly or with criminal negligence in plunging the blade of his knife into [the victim]. Whatever Perez-Cervantes' subjective intent, his objective intent to kill was manifested by the evidence admitted at trial." *Id.* at 481-82.

Likewise, there was no evidence presented that suggested defendant acted recklessly or negligently when he pulled the trigger. Defendant intentionally aimed the gun at Mr. Pitts from a short distance away and pulled the trigger with the intent that the bullet hit Mr. Pitts in the chest. There is nothing reckless or negligent in that act, and there is no question that a natural and foreseeable consequence when intentionally shooting another human being is death. The trial court correctly understood this when it stated "I do not see how taking a gun and shooting

it at a person a short distance from you – I don't know the – none of us know the actual distance, but it couldn't be very big because that apartment wasn't very big – could in any way be reckless as opposed to intentional." 19RP 1646-47.

This distinction is evident in a comparison to the recent case of ***State v. Henderson***, 182 Wn.2d 734, 344 P.3d 1207 (2015). There, the Court found that Henderson should have been entitled to an instruction on manslaughter because there was evidence from which a jury could have found Henderson's conduct in shooting at a house could have been reckless. After detailing testimony and evidence that was presented during the trial, the Court explained "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. In contrast, there was no such evidence in the present case that defendant's action of pulling the trigger was in any way reckless or negligent.

Defendant argues that his level of intoxication and the order of entry of the bullets support his argument that a jury could have found he acted recklessly or negligently. However, there was no evidence that his intoxication level contributed to or affected his ability to pull the trigger when he shot Mr. Pitts. Similarly, the injury that results from the shot has no impact on the defendant's action in firing the gun. There was simply no evidence presented which supported the theory that defendant's action of shooting Mr. Pitts was reckless or negligent as required to satisfy the

second prong of the ***Workman*** test. The trial court did not abuse its discretion in refusing to instruct the jury on the lesser included offenses of manslaughter in the first and second degree when there was no evidence to support those instructions.

5. DEFENDANT FAILS TO SHOW PROSECUTORIAL MISCONDUCT AS THE PROSECUTORS DID NOT MISSTATE THE LAW, LET ALONE DO SO FLAGRANTLY AND WITH ILL INTENT SO AS TO CAUSE AN ENDURING PREJUDICE.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. ***State v. Manthie***, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (*citing* ***State v. Weekly***, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (*overruled on other grounds by* ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002)). Failure

by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." ***Stenson***, 132 Wn.2d at 719, (*citing* ***State v. Gentry***, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). Failure to object or move for mistrial at the time of the argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also* ***State v. Monday***, 171 Wn.2d 667, 679, 257 P.3d 551 (2011).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), (*citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)).

a. <u>The prosecutor did not commit misconduct as he did not misstate the law regarding premeditation.</u>

Premeditation may be proven by circumstantial evidence where the jury draws reasonable inferences and the evidence supporting the jury's finding is substantial. ***State v. Gentry***, 125 Wn.2d 570, 598, 888 P.2d 1105, *cert. denied*, 116 S. Ct. 131, 516 U.S. 843, 133 L. Ed. 2d.79 (1995).

Premeditation must involve more than a moment in time. RCW 9A.32.020. It is "the deliberate formation of and reflection upon the intent to take a human life." ***State v. Gentry***, 125 Wn.2d at 597-98 (*quoting* ***State v. Ortiz***, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). Motive, procurement of a weapon, stealth and method of killing are factors relevant to establishing premeditation. ***State v. Pirtle***, 127 Wn.2d 628, 644, 904 P.2d 245 (1995).

"Premeditation" involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short," while "intent" means acting with the objective or purpose to accomplish a result which constitutes a crime. ***State v. Robtoy***, 98 Wn.2d 30, 43, 653 P.2d 284 (1982); ***State v. Commodore***, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984). It is possible to form an intent to kill that is not premeditated. ***State v. Brooks***, 97 Wn.2d 873, 876, 651 P.2d 217 (1982).

Defendant contends that the prosecutor improperly argued to the jury that defendant deliberated and formed the intent to kill Mr. Pitts after he committed the act which caused Mr. Pitt's death. Brief of Appellant at 48. But a review of the entirety of the closing argument reveals that defendant is combining two arguments the State made in asserting that.

The prosecutors first clearly argued to the jury that the killing was premeditated because the defendant deliberated and formed the intent to kill during the slapboxing scuffle. The prosecutor began his argument on

premeditation by reading to the jury the court's instruction to the jury about how the law defines premeditation. 20RP 1691; CP 281-315, Instruction No. 6. He then went through several of defendant's statements to Investigator Conlon where defendant was describing what he was thinking during the slapboxing and in the moments leading up to the shooting. 20RP 1693-97. The prosecutor told the jury:

> [t]his is the defendant saying they got to wrestling, they got to fighting, and he decided in his mind, he deliberated in his mind, at some point, fuck this, I don't need to wrestle with you, I don't need to fight with you, I got a gun and I'm going to shoot you.... That is evidence of premeditation. Those kind of statements are peppered throughout his interview.

20RP 1696.

The State then argued that because defendant believed Mr. Pitts was still alive when he drug him out of the apartment and held the gun over him saying "I'm going to kill you motherfucker", those actions were further evidence of defendant's premeditated intent to kill the defendant. Regardless of whether Mr. Pitts was alive or not, the defendant believed he was alive and thus, he was still engaged in the act of killing him up until the point he was arrested. Defendant's actions and behavior after the initial shot were relevant to infer what the defendant's intent was before he believed he had killed the defendant and thus, the jury could infer premeditation from those actions.

