93602-1

Supreme Court No. (to be set)
Court of Appeals No. 46633-3-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Anthony Ralls
Appellant/Petitioner

Pierce County Superior Court Cause No. 13-1-01703-4
The Honorable Judge Bryan Chushcoff

PETITION FOR REVIEW

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant/Petitioner

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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Petitioner Anthony Ralls, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals.

II. COURT OF APPEALS DECISION

Anthony Ralls seeks review of the Court of Appeals unpublished opinion entered on August 16, 2016. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did the trial court's nonstandard "retaliation" instruction misstate the law, comment on the evidence, and relieve the prosecution of its burden to disprove self-defense?

ISSUE 2: Is the first-aggressor doctrine inapplicable to lawful acts, such as driving on public streets to a rival gang's territory, even if reasonably likely to provoke a belligerent (albeit illegal) response?

ISSUE 3: Does the pattern aggressor instruction fail to adequately convey both aspects of the objective standard, because it strips the accused person of the right to use self-defense based on lawful acts reasonably likely to provoke an unreasonable belligerent response?

ISSUE 4: Does the pattern instruction on accomplice liability unconstitutionally allow conviction based on mere knowledge of the principle's intended crime, without the statutorily and constitutionally required proof of the accused person's intent to further the charged crime?

ISSUE 5: What standard should be used to interpret questions from a deliberating jury?

ISSUE 6: Did the trial judge's answer to a jury question improperly comment on the evidence, fail to make the relevant standard manifestly clear, and relieve the prosecution of its burden to prove knowledge of the crime charged?

ISSUE 7: Did the trial judge violate Mr. Ralls's right to a fair trial by an impartial jury by erroneously seating an alternate juror who had been unconditionally discharged rather than temporarily excused from service?

ISSUE 8: Did the state fail to prove murder by extreme indifference, where the act causing death was specifically aimed at and inflicted upon one particular person and did not place others at grave risk of death?

IV. STATEMENT OF THE CASE

On August 28, 1988, two local drug dealers named Bernard Houston and Michael Jeter committed several drive-by shootings while roaming around Tacoma in a Jeep. RP (7/1/14) 136; RP (7/2/14) 395-397; RP (7/8/14) 861, 865; RP (7/9/14) 943, 1033, 1051-1052, 1056-1057; RP (7/10/14) 1160, 1200; RP (7/14/14) 1261, 1267, 1350, 1385, 1393. The two shot the "oak tree," a corner where young people hung out. RP (7/9/14) 1053; RP (7/14/14) 1261-1263, 1266, 1392. They shot at a car driven by Brian Allen.[1] RP (7/14/14) 1382. They also shot into a house. This third shooting was especially upsetting to all who heard about it, as there was a baby in the home at the time. The baby had just been moved from a couch before the shooting, and a bullet struck the couch. RP (7/9/14) 1050; RP (7/14/14) 1263-1264, 1396.

After Houston's shootings, two cars of young men went to Tacoma's Hilltop area. RP (7/9/14) 1042-1044; RP (7/14/14) 1268, 1407. They had no real plan other than to confront Jeter and Houston. RP (7/10/14) 1170-1173, 1228-1229; RP (7/14/14) 1298, 1400; RP (7/15/14) 1469-1470, 1519, 1554-1555. One car held 18-year-old Anthony Ralls. RP (7/14/14) 1268-1269, 1301. The young men drove around, found Houston's Jeep and approached it. RP (7/14/14) 1265, 1279.

Houston shot at them. RP (7/1/14) 154-162; RP (7/2/14) 279-280, 410-417, 445-446; RP (7/3/14) 507; RP (7/8/14) 880-903; RP (7/10/14)

[1] Allen later claimed Mr. Ralls was in the car with him, but Mr. Ralls said he was not. RP (7/14/14) 1382; RP (7/28/14) 2421; RP (7/29/14) 2506.

1185; RP (7/14/14) 1276-1277, 1411-1412; RP (7/28/14) 2445. There was return fire from the cars. RP (7/2/14) 410-417, 445-446; RP (7/8/14) 880-903, RP (7/14/14) 1276-1277. Houston was hit in the head and died. Jeter ran and was hit in the leg. RP (7/1/14) 136; RP (7/7/14) 598. Neither Jeter nor anyone else who witnessed the incident knew who had fired shots from the two cars. (7/2/14) 404-420, 445-447; RP (7/8/14) 774-794; RP (7/8/14) 889-892; RP (7/9/14) 965-966. No arrests were made.

Years later, in 2001, a new detective was assigned to the case.[2] RP (3/10/14) 8; RP (7/7/14) 734-735. During his first year on the case, Detective John Ringer spoke to Terris Miller and Darrel Lee. RP (3/10/14) 9-18; RP (7/17/14) 1881-1889, 1893-1897. He had received information linking them both to the shooting. RP (3/10/14) 9, 43; RP (7/17/14) 1870. Before questioning each of them, he reviewed what he knew in great detail. RP (7/14/14) 1327-1329; (7/17/14) 1871, 1882-1889, 1897; RP (7/21/14) 1978-1983, 1989-1990, 2074.

