NO. 46633-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY EUGENE RALLS, and
NATHANIEL WESLEY MILES,
APPELLANTS

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 13-1-01703-4
No. 13-1-01704-2

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Statutes

Rules and Regulations

Other Authorities

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

1. Did the trial court err in its instructions to the jury when they were supported by substantial evidence, informed the jury of the applicable law and permitted the parties to argue their theories of the case?

2. Did the trial court err by giving a provocation instruction when the State had produced substantial evidence that the defendants were the aggressors in that they sought out and provoked the victims with gun violence?

3. Did the trial court err by giving a retaliation instruction where the instruction was a correct statement of the law, was derived from an instruction expressly approved by the Washington Supreme Court and informed the jury of the applicable law?

4. Did the trial court err by giving an accomplice instruction that required the State to prove beyond a reasonable doubt that the defendants had actual knowledge of the crime and committed acts that would promote or facilitate commission of the crime of first degree murder by extreme indifference?

5. Was sufficient evidence introduced to support the extreme indifference first degree murder convictions when the defendants opened fire in a residential neighborhood where unarmed, uninvolved bystanders were present and killed one individual and wounded another?

6. Did the trial court abuse its discretion when it seated an alternate juror during deliberations after a hearing, when the replaced juror had refused to appear for deliberations, and had disobeyed the court's instructions?

7. Did the trial court abuse its discretion when it answered a jury question with an additional instruction that was a correct statement of the law, not a comment on the evidence and did not go beyond the question the jury asked?

8. Did the trial court err when it imposed legal financial obligations when it had before it information from which an individualized determination could be made as to the defendants' ability to pay?

B. STATEMENT OF THE CASE.

1. *Procedure.*

On April 25, 2013, Appellants Anthony Ralls ("defendant Ralls") and Nathaniel Wesley Miles ("defendant Miles") and three accomplices were charged with one count of first degree murder by alternative means. CP Ralls 1-2. CP Miles 215-16. The murder charge stemmed from the August 28, 1988, shooting and subsequent death of seventeen year old Bernard Houston. CP Ralls 3-8. CP Miles 217-22. 2 RP 136. In the same incident, a companion of Mr. Houston, Michael Jeter, was also shot but survived. *Id.* At the time the charges were filed, some 24 years after the shooting, the statute of limitations had lapsed as to all potential charges except murder.

The charges were amended during the trial. Instead of charging the defendants with one count, the prosecution amended the charges so that both of the first degree murder offenses were charged as separate counts. CP Ralls 84-85. CP Miles 555-56. In addition, a witness tampering charge was added for defendant Miles. *Id.*

The case was called for trial as to three of the defendants on June 23, 2014. 1 RP 4[1]. Of the original three trial defendants, Brian Allen, accepted a plea agreement early during the State's case in chief and testified as a witness for the State. Thus, of the original six suspects in the shooting, two were convicted at trial, defendants Ralls and Miles [CP Ralls 139. CP Miles 759.], three testified for the State and were convicted of lesser offenses as a result of cooperation agreements (Mr. Allen, Terris Miller and Darrell Lee) [7 RP 1038. 9 RP 1252. 9 RP 1377], and one, Joe Courtney, was killed in an unrelated incident several years before the trial [9 RP 1258-59.].

Testimony began on July 1, 2014. In its case in chief, the State called a total of eighteen witnesses. The defense case started on July 22, 2014. The defendants called four witnesses, plus defendant Ralls. 14 RP 2120, 2124, 2194, 2245 and 17 RP 2410. Jury instructions were then argued and ruled upon on July 29, 2014. 18 RP 2454.

---

[1] The verbatim report of the trial proceedings consists of 21 consecutively numbered and paginated volumes. Citations in this brief to the verbatim reports will include the volume and page number. Where citations are made to proceedings other than before the trial court, the citation will include the date and nature of the hearing and page number.

The trial court gave a justifiable homicide instruction based on Washington Pattern Instructions – Criminal ("WPIC") WPIC 16.02. CP Ralls 107, CP Miles 727, Instruction 15. It also gave the State's proposed provocation and revenge and retaliation instructions over the defendants' objections. CP Ralls 111-12, 869, 875. CP Miles 731-32, 879, 865, Instructions Nos. 19 and 19A. 18 RP 2571. The trial court gave defendant Miles' proposed instruction on the term extreme indifference. CP Ralls 123, CP Miles 743, Instruction No. 28A.

The trial concluded with closing arguments on July 30, 2014. 19 RP 2777-78. After deliberations the jury returned guilty verdicts for both defendants on Count Two, extreme indifference first degree murder. CP Ralls 139. CP Miles 759. The jury also convicted defendant Miles of the witness tampering charge. CP Miles 887. The jury acquitted both defendants of premeditated first degree murder, as well as two lesser included offenses, second degree murder and first degree manslaughter. CP Ralls 136-38. CP Miles 756-58.

Sentencing was set for August 29, 2014. Defendant Ralls was sentenced at the high end of the standard range to 333 months in prison. CP Ralls 184-96. Defendant Miles offender score was higher, and although he too was sentenced to 333 months, his sentence was near the mid-range. CP Miles 766-79. Defendant Ralls' notice of appeal was

timely filed on September 3, 2014. CP Ralls 197-210. Defendant Miles' notice of appeal was also timely filed on September 5, 2014. CP Miles 790-804.

2. *Facts.*

A. The Early Police Investigation.

On August 28, 1988, a number of Tacoma Police officers, including Officer Timothy Deccio, were dispatched to a shooting in Tacoma's Hilltop neighborhood. 2 RP 146-47. Upon arrival at the scene Officer Deccio found Bernard Houston unconscious and lying on the ground in front of a Jeep Cherokee. 2 RP 150. He was bleeding from a severe gunshot wound to the head. 2 RP 151. A detective noticed that both doors of the Jeep were open and there were bullet strikes on side of the vehicle. 5 RP 622-23.

The location of the shooting was near the intersection of 23rd Street South and South Sheridan. Exs. 7, 10, 17, 66 and 67. The Jeep was parked next to the curb on the wrong side of the road pointed northbound and approximately 20 feet south of the intersection. 2 RP 166. The Hilltop neighborhood in that area included a number of single family residences, a church and a 24 hour convenience store called Doboschi's. 5 RP 628-30, 6 RP 888. Exs. 7, 10, 17, 66 and 67. A second shooting victim, Michael Jeter, was found at Doboschi's suffering from a gunshot wound to the leg. 5 RP 631. The neighborhood and convenience store

was tagged with gang graffiti, including the initials HTC, which signified Hilltop Crips. 5 RP 630-33.

Bernard Houston survived on life support in the hospital for two days. He died on August 30, 1988. 2 RP 227. Findings from his autopsy showed that Mr. Houston had been killed by a single, large caliber, distant gunshot wound to the forehead. 2 RP 226-30.

The scene at 23rd and Sheridan was secured by the police and searched for evidence. One of the first responders, Officer Jennifer Kramer, found and recovered a .22 caliber revolver from Bernard Houston's right hand. 3 RP 279-80. The Jeep was impounded and towed for forensic processing. 5 RP 637. During the search, a hat embroidered with the name Sike and the initials HTC was found. 5 RP 722. Michael Jeter later admitted that the hat was his. 7 RP 982.