The State initially made this argument in their closing and while it may not have been the clearest explanation, it certainly was not a misstatement of the law, let alone a flagrant or ill-intentioned one. The State argued:

> [defendant] was acting even after he shot Mr. Pitts and even after Mr. Pitts was no longer a threat, and his actions were done with the intent to kill Mr. Pitts, and during that entire time from the time that he shot Mr. Pitts to the time that he's caught by the police, during that entire time, he's premeditated, he's deliberating, he's decided this man needs to die. So, again, don't be fooled by any notion that the analysis of whether this defendant is guilty stops at the moment that he pulls the trigger. It continues from the moment he pulls the trigger until the moment that he's apprehended by the police.

20RP 1697-98. The argument was reiterated in the State's rebuttal where the prosecutor described how defendant's actions after shooting Mr. Pitts were further evidence of defendant's premeditated intent to kill Mr. Pitts because defendant believed Mr. Pitts was still alive after the shooting in the apartment. 20RP 1833.

The State never argued that the defendant formed a premeditated intent to kill after he knew he had already killed the defendant or that the law allows for that. The State argued that defendant formed a premeditated intent to kill during the slapboxing match and his actions while he believed defendant was still alive in the parking lot were further evidence that this was an intentional premeditated murder.

As described in the next section, defense counsel himself addressed the argument he thought the State was making in his closing. The fact that he chose not to object during the State's initial closing nor during the rebuttal strongly suggests that this was not flagrant or ill-intentioned misconduct or even a misstatement of the law. It may have been a confusing argument, but it was not a misstatement of the law, let alone a prejudicial one as defendant is required to show.

b. Even if there appeared to be a misstatement of the law to the jury, defendant is unable to show prejudice as the court's instructions on the law were clear.

Even if the court believes the jurors could have interpreted the State's words to be arguing that defendant formed an intent to kill Mr. Pitts after he knew Mr. Pitts was deceased, defendant is unable to show prejudice. Jurors are presumed to follow the court's instructions. ***State v. Johnson***, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). The second element of the "to convict" instruction on first degree murder stated that the State must prove "the intent to cause the death was premeditated." CP 281-315, Instruction No. 10. The instruction defining murder in the first degree states "[a] person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he causes the death of such person unless the killing is justifiable." CP 281-315, Instruction No. 5. The court's instructions to the jury on premeditation read:

> Premeditated means thought beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 281-315, Instruction No. 6. The instructions also stated "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 281-315, Instruction No. 7. These instructions, when read in conjunction, make it clear to the jury that the premeditation decision to kill another must occur before the death, but intent relates to the act itself and may be proven by evaluating the entirety of defendant's actions to accomplish the death. The jurors were not only provided with written packets which included these instructions, they were orally instructed prior to the parties' closing arguments. 20RP 1668-70.

Additionally, the defense attorney reminded the jurors to look to their instructions for clarification about such an argument numerous times during his closing. He stated "the State talks about the ability to form intent after the fact. Nowhere in your instructions are you going to see any indication that you can form the intent after the fact." 20RP 1739. The defense attorney brought it up again later in his argument saying "the State is throwing this argument out here that he can somehow form the intent to kill after a person is dead; and I would ask you to read the jury

instructions." 20RP 1760. Regardless of what the jury thought the State was arguing, the defense attorney questioned whether such an argument was the law in front of the jurors and reminded them to look at the instructions.

The instructions themselves also state that "the lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law.... The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 281-315, Instruction No. 1. If there were any question as to what the law was based upon the parties' arguments, the jurors are directed back to the court's instructions. Again, jurors are presumed to follow the court's instructions. There is nothing to suggest the jurors did not do that in this case. Defendant is unable to prove that he was prejudiced by an attorney's misstatement of the law when the court's instructions on the law were clear.

c. Defense counsel was not ineffective for not objecting to the prosecutor's argument as it was not a misstatement of the law.

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984);

State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

As stated above, the prosecutor's argument was not a misstatement of the law. Defendant cannot show his counsel was ineffective for failing to object to something that was not an error. Even if the prosecutor's argument was confusing to the jury, that is not something defense counsel would object to for obvious strategic reasons. In this case, in an effort to clear up any confusion which may have occurred during the State's argument, defense counsel addressed what the law did not say and reminded the jury to read their instructions (see previous section). There was no objection during the rebuttal portion because the prosecutor was not misstating the law. Defendant cannot prove that his attorney's performance was deficient for failing to object when there was no error and certainly cannot show he was prejudiced. Defendant has failed to satisfy both prongs of the ***Strickland*** test.

6. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 527 U.S. 1, 18, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). A defendant is entitled to a fair trial but not a perfect one, for "there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also* ***State v. Kitchen***, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) ("The harmless error rule preserves

an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See, Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See, Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See*, e.g., ***Johnson***, 90 Wn. App. at 74. Conversely, errors that

individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See*, e.g., ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and ***State v. Kinard***, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see*, e.g., ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts as to cumulative error), or because the errors centered around a key issue, *see*,

e.g., ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of State witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated, some so many times that a curative instruction lost all effect, *see,* e.g., ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See* ***Stevens***, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that any prejudicial error occurred at his trial, much less that there was an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction and sentence.

DATED: September 17, 2015.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9-18-15
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