Detective Ringer told Miller the "basics of the crime." RP (7/17/14) 1889. The detective laid out photos of each person he believed was involved, showing who was in which car. RP (7/17/14) 1889. He made a diagram of the scene. RP (7/21/14) 1978-1983.

He did the same with Lee. RP (7/21/14) 1989-1990. In addition, he showed Lee all of the discovery for the case, including what Miller had told him. RP (7/21/14) 1989-1990, 2074.

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[2] This new detective had retired by the time trial started. RP (7/17/14) 1855-1856.

After listening to Detective Ringer's presentation, they both said they had been present at the shooting. Ex. 53, 54. However, both denied shooting Houston. Ex. 53, 54. Instead, they implicated Allen, Mr. Ralls, and Nathaniel Miles. Ex. 53, 54.

No one was charged until 2011.[3] CP 1-2. At that time, the state charged all five men with first-degree murder.[4] CP 84-85.

Miller accepted a deal to testify against Ralls, Miles and Allen. RP (3/24/14) 18; RP (6/30/14) 4, 10. He pled guilty to first-degree murder, and in return, the state agreed to allow him to withdraw his plea and plead guilty to a reduced charge.[5] He expected to be sentenced to time served (14 months). RP (3/24/14) 18; RP (6/30/14) 4; RP (7/9/14) 1096.

Days later, after trial had started, Lee entered the same agreement. RP (4/10/14) 4; RP (6/30/14) 4, 10; RP (7/14/14) 1293.

On the fifth day of trial, Allen accepted the same deal with the state in exchange for his testimony against Miles and Ralls. RP (7/3/14) 474; RP (7/14/14) 1427-1429.

At trial, several people testified that the first shot came from the area of the Jeep, not the two other cars. RP (7/2/14) 412-413; RP (7/3/14)

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[3] The defendants objected to the late charging. They argued that the defense was prejudiced by the delay: they could not locate some witnesses, some had died in the interim, and one of the firearms involved had been destroyed. RP (1/31/14) 4-58.

[4] The state charged murder with premeditated intent, and murder by extreme indifference. The jury acquitted Mr. Ralls of the premeditated murder. CP 84, 136.

[5] The reduced charge was drive-by shooting, which was not a crime in 1988. RP (3/24/14) 18; RP (4/10/14) 4; RP (6/30/14) 4, 10; RP (7/9/14) 1098-1106; RP (7/14/14) 1245-1247, 1291; RCW 9A.36.045; *See* Laws 1989 Ch 271 §109; Laws 1994 Sp. S Ch 7 §511; Laws 1995 Ch 129 §§8, 19 (Initiative Measure No. 159); Laws 1997 Ch 338, §44.

507; RP (7/14/14) 1276-1277, 1411-1412; RP (7/28/14) 2445. Houston was found with a revolver in his hand. RP (7/1/14) 154-162; RP (7/2/14) 279-280. The revolver held five live rounds; a spent casing was found nearby. RP (7/1/14) 161. On the front passenger floorboard, police found another spent casing of a different caliber. RP (7/7/14) 626-627, 637, 720.

Neither Jeter nor any of the bystanders who saw the shooting could say who returned fire and shot Houston. RP (7/2/14) 324-363, 393-427, 436-469, 495-525, 537-584; RP (7/8/14) 758-832. Miller, Lee, and Allen all claimed that Mr. Ralls and Mr. Miles were the ones who shot back.[6] RP (7/9/14) 1042-1043, 1061, 1069-1071, 1075; RP (7/10/14) 1191-1192, 1211-1212; RP (7/14/14) 1269, 1278, 1280-1281, 1310, 1320, 1322, 1364-1366, 1415-1416. They were the only witnesses who made this claim.

Mr. Ralls testified at trial. He acknowledged that he was present during the encounter. He told the jury he was sitting in the back seat when the gunfight erupted. He admitted that he'd been rolling joints, and said he wasn't paying attention to what the others in the car were saying. RP (7/28/14) 2429-2453; RP (7/29/14) 2545. He said that no one had discussed any plan or desire for retaliation. RP (7/28/14) 2439, 2444-2453; RP (7/29/14) 2505. He also confirmed that the first shot came from the

[6] The state also presented the testimony of two men who claimed that Mr. Ralls had confessed to them. One was Curtis Hudson, a frequently-used informant seeking to avoid prison despite convictions for drug dealing and gun possession. RP (7/15/14) 1602-1621; RP (7/16/14) 1659, 1667-1669, 1782-1803, 1823. The other was Ahmad Dyles, also a drug-dealer and self-described "gang-banger" at the time of the incident. RP (7/16/14) 1707-1708. Both claimed that the group wanted retribution for the earlier drive-by shootings. RP (7/15/14) 1616-1620; RP (7/16/14) 1658, 1671-1673, 1715.

jeep. RP (7/28/14) 2445.

The court agreed to give a non-standard instruction proposed by the state: "The right of self-defense does not permit action done in retaliation or revenge." CP 112. The instruction was given over defense objection. RP (7/29/14) 2559-2560, 2562. The defense also objected to the court's instruction on the first-aggressor rule. RP (7/29/14) 2571-2576. That instruction included the following language:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense.... [I]f you find beyond a reasonable doubt that the defendant or an accomplice was the aggressor and that the defendant's or an accomplice's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.
>
> CP 111.