The detective first assigned to the investigation was Melvin Margeson. Detective Margeson interviewed a number of witnesses during September and October 1988. 5 RP 648-50. Despite his efforts, no suspects were confirmed, nor were any arrests made before he retired in 1999. After 1999 Detective John Ringer, a gang specialist, took over the investigation. 5 RP 650. 12 RP 1870. Detective Ringer began contacting witnesses and suspects. He had a major break in the investigation in 2001 when he traveled to Jacksonville, Florida and interviewed Terris Miller. 12 RP 1871, 1881. Mr. Miller was a passenger in one of two suspect vehicles in the shooting and was originally charged as an accomplice. 8

RP 1157-60. He accepted a plea bargain before trial and testified as a witness for the State. *Id.*

B. Surviving Victims.

At trial the surviving victims from the Jeep, Michael Jeter, Tyra Doucoure and Calille McMichael all testified. 4 RP 495. 6 RP 758, 858. Mr. Jeter and the two women testified that they had been picked up by Bernard Houston in the Jeep a short time before the shooting. 3 RP 397-98. 6 RP 764-65. 6 RP 866. They met at a convenience store and from there went in the Jeep, to South 23rd and Sheridan where they socialized, drank and smoked marihuana. 3 RP 399-402. 6 RP 766-67. 6 RP 873-75. Mr. Jeter denied that he had been with Mr. Houston earlier in the day, and stated that Mr. Houston had picked him up just before they met Ms. Doucoure and Ms. McMichael, that Mr. Houston was acting hyper for unknown reasons, and that Mr. Houston had wanted help fixing a flat in one of the Jeep's tires. 6 RP 868-74.

Michael Jeter and the two women described the arrival of two suspect vehicles and the shooting. Ms. Doucoure testified that the two vehicles that rolled by the Jeep were being driven slowly "in harmony with each other", and that she and Ms. McMichael were told then to get out of the Jeep by either Mr. Houston or Mr. Jeter. 3 RP 406-11. She heard and saw gunshots from the two vehicles and said that the first shots came from the two cars and that there was also gunfire from Mr. Houston's side of the Jeep. 3 RP 412-14. Ms. Doucoure ran back toward

the Jeep after the initial shots and saw Mr. Houston get hit in the head. 3 RP 418. She testified that when she and Ms. McMichael got out of the Jeep, they had their hands up so as not to get shot. 4 RP 565-67, 578-79.

Calille McMichael likewise testified that she and Ms. Doucoure got out of the Jeep before the shooting. 6 RP 767-68. As the suspect vehicles arrived, Ms. McMichael noticed that their headlights were off and she pointed this out to Mr. Houston. *Id.* After getting out of the Jeep, she ran toward the church and toward Doboshi's with Ms. Doucoure, intending to make her way to her mom's house at 19th and Sheridan. 6 RP 786-87, 793. She did not see the shooting but heard the first shots as she was walking across the street in the direction of the church. 6 RP 787-89. As she was running away during the shooting, she heard Mr. Houston say, "fuck those slobs". 6 RP 782.

Michael Jeter testified that when Bernard Houston picked him up Mr. Houston was acting hyper. 6 RP 869. Mr. Jeter did not know why because they never got to finish talking about it before the shooting. *Id.* At 23rd and Sheridan, the shooting incident began with Mr. Houston fleeing from the Jeep and jumping over a back fence at an adjacent residence known as the Noble House before any shots were fired and before Mr. Jeter even knew there was danger. 6 RP 887-88, 918. Next, Mr. Jeter looked outside the Jeep and saw a gun being pointed at him and the women from the passenger side of a car that had pulled alongside the Jeep. 6 RP 888-93, 926-28. The gunman did not fire but someone from

the car called out, "what's up Blood?" *Id.* 7 RP 999. Mr. Jeter told the women to get out of the jeep and got out himself and testified, "We kind of like stood there, and then I was like, man, this ain't good. They have got guns. They are not moving. The car isn't moving. That's what I'm thinking. My first instinct, I was like maybe they were waiting for him." 7 RP 1012. 6 RP 895. He understood the Blood comment to have been intended to convey who they were. 6 RP 893-95.

As Mr. Jeter and the two women fled from the Jeep, gunfire erupted. 6 RP 900-01. Mr. Jeter testified that he was shot in the leg by the second shot as he was running with the two women toward Doboshi's, and that the total number of shots fired was four or five. 6 RP 897-901. The last shots were fired after he had made it to Doboshi's Market where he asked for help and was told that the police had been called. 6 RP 902-06. Mr. Jeter was not armed, did not fire a shot, did not see where the first shots came from and could not identify any of the shooters. 6 RP 919-21, 7 RP 965, 943-46, 988-90, 994-95. He denied having been a participant in the shooting incidents earlier in the day on the eastside. 7 RP 995, 1003.

C. *Cooperating Defendants.*

Michael Jeter, Tyra Doucoure and Calille McMichael all testified that they did not know what precipitated the shooting or who had fired the shots. Lacking such evidence from the victims, the State introduced evidence to prove motive and the identities of the shooters through the defendants' accomplices. The first cooperator was Terris Miller. 12 RP

1871. Mr. Miller (1) identified himself as a Blood gang member from Tacoma's eastside [7 RP 1041]; (2) identified defendant Ralls as the shooter who killed Bernard Houston [7 RP 1042, 1063]; and (3) defendant Miles as the shooter who shot Michael Jeter [7 RP 1070-71]. He testified that what led up to the shooting was three drive-by shootings earlier in the day on Tacoma's eastside, including a shooting in which a stray bullet nearly hit a baby. 7 RP 1049-57. The defendants suspected Bernard Houston and Michael Jeter, both Hilltop Crips, of having been the culprits. *Id.* That night the defendants all decided to go to the Hilltop, roll up on the Jeep and shoot back at them because "That's what I believe was the discussion about, going to retaliate, because everybody was tired of them guys shooting." 7 RP 1059-60. 8 RP 1170-73.

Terris Miller's testimony was supported by Darryll Lee and Brian Allen. Darryll Lee testified about the discussion among the defendants wanting to "just get back at the dudes that did it." 9 RP 1260-66, 1323. He stated specifically that the plan was "I mean, do the same thing they did to us. Shoot back at them." 9 RP 1266, 1298, 133-34. He did not consider it to be a worthwhile option to call 911 or report the shootings to the police. 9 RP 1350-51.

Mr. Lee further testified that after the defendants' cars rolled up on the Jeep the doors of the car that defendant Ralls was in came open and the shooting started. 9 RP 1275-76. He said that the first shot came from the area of the Jeep and that defendant Ralls opened fire immediately. 9

RP 1276-77. While defendant Ralls was shooting toward the Jeep, defendant Miles was shooting down 23rd Street in the direction of Doboshi's. 9 RP 1280. Insofar as intent to kill was concerned, he testified that "They shot at us. They didn't kill us. I mean, it was a possibility that we were going to kill them. It wasn't like we were expert shooters or nothing." 9 RP 1334.

Brian Allen was the last of the cooperators and testified that the plan was to go to the Hilltop for a confrontation with guns. 9 RP 1402. Mr. Allen had been shot at during one of the earlier eastside drive-by shootings; he testified that someone in the Jeep had fired shots at him and defendant Ralls as they were wrapping up some drug business. 9 RP 1381-86. They responded by shooting back at the Jeep and chasing it back to the Hilltop in a rolling gunfight on city streets and the freeway. 9 RP 1386-89. 10 RP 1524-25. They broke off the chase and circled back to the eastside via I-5 and 56th Street. *Id.* Mr. Allen testified that he and defendant Ralls changed vehicles before joining the others to head back to the Hilltop. 9 RP 1389-90. He did not think the trip to the Hilltop would necessarily lead to a killing but they were taking guns and were intent on initiating an armed confrontation on Hilltop Crip turf. 9 RP 1402-07. 10 RP 1472, 1528.