The prosecution used a PowerPoint during closing arguments. The first and third slides included the following language:

> ***RIGHT OF SELF-DEFENSE DOES NOT IMPLY RIGHT OF REVENGE OR RETALIATION**
> CP 812-816.[7]

Most of the slides outlined events before the shooting. CP 812-836.

The prosecutor addressed retaliation and revenge several times throughout closing. He described the defense case as "at best... revenge,

[7] Unlike the other information on the slide, these words were written in all-caps. CP 812-816.

retaliation." RP (7/29/14) 2596.[8] He quoted the "retaliation" instruction when showing jurors his first slide.[9] RP (7/29/14) 2599.

He again quoted the "retaliation" instruction while discussing the first-aggressor concept. RP (7/29/14) 2607. Later, he reiterated "[t]hey are not legally permitted to retaliate." RP (7/29/08) 2608. The state's attorney returned to the subject during rebuttal closing: "This whole concept of this delay in time, you can't do it for retaliation, that has been beat into you by now. This is not imminent." RP (7/30/14) 2766.

Several times he used the word "retaliate" when summarizing testimony. At one point he said "Everyone was talking, [Miller] says, about retaliating…" RP (7/29/14) 2618. He reiterated this later: "Everyone talking about retaliating because getting tired of shootings [sic]. No specific plan other than to go back and shoot at them guys." RP (7/30/14) 2767. At another point he summarized an informant's claim that "[Ralls] said, he and Allen and others went to the Hilltop to retaliate." RP (7/29/14) 2628. He also repeated this claim in rebuttal closing: "Ralls said, he, Allen, and others went to the Hilltop to retaliate." RP (7/30/14) 2768.

He averred that no witnesses had testified about self-defense, but that "[e]very person, in contrast, has said retaliation, which, as I have said, is not self-defense. You cannot do that." RP (7/29/14) 2629.

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[8] He also told jurors that Tacoma is not "the wild west," where feuding parties "engage in shootouts, revenge, go back and shoot the other side now because you've been hit…" RP (7/29/14) 2596.

[9] He also provided his own interpretation: "You just cannot, under the law…after the threat is gone, calculate to go take care of it later." RP (7/29/14) 2599.

Following the state's closing, defense counsel reminded the court of her objection to the instruction, and told the judge that "the State misused the instruction." RP (7/30/14) 2639. When asked, she explained

> The State made it the theme of its case. In doing so, by saying the right of self-defense does not permit action in retaliation or revenge in the context of the other self-defense instruction other instructions basically used it out of context.
> RP (7/30/14) 2639.

She also pointed out that the other instructions already covered killings done solely for retaliation or revenge. She criticized the prosecutor for improperly arguing that the instruction prohibited Mr. Ralls and his companions from arguing self-defense even if Houston were the aggressor. RP (7/30/14) 2639-2640.

The state also argued that the mere act of traveling to the Hilltop neighborhood was an act of aggression and negated any self-defense claim. RP (7/29/14) 2608-2611.

At the end of the closing arguments, the trial judge "thanked and excused" the alternate jurors. RP (7/30/14) 2776. The record does not establish that the court instructed the alternates to avoid the media or information that may taint deliberations should they be recalled. Nor does the record suggest the judge gave the alternates any other warnings or directions, including the admonishment not to discuss the case until the deliberations were completed. RP (7/30/14) 2776.

On the next day, Juror No. 4 did not show up. Before deliberations started, he had voiced his concern about the schedule. At that time, both

defendants asked the judge to keep Juror No. 4 on the jury rather than replacing him with an alternate. RP (7/30/14) 2744-2746.

When Juror No. 4 failed to appear (after calling in to reiterate he couldn't come), defense counsel asked the court to recess and allow the jury to resume deliberations on Monday. RP (7/31/14) 2783-2785. The judge, who had already summoned an alternate, announced his plan to replace Juror No. 4 with an alternate. The court made no attempt to contact Juror No. 4. Over defense objection, the judge seated Juror No. 13 as a replacement for Juror No. 4. The judge did not ask the alternate if she'd heard anything about the case after she'd been excused. Nor did the judge ask if she'd discussed the case with anyone. RP (7/31/14) 2783-2788.

After hours of deliberations, the jurors sent out a note. CP 837-862. The note was captioned "Jury Question During Deliberations." It included the following two lines of handwritten text:

> 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.
> CP 837-838.

The defense repeatedly asked the court to refer jurors back to the instructions. RP (8/1/14) 2794-2795, 2805, 2808. Defense counsel pointed out that the jury's confusion was unclear: "we are just guessing—randomly guessing as to what they may be thinking." RP (8/1/14) 2805. When the court acknowledged "that it's difficult to always know what the jury is really upset about," defense counsel interrupted to ask "What if

we're wrong?" RP (8/1/14) 2805.

Both the court and the prosecutor believed the correct legal answer to be "Yes." RP (8/1/14) 2794, 2809, 2800, 2801, 2806, 2809. The judge proposed a response, to which the defense objected. RP (8/1/14) 2796-2809. Counsel pointed out that the proposed language might add confusion, in part because "it doesn't distinguish between 'a crime' and 'the crime.'" RP (8/1/14) 2802, 2803. The defense also pointed out that the court was "emphasizing only [one] portion in that entire instruction" (the instruction on accomplice liability). RP (8/1/14) 2803.

After the court refused to refer jurors back to the instructions as a whole, the defense asked the court to read the whole instruction on accomplice liability, rather than to emphasize one particular part.[10] RP (8/1/14) 2803-2804, 2807-2808. After hearing from counsel, and over defense objection, the court gave the following answer:

> Instruction #3 instructs you that each defendant's charge is to be assessed by you independently and so your verdict on one count as to one defendant should not control your verdict on any other count or as to the other defendant.
>
> Instruction #9 instructs that a person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime. Instruction #9 further defines when a person is an accomplice.
>
> CP 837-838; RP (8/1/14) 2793-2809.

[10] In the end, the defense warned the judge regarding his planned course of action: "I think that you modify instructions and you give answers to juries about instructions at your peril. I think providing any further definitions or direction on these instructions is dangerous." RP (8/1/14) 2809.

Approximately one hour later, the jury convicted Mr. Ralls of murder by extreme indifference.[11] CP 39, 839-862.

The court sentenced Mr. Ralls to 333 months in prison. CP 190. Mr. Ralls timely appealed. CP 197-210. The Court of Appeals affirmed his conviction. Op. 2, 22.[12]

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the trial court's nonstandard "retaliation" instruction misstated the law, commented on the evidence, and relieved the prosecution of its burden to disprove self-defense. The Court of Appeals decision conflicts with *Kyllo*. In addition, this case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

1. The trial court's retaliation instruction improperly stripped Mr. Ralls of his right to claim self-defense.

After randomly shooting at people throughout the day, Bernard Houston shot first when he encountered the group that included Mr. Ralls. RP (7/2/14) 410-417, 445-446; RP (7/8/14) 880-903; RP (7/9/14) 1051-1052, 1056-1057; RP (7/10/14) 1160, 1200; RP (7/14/14) 1261, 1267, 1276-1277, 1350, 1385, 1393. Because this was "some evidence" of self-defense, it entitled Mr. Ralls to proper instructions burdening the state with disproving self-defense. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010).

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[11] The jury rejected a charge of premeditated murder and a number of lesser included charges.

[12] The Court of Appeals remanded for inquiry into Mr. Ralls's ability to pay discretionary LFOs. Op. 22.

The court's instructions should have "more than adequately convey[ed] the law;" the trial judge was required to "make the relevant legal standard manifestly apparent to the average juror." *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (citations and internal quotation marks omitted). Instead, the court's nonstandard instruction on retaliation misstated the law, commented on the evidence, and relieved the state of its burden to disprove self-defense. CP 112. This violated Wash. Const. art. IV, §16 and Mr. Ralls's Fourteenth Amendment right to due process. *See, e.g., State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997).

Homicide is justifiable whenever there is "reasonable ground" to believe the person slain intends great personal injury and there is imminent danger that such injury will be inflicted. RCW 9A.16.050. Mr. Ralls was justified in using deadly force when Houston started shooting at him and his companions; this is especially true given what Mr. Ralls knew about Houston's earlier conduct. RP (7/1/14) 154-162; RP (7/2/14) 279-280, 410-417, 445-446; RP (7/3/14) 507; RP (7/8/14) 880-903, RP (7/14/14) 1276-1277, 1411-1412; RP (7/28/14) 2445. Once Houston started shooting, anyone would "reasonably believe[ ] that [he]… intended to inflict death or great personal injury," and that there was "imminent danger of such harm being accomplished." CP 107.

The court's overly simplistic "retaliation" instruction misstated the law and relieved the state of its burden to disprove self-defense, in violation of due process. CP 112. If the court deemed a retaliation instruction necessary, it should have clarified that "The right of self-defense does not

permit action done *solely* in retaliation or revenge." CP 112 (modified by the addition of the word "solely.")

As given, the instruction did not explain that a mixed-motive killing may qualify as self-defense if legally justified. Instead, it erroneously suggested that Mr. Ralls and his companions could be found guilty even if the state failed to disprove self-defense. The instruction allowed jurors to improperly convict if they believed that some in the group desired revenge or were pleased at the opportunity to retaliate for Houston's earlier random shootings—even if the killing was justified.

The instruction also comprised a comment on the evidence in violation of Wash. Const. art. IV, §16. The prosecutor was free to argue its retaliation theory under the standard instructions on self-defense. If the state proved that the killing was motivated *solely* by a desire for retaliation or revenge, it would have obtained a conviction. The court's erroneous instruction ratified the state's improper argument that self-defense was irrelevant if some in the group harbored thoughts of retaliation or revenge. The state misused the court's instruction by repeatedly referencing it as a theme throughout closing. RP (7/29/14) 2596, 2599, 2607, 2608, 2618, 2628-2629, 2766-2767; RP (7/30/14) 2639. The prosecutor even made it a significant part of his closing PowerPoint. CP 812-836.

A statement is a judicial comment if the court's attitude can be inferred. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007). The erroneous instruction here allowed jurors to infer the court's attitude regarding the state's theory—that Mr. Ralls

could be convicted even if the state failed to disprove self-defense if jurors believed that the car's occupants had mixed motives at the time of the shooting.