The shooting incident happened when Brian Allen and defendant Ralls pulled their car up next to the Jeep. Mr. Allen claimed that the first shot came from the area of the Jeep and that he did not see any additional

shots because he was ducking. 9 RP 1413. 10 RP 1497-98. Insofar as the armed confrontation and shooting were concerned, he was prepared for a gun battle and knew that innocent people could be killed or injured by the gunfire, just as earlier in the day a baby had nearly been hit by gunfire from the Jeep on the eastside. 10 RP 1529-33.

D. *Defendant Ralls.*

Defendant Ralls elected to testify. 17 RP 2410. Defendant Miles did not. 18 RP 2552. Mr. Ralls denied having been shot at by the Jeep on the eastside and testified that Mr. Allen and Mr. Lee had picked him up and that he did nothing more than sit in the back of their car rolling joints. 17 RP 2423-30, 2436, 2438, 18 RP 2505-06. Mr. Ralls did admit to knowing about the shooting incident earlier in the day that resulted in the near miss of a baby [17 RP 2435, 18 RP 2506-07], but he denied that he had a gun or that he fired any shots when they went to the Hilltop. 17 RP 2439, 18 RP 2507.

Defendant Ralls admitted that he was riding in the car driven by Mr. Allen when it pulled alongside the Jeep and the shooting started. He said, "I think it was slowing. Mr. Lee gave a gesture or something out of the window. A gunshot." 17 RP 2444. After the first shot Mr. Ralls ducked down and he stated that the first shot came from the area of the Jeep and that Mr. Lee was the one shooting from the car he was in. 17 RP 2444-51, 18 RP 2516, 2528-29. Defendant Ralls was confronted with statements he had made to a jailhouse informant, Curtis Hudson. 17 RP

2467-68. He denied (1) having admitted being the shooter who killed Bernard Houston, (2) having been fired at on the eastside by the Jeep, (3) having chased the Jeep back to the Hilltop while shooting at it, and (4) having run out of bullets and having continued firing at the Jeep with Mr. Allen's gun. 17 RP 2468-69.

E. *Jury Deliberations.*

On July 30, 2014, after four weeks of testimony, the jury retired to deliberate. 19 RP 2778. The next day, the first full day of deliberations, a Thursday, the trial court received a message from Juror No. 4. 20 RP 2783. That juror had previously requested that deliberations be postponed because he had plans for the weekend. *Id.* The juror stated in his message that he would not come to court to commence deliberations. *Id.* By 9:48 a.m. the juror had not appeared and the court convened the parties in order to consider replacing him with the first alternate. 20 RP 2784.

The court considered having Juror No. 4 arrested but decided against that course of action because it had alternate jurors available. 20 RP 2785. Defendant Ralls objected to substituting the alternate. 20 RP 2785. Defendant Miles did not object. *Id.* The court substituted the first alternate, instructed the entire jury that, "You must disregard all previous deliberations and begin deliberations anew", and directed that the jury retire to the jury room to "commence your deliberations". 20 RP 2787-88. They did so and deliberated for the rest of the day.

The following day, the second full day of deliberations, the jury delivered a written question to the trial court. The question was, "If we determine a defendant is an accomplice, are they liable for the same crime? We are having confusion distinguishing between Instructions No. 3 and No. 9." CP Ralls 837-38. CP Miles 708-09. 21 RP 2793. After a colloquy with the parties in which (1) the State proposed an answer that was not adopted, (2) the defendants opposed any answer other than a standard answer that would have directed the jury to re-read the instructions and continue deliberating, the trial court provided a written answer to the jury's question. 21 RP 2805-09. CP Ralls 837-38. CP Miles 708-09.

The jury continued deliberating and returned its verdict later the same day. The defendants were found guilty as charged of Count Two, Murder in the First Degree by extreme indifference to human life. CP Ralls 139, CP Miles 759, Verdict Form A, Count Two.

C. ARGUMENT.

1. THE TRIAL COURT'S JURY INSTRUCTIONS WERE PROPER BECAUSE THEY INFORMED THE JURY OF THE APPLICABLE LAW, WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND PERMITTED THE PARTIES TO ARGUE THEIR THEORIES OF THE CASE.

The defendants have assigned error to the trial court's self defense and accomplice jury instructions. This discussion of the standards of

review applies generally to the alleged instructional errors.

In general, the trial court's choice of jury instructions is reviewed for an abuse of discretion. ***State v. Green,*** 182 Wn. App.133, 152, 328 P.3d 988 (2014). However, alleged errors of law are reviewed *de novo*. ***State v. Fehr***, 185 Wn. App. 505, 514, 341 P.3d 363, 368 (2015). Adequacy of the instructions and alleged errors are not reviewed in isolation but in the context of "the jury instructions as a whole." ***State v. Davis***, 174 Wn. App. 623, 638, 300 P.3d 465, 472 *review denied*, 178 Wn. 2d 1012, 311 P.3d 26 (2013). "Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." ***State v. Fehr***, 185 Wn. App, at 514, quoting ***State v. Barnes***, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Proposed instructions may be given when supported by substantial evidence. ***State v. Saunders***, 177 Wn. App. 259, 270, 311 P.3d 601, 606 (2013) *review denied*, 180 Wn. 2d 1015, 327 P.3d 55 (2014), quoting ***State v. Clausing***, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

a. <u>The trial court's provocation instruction was properly given where the defendants provoked the need to act in self defense, and where the State sustained its burden of production and had produced substantial evidence that the defendants were the aggressors.</u>

In Washington it is a defense to murder if the homicide was justified because it was committed in lawful self defense. RCW

9A.16.050(1). The elements of lawful self defense as presented to the jury by Instruction 15 were that the defendants must have (1) "reasonably believed that [Bernard Houston]" or others "acting in concert with [Bernard Houston] intended to inflict death or great personal injury", and (2) that the defendants "reasonably believed there was imminent danger of such harm being accomplished", and (3) that they "employed such force and means as a reasonably prudent person" would have used in like circumstances. CP Ralls 107, CP Miles 727, Instruction 15. Instruction 15 was (1) proposed by the State [CP Ralls 869, CP Miles 879, Proposed Instruction No. 23.] and both defendants [CP Ralls 50, 52, Proposed Instruction Nos. 5 and 7. CP Miles 601, Proposed Instruction No. 2.]; (2) taken from WPIC 16.02; (3) not excepted to by the defendants [18 RP 2563-68, 2568-2576]; and (4) has not been challenged on appeal.

By itself the lawful self defense instruction does not address all potential issues in a deadly force case. For that reason, additional instructions are inevitably necessary. These include (1) the level of injury threatened by the homicide victim [CP Ralls 108, CP Miles 728, Instruction 16], or (2) the effect of the defendant's subjective perception of the level of threat or injury [CP Ralls 109, CP Miles 729, Instruction 17], or (3) the right to stand one's ground [CP Ralls 110, CP Miles 730, Instruction 18].

Provocation was likewise not addressed in the lawful self defense instruction, WPIC 16.02. Provocation means that one may not use force

in lawful self defense when one created the need for the use of force in the first place. ***State v. Wingate***, 155 Wn.2d 817, 122 P.3d 908 (2005), ***State v. Riley***, 137 Wn.2d 904, 976 P.2d 624 (1998), ***State v. Davis,*** 119 Wn.2d 657, 835 P.2d 1039 (1993), ***State v. Dennison***, 115 Wn.2d 609, 801 P.2d 193 (1990), and ***State v. Craig***, 82 Wn.2d 777, 514 P.2d 151 (1973). This principle is set forth in WPIC 16.04, and was presented to the jury in this case by Instruction 19. CP Ralls 111, CP Miles 731, Instruction No. 19.