The Court of Appeals should not have applied an abuse-of-discretion standard to its review of the court's instructions. Op. 8-9, 11. In fact, appellate courts review constitutional issues *de novo*. *State v. Samalia*, --- Wn.2d---, ___, 375 P.3d 1082 (2016). When a trial court makes a discretionary decision alleged to violate a constitutional right, review is *de novo*. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009). Thus, for example, the *Jones* court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones,* 168 Wn.2d at 719.[13] Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. That court specifically pointed out that review would have been for abuse of discretion had not the defendant argued a constitutional violation. *Id.*[14]

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[13] Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

[14] The Supreme Court has not applied this rule consistently. For example, one month prior to its decision in *Jones* I, the court apparently applied an abuse-of-discretion standard to questions of admissibility under the rape shield law, even though—as in *Jones*— the defendant alleged a violation of his right to present a defense. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). This case presents an opportunity to clarify that review is *de novo* whenever a litigant alleges that a discretionary decision violates a constitutional right.

After choosing the wrong standard of review, the Court of Appeals went on to blindly apply *State v. Studd*, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999). Op. 10. Although the *Studd* court approved a similar instruction, the court was not faced with the particular challenges raised here. *Id.*, at 550. The petitioner in *Studd* argued only that the instruction "ha[d] never been approved—without citing any authority for what 'approval' is necessary." *Id.*, at 550. The *Studd* court did not purport to uphold the instruction against all future challenges. Any language implying such a preemptive decision is unnecessary to the *Studd* court's holding, and this is necessarily *dicta*.[15]

Finally, the appeal court applied the wrong legal standard in approving the instruction. The court found that the instruction "adequately conveyed" the relevant legal standard. Op. 10. But instructions must "more than adequately convey the law." *Kyllo*, 166 Wn.2d 864. Instead, instructions must "make the relevant legal standard *manifestly apparent* to the average juror." *Id.*

The Court of Appeals' decision directly conflicts with *Kyllo's* mandate. Even if adequate, the instructions here did not make the relevant legal standard "manifestly apparent." *Id.* The Supreme Court should accept review and clarify that the lawful use of force in self-defense requires acquittal, even in the presence of other thoughts, feelings, or motivations. The trial court's retaliation instruction oversimplified the issue and failed

[15] *See State v. Chenoweth*, 185 Wn.2d 218, 233, 370 P.3d 6 (2016) (Madsen, C.J., dissenting) (defining dicta as comments unnecessary to the outcome of the case.)

to make the relevant standard manifestly clear to the average juror. The Court of Appeals' decision conflicts with *Kyllo*. Furthermore, this case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

2. Mr. Ralls adopts the arguments raised in Mr. Miles's Petition for Review.

Pursuant to RAP 10.1(g), Mr. Ralls adopts and incorporates by reference Mr. Miles's arguments regarding the court's retaliation instruction.

B. The Supreme Court should accept review and hold that the aggressor doctrine does not apply to lawful conduct that provokes an unreasonably belligerent response. The Court of Appeals decision conflicts with this court's decision in *Riley*. In addition, this case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

Houston went on a shooting spree, and shot at Mr. Ralls and his companions when they drove near his jeep. RP (7/1/14) 154-162; RP (7/2/14) 279-280, 412-413; RP (7/3/14) 507; RP (7/14/14) 1276-1277, 1411-1412; RP (7/28/14) 2445. According to the prosecution, the defendants "provoked" Houston by driving to his location on public roads. RP (7/29/14) 2595-2632; RP (7/30/14) 2747-2776. Based on this "provocation," the court gave an aggressor instruction suggesting that Mr. Ralls had no right to use self-defense even though Houston shot first. CP 111.

The court should not have given the instruction. Lawful conduct does not strip a person of the right to self-defense. This is especially true where the attacker's belligerent response is unreasonable or illegal.

1. Mr. Ralls was not the aggressor because he did not perform an *unlawful* aggressive act.

The "aggressor doctrine" derives from the common-law rule that a person who provokes a fight may not claim self-defense. *See, e.g., State v. McCann*, 16 Wash. 249, 47 P. 443 (1896). The common law has always required evidence of an unlawful (or "lawless") aggressive act.[16]

When first published, the pattern aggressor instruction required the jury to determine whether the defendant created the need to act in self-defense "by any *unlawful* act." Former WPIC 16.04 (1977) (emphasis added). However, the Court of Appeals found this language unconstitutionally vague unless "directed to specific unlawful intentional conduct." *State v. Thompson*, 47 Wn. App. 1, 8, 733 P.2d 584 (1987) (citing *State v. Arthur*, 42 Wn. App. 120, 708 P.2d 1230 (1985)).[17]

Although juries no longer determine the lawfulness of allegedly aggressive acts, the state must still show that the defendant engaged in unlawful aggressive conduct. *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). In *Riley*, the Supreme Court held that "words alone do not constitute sufficient provocation" for an aggressor instruction. *Id.*, at 911. Its explanation rested, in part, on the "unlawful" force requirement inherent in the aggressor rule:

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[16] *See, e.g., State v. Turpin*, 158 Wash. 103, 290 P. 824 (1930); *State v. Thomas*, 63 Wn.2d 59, 385 P.2d 532 (1963), *overruled on other grounds by State v. Rogers*, 83 Wn.2d 553, 520 P.2d 159 (1974); *State v. Upton*, 16 Wn. App. 195, 556 P.2d 239 (1976); *State v. Bailey*, 22 Wn. App. 646, 591 P.2d 1212 (1979).