Whether or not there was sufficient evidence to justify a provocation instruction is a question of law, and review is therefore *de novo.* ***State v. Anderson,*** 144 Wn. App. 85, 89, 180 P.3d 885, 887 (2008), citing ***State v. J–R Distribs., Inc.***, 82 Wn.2d 584, 590, 512 P.2d 1049 (1973). Where a provocation instruction is proffered by the State, the State need only produce "some evidence that [the defendant] was the aggressor to meet its burden of production." *Id.* at 89, citing ***State v. Riley***, 137 Wn.2d 904, 909–10, 976 P.2d 624 (1999), and ***State v. Hughes***, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

A provocation instruction is appropriate where "there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense. . . ." ***State v. Riley***, 137 Wn.2d at 909, citing ***State v. Hughes***, 106 Wn.2d 176, 191–92, 721 P.2d 902 (1986) and ***State v. Kidd***, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). It is also appropriate "if there is conflicting evidence as to whether the defendant's

conduct precipitated a fight." ***State v. Riley,*** 137 Wn.2d at 910, citing ***State v. Davis***, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992).

Provocation is a common sense doctrine. It elaborates on the right to use force in lawful self defense as well as the right to stand one's ground in that "the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action." ***State v. Riley,*** 137 Wn.2d. at 910, citing ***State v. Craig***, 82 Wn.2d 777, 783, 514 P.2d 151 (1973).

The Supreme Court cited the reasoning from a leading treatise concerning the rationale for provocation: self-defense is generally not available to an aggressor because "'the aggressor's victim, defending himself against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense.'" 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 5.7, at 657-58 (1986), quoted in ***State v. Riley,*** 137 Wn.2d at 911. The ***Riley*** court also noted that "[f]or the victim's use of force to be lawful, the victim must reasonably believe he or she was in danger of imminent harm." *Id.* at 912.

In this case there was a wealth of evidence that the defendants were not in imminent danger of harm and that they provoked the fatal shooting. Three witnesses, Tyra Doucoure, Calille McMichael and

Michael Jeter, testified about having been with Bernard Houston in the smoker rental Jeep just before the shooting. All three described the defendants' vehicles as rolling up on the Jeep together. 3 RP 406-411. 6 RP 767. 6 RP 888. Calille McMichael testified that the first car had its lights off. 6 RP 767, 803. Both Ms. McMichael and Ms. Doucoure testified that they got out of the car before any shots were fired, and Ms. Doucoure testified that they both had their hands raised over their heads so as not to get shot. 3 RP 408, 4 RP 566-67. 4 RP 767-86. The reason they got out of the car was that they were told to do so by Bernard Houston and Michael Jeter for fear of a shooting. 6 RP 895-96.

Michael Jeter testified that he told Tyra Doucoure and Calille McMichael to get out of the Jeep for their own safety because he saw a gun being pointed at them. 6 RP 893-95, 7 RP 1012-13. Even before Mr. Jeter saw the gun, he saw Bernard Houston reacted to it. Mr. Jeter testified that Mr. Houston got out of the Jeep and dove for cover over a fence before Mr. Jeter even realized that the defendants were there. 9 RP 888, 7 RP 918. It was after Bernard Houston dove for cover that Mr. Jeter and the women got out of the Jeep. 7 RP 1012.

Michael Jeter further testified that the defendants' arrival was accompanied by verbal provocation. He testified, "I thought something was wrong, you know. That's all. I just thought this ain't – there's a gun out of the window, and they are saying what up Blood?" 6 RP 895. Mr. Jeter did not have a gun, had not done anything wrong at that time at the

scene. He also claimed not to have been a participant in the shootings on the eastside earlier in the day. 6 RP 989, 7 RP 1003. Because the gunman did not open fire immediately and because the gunman seemed to let Mr. Jeter and the two women get out of the Jeep without shooting them, Mr. Jeter thought that the defendants were not looking for him. He thought "like, okay, maybe they are just trying to scare us. Then I was like everybody get out of the car." 7 RP 1035. Mr. Jeter fled from the Jeep intending to go home and was shot while running away. 6 RP 900-03. He did not pose a threat to anyone, and was shot while unarmed. *Id.*

The actions of the defendants place them squarely in the role of the aggressors. Three of their accomplices testified for the State about what they all planned to do in driving across town to rival gang territory in search of the Jeep and its occupants. Terris Miller testified that the plan was to "go back and shoot at them guys." 7 RP 1059-61. They drove to the Hilltop, found the Jeep and as soon as they arrived started shooting at it. 7 RP 1062-63, 8 RP 1141. Mr. Miller testified that the first shots were fired by defendant Ralls from the passenger side of the vehicle driven by Brian Allen. 7 RP 1042-44. Furthermore, in Mr. Miller's first statement to the police, he had stated that Brian Allen and defendant Ralls said they "were going to go up and kill them" and that he took it from their words that they meant what they said. 8 RP 1170-73, 1237. Mr. Miller also confirmed that defendant Miles, who was in the same car as Mr. Miller, fired shots at Michael Jeter as Mr. Jeter was running away. 7 RP 1068-71.

Darrell Lee and Brian Allen likewise testified about the plan. Mr. Allen testified that he and defendant Ralls had been fired upon by someone in the Jeep earlier in the day and that they had chased the Jeep back to the Hilltop shooting at it along the way. 9 RP 1382-85, 10 RP 1436, 1523. After successfully chasing the Jeep from their eastside neighborhood, they circled back, met with the other defendants. There can be no argument that the Jeep posed an imminent threat to anyone at that point. Mr. Allen found out then about two other shootings, including the one in which a baby suffered a near miss. 9 RP 1386-88, 1392-97, 10 RP 1523. Mr. Allen testified that "I was here to make some money [by dealing drugs]. At the same time, there was a respect level that I expected, you know, and I wasn't going to be shot at." He went to the Hilltop with the others as an armed group to track down and confront the shooters in the Jeep and if somebody were to get hit in the cross fire, so be it. 10 RP 1528-30. He testified, "We are going to end it." 10 RP 1536-38.

Darrell Lee had much the same account of the road trip to the Hilltop. He testified that after the shootings on the eastside, the defendants went *en masse* and drove around the Hilltop for twenty minutes looking for the Jeep. 9 RP 1271-73. The plan was to shoot back at the culprits who had fired shots at them or their associates on the eastside. 9 RP 1298. Retaliation was something that Mr. Lee believed was called for under the circumstances: If "somebody dissed me, I'm going to get back at you." 9 RP 1323. Getting back meant shooting back

in a retaliatory drive-by shooting. "They shot at us. They didn't kill us. I mean it was a possibility that we were going to kill them." 9 RP 1334.

In this case the defendants did not provoke the drive-by shootings that led to their Hilltop sortie. Had they shot and killed Mr. Houston while Mr. Houston was shooting up the eastside, this appeal would be quite different. But the fatal shooting in this case did not take place on the eastside. Instead, two carloads of young men departed from the eastside together for Tacoma's Hilltop neighborhood long after Bernard Houston had fled the eastside under fire from defendant Ralls and Brian Allen. The defendants' mission was to find the Jeep and its occupants and as stated by Brian Allen, "end it". 10 RP 1538. Theirs was a mission of retaliation and revenge rather than of self protection.

Provocation is not a question solely of motive but of action. The provocative actions need not be illegal. ***State v. Wingate,*** 155 Wn 2d 817, 122 P.3d 908 (2005). In ***Wingate*** the court reviewed a shooting homicide arising from an alleged affair between the victim and the defendant's former girlfriend. The defendant initiated the fatal confrontation by going to the victim's house with several friends. The trial court gave a provocation instruction. The court of appeals reversed the conviction on the ground that provocation would not apply if the defendant was not engaged in "wrongful or unlawful conduct". *Id.* at 821.

The Supreme Court reversed. *Id.* at 822-23. The Court stated, "[T]he Court of Appeals' approach is contrary to the directive of ***Riley*** that

'[a]n aggressor instruction is appropriate if there is *conflicting* evidence as to whether the defendant's conduct precipitated a fight' " *Id.* at 822 (emphasis in the original). Furthermore the ***Wingate*** court stated that "in light of the presence of evidence of the defendant's 'aggressive conduct' -- that is, the defendant drawing his gun first and aiming it at another person—the giving of an aggressor instruction was proper." *Id.* at 823.

Wingate is similar to this case in at least two respects. First, the evidence in this case is not limited to motive any more than was the evidence in ***Wingate.*** Both cases involve a shooting in which there could be said to be fault on both sides. In ***Wingate*** the defendant precipitated an armed confrontation about an alleged affair. In this case the confrontation was about the shootings on the eastside allegedly committed by Mr. Houston and Mr. Jeter. In both cases, while it may be true that the defendants traveled on public roadways in order to get to the location where the confrontation took place, it was the defendants who resorted to gun violence that ultimately led to a death.

A second similarity between this case and ***Wingate*** is the mixed nature of the evidence. This case was gun violence prompted by the prior drive by shootings. Regardless of whether defendant Ralls fired first, as per Terris Miller, or whether Bernard Houston fired first after having been cornered by two carloads of armed men obviously out to do him harm, it is an undisputed fact that the defendants sought out Bernard Houston with guns, not the other way around. With such mixed evidence the jury

required a provocation instruction in order to sort out who had a right to use deadly force in self defense in a confrontation where both sides were armed with handguns.

A provocation instruction is not a question of equity. The instruction was given in ***Wingate,*** not because the victim was blameless. It was given because there was evidence that the defendant had provoked the fatal confrontation. Likewise in ***Riley*** the victim was not without fault; he was an alleged gang member who had been selling drugs and guns in the defendant's neighborhood, and who, according to the defendant, threatened to shoot the defendant. ***State v. Riley,*** 137 Wn.2d 904, 906, 976 P.2d 624 (1999). The provocation instruction was nevertheless appropriate in both cases because there was (1) "credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense", (2) "credible evidence that the defendant made the first move by drawing a weapon", and (3) "conflicting evidence as to whether the defendant's conduct precipitated a fight." *Id.* at 909-10 (citation omitted).

In this case, at the time the two carloads of defendants departed for the Hilltop, no one in either car could be said to have been in immediate danger. While he may have been the provocateur when he was committing the drive-by shootings on the eastside, Bernard Houston had "withdrawn from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or

intended to desist, from further aggressive action." ***State v. Craig,*** 82 Wn. 2d 777, 783-84, 514 P.2d 151(1973). He ceased having been the provoker. The defendants could not justify killing him because of past misdeeds that no longer posed an imminent danger, nor could they create imminent danger through provocative action of their own.

Just as the jury required a definition of great personal injury in order to determine whether the risk posed to the defendants at 23rd and Sheridan could justify the killing of Bernard Houston, it also required an explanation of the legal significance of the defendants' actions in response to the eastside shootings. It would be difficult to quantify whether provocation is a common or uncommon issue in self defense cases, or whether courts commonly or sparingly give the instruction. Despite its use of the term sparing in footnotes, the Supreme Court has not abandoned provocation as a limitation on justifiable homicide. *See* ***State v. Riley,*** 137 Wn.29 at 910, footnote 2, citing footnote 1, ***State v. Arthur***, 42 Wn. App. 120, 125, 708 P.2d 1230 (1985). Where a case involves provocateurs who kill and then claim that the killing was justifiable, the jury must be given the full legal standard if it is to deliberate on a proper verdict.

b. The trial court's retaliation instruction was properly given where it was a correct statement of the law, was derived from an instruction expressly approved of by the Washington Supreme Court, and informed the jury of the applicable law.

Self defense is based "in necessity and generally ends with the cessation of the exigent circumstance which gave rise to the defensive act." ***State v. Janes***, 121 Wn. 2d 220, 237, 850 P.2d 495 (1993), citing ***United States v. Peterson,*** 483 F.2d 1222, 1229 (DC. Cir.), *cert. den.* 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed 2d 244 (1973). Necessity implicates both the subjective and objective aspects of self defense: "The longstanding rule in this jurisdiction is that evidence of self-defense must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." ***State v. Janes***, 121 Wn.2d at 238, citing ***State v. Allery***, 101 Wn.2d 591, 594, 682 P.2d 312 (1984).

The right to use deadly force in self defense does not imply a right to retaliate or exact revenge. ***State v. Janes***, 121 Wn.2d at 240. Insofar as revenge or retaliation are concerned, the court in ***Janes*** stated, "The objective aspect also keeps self-defense firmly rooted in the narrow concept of necessity. No matter how sound the justification, revenge can never serve as an excuse for murder. '[T]he right of self-defense does not imply the right of attack in the first instance or permit action done in

retaliation or revenge.' " *Id.*, quoting ***People v. Dillon***, 24 Ill.2d 122, 125, 180 N.E.2d 503 (1962).

Where the facts in a particular case call for it, a retaliation and revenge instruction is appropriate in order to apprise the jury of a limitation on the right to use deadly force. ***State v. Studd***, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999). While ***Janes*** was a self defense case that dealt primarily with admissibility of battered child syndrome evidence, its discussion of retaliation and revenge was reaffirmed in regard to jury instructions in ***Studd***.

In ***Studd*** the court reviewed six consolidated self defense appeals that challenged a specific defect in a since-replaced version of the pattern jury instruction, WPIC 16.02. ***State v. Studd***, 137 Wn. 2d at 545-46. One of the cases was a Pierce County second degree murder case in which a retaliation instruction was proposed and given. The Supreme Court upheld giving of the instruction saying, "We find that the instruction correctly stated the law, and did not unfairly emphasize the State's theory of the case or, in any way, comment upon the evidence." ***State v. Studd***, 137 Wn. 2d 533, 550, 973 P.2d 1049 (1999). The Piece County defendant's conviction was upheld. *Id.*

Instruction 19A in this case was identical to the second sentence of the instruction approved of in ***Studd***. CP Ralls 112, CP Miles 732, Instruction 19A. What was left out in this case was the first sentence from ***Studd*** which read, "Justifiable homicide committed in the defense of the

slayer, or 'self-defense,' is an act of necessity." *Id.* at 550. The defendants do not argue that the omission of that sentence is significant and since the content of that sentence is included elsewhere in the instructions, the omission is inconsequential. CP Ralls 107, 109 CP Miles 727, 729, Instructions 15 and 17.

The principle enunciated in ***Janes*** and re-applied in ***Studd*** applies most clearly in cases in which the defendant seeks out the victim. ***State v. Bolar***, 118 Wn. App. 490, 507, 78 P.3d 1012, 1021 (2003). ***Bolar*** arose from a self defense case in which the defendant searched for the victim for a week and shot him dead because "he needed to kill [the victim] before [the victim] killed him". *Id.* at 506. The court observed, "By his own theory of self-defense, [the defendant] went searching for Hill, located him, and attacked in the first instance. Moreover, the evidence is very strong that he acted in retaliation and revenge for the theft of his property and the loss of his girlfriend to a rival." *Id.* at 507.