[17] In *Arthur*, jurors may have believed that the defendant was the aggressor because he was involved in an automobile accident. *Id.*, at 123-124. The Court of Appeals found that this was "not rational, reasonable, or fair." *Id.*

> the reason one generally cannot claim self-defense when one is an aggressor is 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."

Id. (quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 657–58 (1986) (footnotes omitted by court)).[18]

Now, instead of having the jury determine unlawfulness, the court must make the determination prior to instructing jurors on the aggressor doctrine. Courts have allocated similar threshold determinations to judges in other contexts. For example, the validity of a no contact order is an issue for the judge to determine, rather than an element on which the jury must be instructed. *State v. Miller*, 156 Wn.2d 23, 30, 123 P.3d 827 (2005) (*Miller* I) (addressing a charge of violating a no-contact order).[19]

Courts review *de novo* whether sufficient evidence justifies a first

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[18] This is confirmed by later cases. Some have prohibited application of the aggressor doctrine based on lawful but provoking words or actions. *See State v. Hardy*, 44 Wn. App. 477, 484, 722 P.2d 872 (1986) ("the jury, by treating the name-calling as an unlawful act, [may have] improperly denied Hardy her claim of self-defense"); *State v. Brower*, 43 Wn. App. 893, 902, 721 P.2d 12 (1986) ("Here, there is no indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident); *State v. Douglas*, 128 Wn. App. 555, 563-564, 116 P.3d 1012 (2005) ("The record [did] not show that Douglas was the aggressor or that he was involved in any wrongful or unlawful conduct.")

Other decisions have upheld use of the aggressor instruction based on the defendant's unlawful conduct, even where the unlawfulness determination was left to the jury. *Thompson*, 47 Wn. App. at 8 (noting that former WPIC 16.04 (1977) "is vague and overbroad unless directed to specific unlawful intentional conduct"); *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986) ("the evidence of unlawful conduct was clear").

[19] *See also State v. Chambers*, 157 Wn. App. 465, 477, 237 P.3d 352 (2010) (court determines whether a prior conviction qualifies as a predicate offense that will elevate a crime to a felony); *State v. Boss*, 167 Wash. 2d 710, 719, 223 P.3d 506 (2009) (court decides the lawfulness of a prior custody order in case involving custodial interference charge); *State v. Gonzalez-Lopez*, 132 Wn. App. 622, 635, 132 P.3d 1128 (2006) (court decides the classification of the underlying offense in a bail jumping case).

aggressor instruction in a self-defense case. *State v. Stark*, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). Here, the state produced no evidence that Mr. Ralls and his companions engaged in any *unlawful* aggressive act before Houston shot at them.[20]

Instead, the state relied solely on the defendants' *lawful* acts. In seeking the instruction, the prosecutor argued that the defendants provoked Houston simply by their presence on Hilltop. RP (7/29/14) 2607-2608. According to the state, once Houston and Jeter finished their drive-by shootings and returned to Hilltop, the defendants became the aggressors by going to that area of town:

> If you believe that Mr. Houston shot at them earlier, now he is back on the Hilltop sitting in that car, and here comes the people that he shot at, knowing that, uh-oh, now it is their turn to come at me. Does he [have] to take it at that point? …No. Because of this passage in time, he is now defending himself.
> RP (7/29/14) 2607-2608.

The prosecutor went on to assert that "As soon as [Houston] shot, or the time period of the shot, or before the shot, these individuals [the defendants] that came there were the aggressors." RP (7/29/14) 2608. He also urged the jury to find Mr. Ralls the aggressor because Houston and his companions reacted as though expecting trouble when the two cars arrived. RP (7/29/14) 2608.

The first aggressor doctrine cannot apply to someone who lawfully

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[20] In ruling on the issue, the court found it reasonable to infer "that there was a first aggressor here." RP (7/29/14) 2576. The judge did not specify the aggressive act he believed justified the instruction.

drives on a public street. Under the state's reading of the law, any lawful behavior could subject a person to attack and extinguish the right to use self-defense. Approaching a drug dealer to say "Leave my neighborhood" is an intentional act reasonably likely to produce a belligerent response. Under the state's trial theory, a person who approaches a drug dealer in this manner would lose the right to use force in self-defense if attacked by the dealer.

An improper aggressor instruction strips an accused person of a valid self-defense claim and thus relieves the state of its burden to prove the absence of self-defense. *Stark*, 158 Wn. App. at 961. Here, the improper instruction allowed the prosecutor to argue that Mr. Ralls's lawful conduct—driving on public streets—eliminated his self-defense claim. This violated his Fourteenth Amendment right to due process. *State v. Slaughter*, 143 Wn. App. 936, 942, 186 P.3d 1084 (2008).