The evidence of retaliation and revenge is no less strong in this case. Any suggestion that the defendants' desire for revenge was not acted upon should be rejected. The defendants did not remain on the eastside and engage in a discussion about what to do about Bernard Houston and Michael Jeter. They took action which included arming themselves, driving to the Hilltop and cornering Mr. Houston with their vehicles. Jury instruction 19A referenced "action done in retaliation or in

revenge." CP Ralls 112, CP Miles 732, Instruction 19A. And action is exactly what the defendants engaged in.

The killing of Bernard Houston can accurately be described as vigilante justice. Three of the defendants' accomplices, Terris Miller [7 RP 1059-63, 1141], Darrell Lee [9 RP 1260-66, 1298] and Brian Allen [10 RP 1536-38], testified that because of the shootings on the eastside, the purpose of driving to the Hilltop was to find Bernard Houston and Michael Jeter and engage them with handguns. Darrel Lee testified that they intended to perpetrate a drive-by shooting at Mr. Houston and Mr. Jeter because "I mean, do the same thing they did to us. Shoot back at them." 9 RP 1266.

The defendants knew that their targets were armed and likely to shoot. They chose not to involve the police. 9 RP 1350-51. Instead they set out as vigilantes to do to Mr. Houston and Mr. Jeter what had been done to them and their friends. While the defendant in ***Bolar*** may have thought that he could lawfully engage in vigilantism in the name of self defense, his position was rejected by the court of appeals. The defendants' position in this case should similarly be rejected.

If revenge or retaliation or retribution were to be sanctioned in the name of self defense, it is likely that most gang drive-by shootings would be thought of as self defense. Most such shootings are prompted by some form of threat or disrespect from the victims. Whether viewed subjectively or objectively, if a defendant is not in imminent danger, there

can be no self defense justification for taking a life. No one should be permitted to initiate an armed confrontation in the knowledge or hope that there will be an excuse for a shooting.

c. The trial court's accomplice instruction was properly given where it required that to convict either of the defendants as an accomplice, the State had to prove actual knowledge and acts that would promote or facilitate the crime that was committed, first degree murder by extreme indifference.

In Washington a person may be found guilty of a crime committed by another person if he "*actually* knew that he was promoting or facilitating" the other person in the commission of the crime." RCW 9A.08.020(3). ***State v. Allen***, 182 Wn.2d 364, 374, 341 P.3d 268 (2015)(emphasis in the original). "[T]he accomplice liability statute establishes a *mens rea* requirement of 'knowledge' of 'the crime.' " ***State v. Roberts***, 142 Wn. 2d 471, 510, 14 P.3d 713 (2000), ***State v. Cronin***, 142 Wn. 2d 568, 579, 14 P.3d 752, 757 (2000)("[T]he statutory language requires that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate *the* crime for which he or she is eventually charged.").

The statutory language also establishes an *actus reus* in that an accomplice is one who: "(i) Solicits, commands, encourages, or requests such other person to commit [the crime]; or (ii) Aids or agrees to aid such other person in planning or committing it". RCW 9A.08.020(3)(a)(i) and

(ii). While each of the acts enumerated by the accomplice statute may be intentional, no Washington case has held that the mental state required for conviction in all accomplice cases is intent rather than knowledge, nor must an accomplice must have knowledge of every element of the crime committed by the principal. ***Sarausad v. State***, 109 Wn. App. 824, 836, 39 P.3d 308, 315 (2001)("[W]e conclude that the law of accomplice liability in Washington requires the State to prove that an accused who is charged as an accomplice with murder in the first degree, second degree or manslaughter knew generally that he was facilitating a homicide, but need not have known that the principal had the kind of culpability required for any particular degree of murder.").

In this case the defendants' argument would be stronger if the defendants had been convicted of a crime with an intent *mens rea* such as premeditated or intentional murder. They were not. Instead they were convicted of first degree murder by extreme indifference. The *mens rea* for that crime is "extreme indifference to human life". RCW 9A.32.030(1)(b). "[T]he crime of murder by extreme indifference requires a death, it does not require a specific intent of death. Instead, the facts need show merely that [the accomplice] knew that his actions, along with [the principal actor's] actions, were extremely dangerous, and yet he was indifferent to the consequences." ***State v. Guzman***, 98 Wn. App. 638, 646, 990 P.2d 464, 468 (1999), *review denied*, 140 Wn.2d 1023 (2000). Contrary to the arguments of the defendants there was no element of intent

in the underlying crime. Furthermore, under ***Allen***, ***Roberts*** and ***Cronin***, the mental state for conviction as an accomplice was knowledge, not intent.

For the sake of argument, even if the defendants had been convicted of premeditated murder, the accomplice instructions were nevertheless correct. Instruction 9 included both the required *mens rea* and *actus reus* elements and mandated that the State prove beyond a reasonable doubt that the defendants acted "with knowledge that [their actions] will promote or facilitate the commission of the crime". CP Ralls 101, CP Miles 721, Instruction 9. Conviction for premeditated murder would have required "premeditated intent to cause the death of another person", whereas accomplice liability required "knowledge that [the defendants' acts] will promote or facilitate the commission of the crime". CP Ralls 101-02, CP Miles 727-28, Instructions 9 and 10. It is well settled that an "accomplice need not 'have specific knowledge of every element of the crime nor share the same mental state as the principal.' "***State v. Whitaker***, 133 Wn. App. 199, 230, 135 P.3d 923 (2006), quoting ***State v. Berube***, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). Accordingly, the instructions in this case did not require the same mental state for accomplice liability as for premeditated murder.

Insofar as the crime that the defendants were convicted of, the accomplice instructions were a correct statement of the law. "Jury instructions as a whole must provide an accurate statement of the law and

must allow each party to argue its theory of the case" and "are sufficient if they are readily understood and are not misleading to the ordinary mind." ***State v. Sublett***, 156 Wn. App. 160, 183, 231 P.3d 231, 243-44 (2010), citing ***State v. Benn***, 120 Wn.2d 631, 654, 845 P.2d 289 (1993), ***State v. Dana***, 73 Wn.2d 533, 537, 439 P.2d 403 (1968). As to extreme indifference first degree murder, the accomplice instructions were an accurate statement of the law and of the mental state that the jury was required to apply.

2. SUFFICIENT EVIDENCE WAS INTRODUCED TO SUPPORT THE EXTREME INDIFFERENCE CONVICTION WHERE, A RATIONAL JURY COULD HAVE CONCLUDED THAT THE DEFENDANTS FIRED MULTIPLE SHOTS IN A RESIDENTIAL NEIGHBORHOOD WITH BYSTANDERS PRESENT, KILLING ONE INDIVIDUAL AND WOUNDING ANOTHER.

A defendant may be convicted of extreme indifference first degree murder when the State proves "beyond a reasonable doubt that [the defendant] (1) acted with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person." ***State v. Yarbrough***, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009) citing ***State v. Pastrana***, 94 Wn. App. 463, 470, 972 P.2d 557, *review denied*, 138 Wn.2d 1007, 984 P.2d 1035 (1999). A defendant may be convicted as an accomplice to extreme indifference murder when the facts show that the defendant knew that his acts and

those of his compatriots "were extremely dangerous, and yet he was indifferent to the consequences." ***State v. Guzman***, 98 Wn. App. 638, 646, 990 P.2d 464 (1999).