According to the Court of Appeals, the unlawfulness requirement may be dispensed with, and lawful acts may be considered provocation that strips a person of the right to use self-defense.[21] Op. , p. 11. This is

[21] The Court of Appeals relied on evidence that Mr. Ralls "chased Houston from [the] neighborhood following shootings earlier in the day." Op. 10. It is difficult to see how this made Mr. Ralls the aggressor, since Houston was the one shooting up the neighborhood when Allen gave chase (allegedly in Mr. Ralls's company). Nor can the display of firearms or announcement of gang affiliation qualify as provocation. *See* Op. 10. The state presented no evidence that any such display or announcement occurred prior to the moment when Houston drew his gun and opened fire. *See* RP (7/8/14) 888-902. In addition, any announcement of gang affiliation—through words or other expressive conduct—cannot be a provoking act. *See Riley*, 137 Wn.2d at 911. Finally, the state did not rely on display of firearms or announcement of gang affiliation in seeking the instruction or in arguing provocation to the jury. RP (7/29/14) 2559-2576, 2595-2632.

inconsistent with the long line of authority requiring proof of an unlawful act before the issue can go to the jury. *See Riley*, 137 Wn.2d at 911; *Hardy*, 44 Wn. App. 477; *Brower*, 43 Wn. App. at 902; *Douglas*, 128 Wn. App. at 563-564; *Thompson*, 47 Wn. App. at 8; *Hughes*, 106 Wn.2d at 193.

The Supreme Court should accept review and clarify that the aggressor doctrine does not apply to lawful acts. The Court of Appeals decision conflicts with *Riley*. In addition, this case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

2. Mr. Ralls was not the aggressor because Houston's belligerent response was illegal and unreasonable.

The court instructed jurors to apply the first-aggressor rule based on "any intentional act reasonably likely to provoke a belligerent response..." CP 111. Under the circumstances of this case, the instruction was flawed. It conveyed only half of the aggressor rule's objective standard. Although the instruction required proof of a "reasonable likel[ihood]" of a belligerent response, it did not require jurors to evaluate the reasonableness (or the legality) of such a response. This relieved the state of its burden to disprove self-defense, and violated Mr. Ralls' Fourteenth Amendment right to due process. *See Randhawa*, 133 Wn.2d at 76.

The common law aggressor doctrine cannot be premised on unreasonable or illegal belligerence, no matter how foreseeable. If it were, it would grant those who are known to be bellicose, combative, and thin-

skinned the right to attack others with impunity.[22] For example, a letter carrier who approaches the house of a person known to hate postal workers would be guilty of an "intentional act reasonably likely to provoke a belligerent response." Under the state's theory, the letter carrier would have no right to use self-defense if attacked by the belligerent resident.

The aggressor instruction becomes a problem where the defendant knows something about the other party. Delivering mail to most people is a positive action; delivering mail to a person known to harbor animosity against postal workers would be "reasonably likely to provoke a belligerent response" from that person.

Here, the jury may have concluded that traveling to Hilltop was "reasonably likely" to provoke a response from Houston and Jeter, because they belonged to a rival group.[23] In essence, the instruction stripped Mr. Ralls of his right to travel to parts of Tacoma without fear of being killed.

Instruction No. 19 conveyed only half of the aggressor rule's objective standard. It improperly stripped Mr. Ralls of his right to use self-defense based on his knowledge that legally traveling to certain parts of Tacoma would provoke others, including Houston and Jeter. This relieved the state of its burden to disprove self-defense and violated Mr. Ralls's

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[22] This is especially true if the "unlawfulness" requirement is eliminated.

[23] The conflict was not a gang rivalry, strictly speaking, since one of Mr. Ralls's companions belonged to the same gang as Houston and Jeter. RP (7/10/14) 1199.

Fourteenth Amendment right to due process. *See Randhawa*, 133 Wn.2d at 76.

The Court of Appeals misunderstood Mr. Ralls's argument regarding the objective standard.[24] The court upheld the instruction because it correctly conveys the *first* part of the objective standard. Op. 11, n. 2. But the language which "clearly define[s] provocation as 'any intentional act reasonably likely to provoke a belligerent response'"[25] does not convey the *second* part of the objective test. Nothing in the instruction requires proof that the belligerent response be reasonable or lawful. Instead, it requires only proof that the belligerent response be foreseeable. Confronting a drug dealer or delivering mail to a person who hates the postal system may be "reasonably likely to provoke a belligerent response," but should not strip the actor of his or her right to use force in self-defense if the provoked person reacts unlawfully or unreasonably—no matter how foreseeable the response is.

The Supreme Court should accept review and clarify that the aggressor doctrine does not shield those whose foreseeable belligerence is unreasonable (or unlawful).[26] This case presents significant questions of

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[24] In addition, as noted above, the court erroneously applied an abuse-of-discretion standard to Mr. Ralls's constitutional claims. Such claims are reviewed *de novo*, even when related to discretionary decisions of the trial judge. *See Jones*, 168 Wn.2d at 719;. *Iniguez*, 167 Wn.2d at 281.

[25] Op. 11, n. 2.

[26] A proper instruction would convey both halves of the objective standard. One possible formulation would refer to acts "reasonably likely to provoke a belligerent response *from a reasonable person*." WPIC 16.04 (modified).

constitutional law that are of substantial public interest. RAP 13.4 (b)(3), and (4).