Evidence of a defendant firing a gun multiple times on a flat trajectory in a residential neighborhood from a motor vehicle is sufficient to support a conviction for extreme indifference murder. ***State v. Pettus***, 89 Wn. App. 688, 694, 951 P.2d 284 (1998), *overruled on other grounds* by ***State v. Henderson***, 182 Wn.2d 734, 744, 344 P.3d 1207 (2015). The endangerment of multiple bystanders is sufficient to support an extreme indifference conviction even if a primary target was also endangered. *Id.* ***State v. Pastrana***, 94 Wn. App. 463, 972 P.2d 557(1999), *overruled on other grounds* by ***State v. Henderson***, 182 Wn.2d 734, 744, 344 P.3d 1207 (2015).

The defendants' actions in this case are a carbon copy of the gang-related shootings in ***Yarbrough*** and ***Pettus***. In both ***Yarbrough,*** and ***Pettus,*** the defendants had a prior dispute with a particular individual and targeted that individual at a time and in a location where other people unrelated to the dispute were present. ***State v. Yarbrough***, 151 Wn. App. at 84. ***State v. Pettus***, 89 Wn. App. at 695. Here, likewise the defendants were after a specific target or targets and were entirely indifferent to the location where they chose to engage them and to the innocent bystanders who would be endangered by the gunfire. Exs. 7, 10, 17, 66 and 67. Michael Jeter testified that he, Bernard Houston and the two women were

sitting in the Jeep at the corner of 23rd and Sheridan, an intersection of two residential streets, in front of a residence known as the Noble House. 6 RP 873-74, 888. Across the street was a church and down the street was the Doboshi's convenience store with residents living above it. 6 RP 895-98. Mr. Jeter heard multiple shots being fired and was hit by gunfire as he fled on foot in the direction of Doboshi's. 6 RP 900-03. The shooting of Bernard Houston in front of the Noble house and the shooting of unarmed Michael Jeter as he was fleeing in the company of two unarmed and uninvolved women on foot toward Doboshi's is more than sufficient evidence of extreme indifference.

The test of sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Hosier***, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Furthermore, "[a]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* at 8.

In an insufficiency claim, the defendant "admits the truth of the State's evidence" and all reasonable inferences that can be drawn from it. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The court defers "to

the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." ***State v. Thomas***, 150 Wn.2d 821, 874–75, 83 P.3d 970, *abrogated in part on other grounds* by ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt can a claim of insufficiency be sustained. ***State v. Smith***, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

Any argument that the jury misunderstood extreme indifference murder is belied by the jury instructions in this case. The instructions drew a distinction between premeditated first degree murder and extreme indifference murder. CP Ralls 101-02, 124-25. CP Miles 721-22, 743-44, Instructions 13, 14, 29 and 30. The State was required to prove beyond a reasonable doubt that each defendant "or an accomplice engaged in [conduct that created a grave risk of death] under circumstances manifesting an extreme indifference to human life". CP Ralls 124-25. CP Miles 743-44, Instructions 29 and 30. Furthermore, the instructions required that the defendants' acts were "without a premeditated design to effect the death of a particular individual." CP Ralls 123, CP Miles 124, Instruction 28A. "A jury is presumed to follow instructions." ***State v. Gamble***, 168 Wn. 2d 161, 178, 225 P.3d 973 (2010), citing ***State v. Montgomery***, 163 Wn.2d 577, 183 P.3d 267 (2008).

There is no reason to believe that the jury in this case disregarded the trial court's explicit instructions about extreme indifference. The evidence supporting the verdict was all but uncontroverted. The evidence included (1) the location where the shooting took place, a residential neighborhood that included single family residences and a church in the back drop [6 RP 766-68]; (2) people other than the intended target, Mr. Houston, were in the vicinity just before the shooting [3 RP 327-29]; (3) the shooting started as three individuals, Michael Jeter, Tyra Doucoure and Calille McMichael fled unarmed from the Jeep, and in the case of the two women, while they had their hands up so as not to be shot [3 RP 408, 566-67. 6 RP 767-86.]; (4) of the multiple shots fired by the defendants, only two found their mark; the other bullets posed a danger to any number of innocent bystanders, much as the bullet fired earlier in the day on the eastside had endangered the infant child of Fred Appleton [2 RP 151, 200, 230, 6 RP 896, 7 RP 1049-51].

In light of the wealth of uncontroverted evidence of extreme indifference, it can hardly be said that no rational trier of fact would have found as this jury found. In fact, it can be said that because this shooting and killing were not justified by lawful self defense, extreme indifference was the only reasonable conclusion.

3. WHEN IT SEATED AN ALTERNATE JUROR, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION, WHERE THE JUROR HAD REFUSED TO DELIBERATE AND HAD NOT COMPLIED WITH THE COURT'S INSTRUCTION TO COMMENCE DELIBERATIONS WITH THE REST OF THE JURY.

The decision to seat an alternate juror is entrusted to the sound discretion of the trial court. ***State v. Johnson***, 90 Wn. App. 54, 71-73, 950 P.2d 981 (1998), citing ***State v. Ashcraft***, 71 Wn. App. 444, 461, 859 P.2d 60 (1993). While the trial court is responsible to ensure that there are sufficient reasons to release a deliberating juror, and to ensure the impartiality of the alternate, there is no required format that the trial court must follow. ***State v. Dye***, 170 Wn. App. 340, 349, 283 P.3d 1130, *affirmed on other grounds*, 178 Wn.2d 541 (2012), ***State v. Jorden***, 103 Wn. App. 221, 11 P.3d 866, *review denied* 143 Wn.2d 1015 (2000). "We are unwilling to impose on the trial court a mandatory format for establishing such a record. Instead the trial judge has discretion to hear and resolve the misconduct issue in a way that avoids tainting the juror and, thus, avoids creating prejudice against either party." *Id.* at 229.

In this case the behavior of Juror No. 4 placed the trial court and the parties in an impossible position. On the one hand the juror was one of twelve jurors who had been excused late in the day the day before to deliberate. 19 RP 2776. On the other, the juror had made a request for personal reasons that deliberations be postponed over the weekend, and

when that request was not granted, chose to violate his oath and duty and not join the other jurors to deliberate. 20 RP 2783. The court also had to weigh any delay in deliberations against the needs of another juror, number 11, who had voluntarily re-arranged a vacation in order to complete his jury service. 20 RP 2785. A reasonable inference from juror 4's behavior is that he was unwilling to follow the trial court's direction and instructions and could not be counted upon to complete his service as a juror without prejudicing the fairness of the trial. Under these circumstances, the trial court would have been remiss if it had not excused the juror because it risked misconduct that could have affected the entire panel.

For the sake of argument, the defense position that deliberations should have been delayed over the weekend to accommodate a single uncooperative juror could conceivably be deemed reasonable. But so too was the decision to replace the uncooperative juror with an alternate. Surely the trial court cannot have abused its discretion by choosing one reasonable option over the other.

As any experienced trial judge would know, in a trial that lasts a month, there is every possibility that seating an alternate juror may become necessary. CrR 6.5 entrusts the trial court with assuring the impartiality of alternate jurors and states that "the jury shall be instructed to disregard all previous deliberations and begin deliberations anew" when an alternate is seated. The record reflects that the trial court was mindful

of the possibility of an alternate being seated and of the requirements of this rule. It said, "We haven't lost an alternate yet, and we have been here for over a month." 20 RP 2785. Furthermore it instructed the jury as follows:

> As you also note, during the trial earlier, Ms. Newport was excused as an alternate juror. Ms. Newport has now been seated as a juror in the case. You must disregard all previous deliberations and begin deliberations anew. Ladies and gentlemen, with that additional instruction, you are now free to go back and commence your deliberations. 20 RP 2788.

With the foregoing instruction in mind, there is every reason to infer that the trial court faithfully discharged its duty of assuring that the re-constituted panel was not tainted. No evidence has been brought to the Court's attention of juror misconduct. Thus it would be speculation to read into the record something that is not there. The trial court's decision to seat an alternate juror should be upheld.

4. THE TRIAL COURT'S ANSWER TO A JURY QUESTION WAS NOT AN ABUSE OF DISCRETION WHERE IT PROVIDED THE JURY WITH A CORRECT STATEMENT OF THE LAW, DID NOT COMMENT ON THE EVIDENCE AND DID NOT GO BEYOND THE JURY'S QUESTION.

A trial court has discretion to respond to questions from a deliberating jury and to give additional instructions. CrR 6.15(f). ***State v. Becklin***, 163 Wn.2d 519, 182 P.3d 944 (2008). In considering jury questions about the law or instructions, "The court shall respond to all

questions from a deliberating jury in open court or in writing. . . Any additional instruction upon any point of law shall be given in writing." CrR 6.15(f).

A trial court's decision to answer a jury question and give or not give additional jury instructions to a deliberating jury is entrusted to the court's discretion. ***State v. Jasper***, 158 Wn. App. 518, 542, 245 P.3d 228, 241 (2010), *affirmed*, 174 Wn.2d 96 (2012), citing ***State v. Becklin***, *supra* at 529-30, and ***State v. Ng***, 110 Wn.2d 32, 42–43, 750 P.2d 632 (1988). The abuse of discretion standard means that "the trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did." ***State v. Thomas***, 150 Wn. 2d 821, 856, 83 P.3d 970 (2004), citing ***State v. Castellanos***, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

During deliberations the jury sent the trial court a written note about two of the jury instructions. 21 RP 2793. CP Ralls 837-38. CP Miles 708-09. The question read: "If we determine a defendant is an accomplice, are they liable for the same crime? We are having confusion distinguishing between instructions #3 and #9." It would be a mistake to read more into this question than the actual words. The jury said that they were experiencing "confusion" about two jury instructions. Their confusion is more than reasonable considering that those particular instructions said both (1) that "Your verdict on one count as to one defendant should not control your verdict on any other count or as to the

other defendant", and (2) that a "person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable". CP Ralls 95, 101, Instructions 3 and 9. CP Miles 715, 721, Instructions 3 and 9.

The jury identified a difficult aspect of the instructions that could delight a legal scholar. Namely it was concerned about deciding each defendant's case independently while simultaneously applying the law of complicity. Contrary to the defendants' arguments, the jury did not express any confusion as to the mental state for an accomplice. Had the trial court read mental state into the jury's question and given additional instructions on the mental state of the defendants, it would have strayed into commenting on the evidence. It did not do so. Instead, the trial court answered the question by reference to the original instructions.

The trial court's answer was contained in two paragraphs. The first paragraph contained a single sentence, most of which was taken verbatim from Instruction 3. Only fifteen of the words differ from Instruction No. 3 and those words correctly told the jury that they had to decide the case of each defendant "independently". CP Ralls 838. CP Miles 709. This was a correct statement of the jury's duty in a co-defendant case. WPIC 3.03.

The second paragraph was even more appropriate. In that paragraph, in the first of two sentences, the trial court used the same words that were used in Instruction 9. CP Ralls 838. CP Miles 709. In the

second sentence the trial court simply stated, "Instruction # 9 further defines when a person is an accomplice." While the defendants now argue that the trial court should have gone beyond the jury's question and given additional instructions on the mental element of accomplice liability, they argued at the time for no additional instructions to be given.

Any experienced trial judge has been called upon to rule on questions such as this countless times. Lay jurors are called upon to interpret and apply complicated legal standards on a daily basis. It cannot be said that no reasonable trial judge would have done as this judge did. While it may have been permissible to not answer the jury's question, as requested by the defense, surely when such issues are entrusted to the trial court's discretion, the trial court cannot be faulted for giving a simple conservative answer that was a correct statement of the law. The defendants' arguments about an improper answer to the jury question should be rejected.

5. WHEN IT IMPOSED LEGAL FINANCIAL OBLIGATIONS, THE TRIAL COURT HAD BEFORE IT INFORMATION FROM WHICH AN INDIVIDUALIZED DETERMINATION COULD BE MADE AS TO THE DEFENDANTS' ABILITY TO PAY AND THUS DID NOT COMMIT REVERSIBLE ERROR.

When imposing discretionary legal financial obligations ("LFO's"), a trial court must include in its record "that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors . . .

such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." ***State v. Blazina***, 182 Wn. 2d 827, 838, 344 P.3d 680 (2015). In making such an individualized determination it is important to bear in mind that "[s]entencing judges have traditionally been given discretion in the sources and types of evidence used for determining a defendant's sentence." ***State v. Strauss***, 119 Wn.2d 401, 418, 832 P.2d 78 (1992). Moreover, on direct review an "appellate court may refuse to review any claim of error which was not raised in the trial court." ***State v. Blazina***, *supra* at 832, quoting RAP 2.5(a).

In most violent crime cases LFO's are the least of the defendants' concerns at sentencing. This explains the paucity of argument over money during the sentencing hearings in these cases. The standard range for defendant Ralls in this case was 250 to 333 months [CP Ralls 188.] and for defendant Miles it was 291 to 388 months [CP Miles 770.]. Considering that the defendants were endeavoring to be sentenced at less than the high end of the range, their attorneys can be excused for choosing not to quibble over money in the presence of Bernard Houston's family.

In the event that ***Blazina*** is read, as the defendants would have this Court read it, as mandating a contested hearing about money at all sentencing hearings, in this case both defendants can be said to have waived the issue. ***State v. Lyle***, ___ Wn. App.___, 355 P.3d 327, 329 (2015). Both of the defendants in this case were sentenced a year before

the Supreme Court issued its opinion in ***Blazina***. They were also sentenced approximately five months after this Court issued its opinion in ***Blazina***. *Id.* Regardless of the record that was made at the sentencing hearings in these cases, because the defendants were not mindful of this Court's ***Blazina*** opinion, it would be perfectly reasonable for this Court to decline to review of alleged error that was not preserved. *Id.* at 329. ("Our decision in ***Blazina,*** issued before [the defendant's] March 14, 2014 sentencing, provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal."). This Court certainly has discretion to review or not review an unpreserved claim of error under RAP 2.5(a). In this case this Court should decline review.

Although for strategic reasons LFO's were not a contested issue at the sentencing hearings in these cases, it cannot be said that the trial court had no information before it from which an individualized inquiry could be made. It knew that both defendants were indigent because they were both being represented at public expense. It also knew that they faced decades in prison and from that it could easily infer that they would have difficulty finding employment after they were released. Even with those facts in mind, the trial court could hardly be faulted for optimistically concluding that the defendants would apply their best efforts to paying off their LFO's after they served their time. In the event honest effort did not permit them to pay off their LFO's, a remission hearing could be

scheduled at any time pursuant to RCW 10.01.160(4) to remit all or part of their LFO's.

In light of the record from the sentencing hearings in these cases, and with the legal remedy provided by RCW 10.01.160(4) in mind, there is no reason to reverse the trial court's LFO sentence. Even if an individualized inquiry is not an issue waived by the defendants, the trial court's LFO sentence should nevertheless be upheld.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that the defendants' convictions and sentences be upheld.

DATED: Thursday, October 15, 2015.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

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.

10-15-15 Date Signature

PIERCE COUNTY PROSECUTOR

October 16, 2015 - 10:16 AM

Transmittal Letter

Document Uploaded: 4-466333-Respondent's Brief.pdf

Case Name: st. v. Miles and Ralls

Court of Appeals Case Number: 46633-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

SCCAttorney@yahoo.com
backlundmistry@gmail.com