3. Mr. Ralls adopts the arguments raised in Mr. Miles's Petition for Review.

Pursuant to RAP 10.1(g), Mr. Ralls adopts and incorporates by reference Mr. Miles's arguments regarding the court's aggressor instruction.

C. The Supreme Court should accept review and hold that the pattern instruction on accomplice liability fails to make the statutorily and constitutionally required "intent" element manifestly clear to the average juror. The Court of Appeals decision conflicts with *Coleman, Ferguson,* and *Kyllo.* In addition, this case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(1), (2), (3), and (4).

Under the court's instructions, the jury could have convicted Mr. Ralls as an accomplice even if he opposed his companions' intentions and hoped to dissuade them from shooting Houston. This relieved the state of its burden to prove accomplice liability, and violated Mr. Ralls's Fourteenth Amendment right to due process. *See Randhawa*, 133 Wn.2d at 76.

To prove accomplice liability, the prosecution must establish both "knowledge" and "intent." The burden to prove knowledge is explicit in RCW 9A.08.020(3)(a). The burden to improve intent derives from the phrase "aids or agrees to aid." RCW 9A.08.020(3)(a)(ii); *see See State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011) (citing *State v. Coleman*, 155 Wn. App. 951, 960-961, 231 P.3d 212 (2010)). Proof of intent is also constitutionally required to avoid overbreadth problems. *Id.* The statute's implied intent requirement ensures that conviction may only

be based on words "*directed to* inciting or producing imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969) (emphasis added).

The *Coleman* and *Ferguson* courts both implicitly found that the intent element—implied from the language "aid or agree to aid"— saves the accomplice liability statute from being unconstitutionally overbroad under *Brandenburg*. According to the *Coleman* and *Ferguson* courts, "'the criminal *mens rea* to aid or agree to aid the commission of a specific crime... avoids protected speech activities... that only consequentially further the crime.'" *Ferguson*, 164 Wn. App. at 376 (quoting *Coleman*, 155 Wn. App. at 960-961).

Here, the court's accomplice instruction—even if it could be interpreted in a manner consistent with *Brandenburg, Coleman,* and *Ferguson*—did not make the intent requirement "manifestly apparent to the average juror." *Kyllo*, 166 Wn.2d at 864 (internal quotation marks and citation omitted). The court based its instruction on WPIC 10.51[27]which is phrased in the statutory language. CP 101.

But "'[t]the standard for clarity in a jury instruction is higher than for a statute.'" *State v. Bland*, 128 Wn. App. 511, 515, 116 P.3d 428 (2005) (quoting *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996) *abrogated on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009)). This is so because jurors cannot rely on the rules of

[27] 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.51 (3d Ed).

interpretation familiar to lawyers and judges. *State v. Harris*, 122 Wn. App. 547, 553-554, 90 P.3d 1133 (2004).

In the context of an instruction, the phrase "aids or agrees to aid" does not make the intent requirement "manifestly apparent." *Kyllo*, 166 Wn.2d at 864.[28] The language fails to explicitly identify "intent" as necessary to conviction as an accomplice. Jurors might have felt compelled to convict if Mr. Ralls *knew* that his words or actions would embolden the shooter, even if his actual *intent* was to prevent violence. CP 101.

The prosecution was required to prove that Mr. Ralls *knew* his words or conduct would promote acts of extreme indifference to human life, and that he *intended* his words or conduct to promote such acts of extreme indifference. The court's instruction relieved the state of its burden to prove his intent. CP 101. The Court of Appeals erroneously held that "knowledge, not intent, is required." Op. 14. This holding conflicts with *Brandenburg*. The *Brandenburg* court prohibited conviction based on advocacy unless "*directed to* inciting or producing imminent lawless action." *Brandenburg*, 395 U.S. at 447 (emphasis added). The phrase "directed to" requires the state to prove intent. *Id.* The *Ferguson* and *Coleman* courts recognized this, and harmonized RCW 9A.08.020 with *Brandenburg* by finding that the statute required proof of intent. According to *Ferguson*

[28] In civil cases (and criminal cases predating the "manifestly apparent" standard), instructions in the language of a statute are "appropriate only if the statute is applicable, reasonably clear, and not misleading." *Bell v. State*, 147 Wn.2d 166, 177, 52 P.3d 503 (2002).

and *Coleman*, the intent requirement is incorporated into the statute because it "requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime." *Coleman,* 155 Wn. App. at 960-961; *see also Ferguson*, 164 Wn. App. at 376.

The lower court's conclusion in this case—that proof of knowledge alone is sufficient for accomplice liability—conflicts with *Coleman* and *Ferguson.* Consistent with the *Brandenburg* standard, those cases found that the statutory language prohibited "advocacy *directed at* and likely to incite or produce imminent lawless action." *Ferguson*, 164 Wn. App. at 376. This is what saves the statute from overbreadth. *Id.*

Finding the statute constitutional is not the same as determining that a jury instruction is manifestly clear. Because the Court of Appeals improperly dispensed with the statutory and constitutional intent requirement, it never determined whether the instruction made that requirement "manifestly apparent to the average juror." *Kyllo*, 166 Wn.2d at 864.[29]

The Supreme Court should accept review and hold that the pattern instruction on accomplice liability fails to make the intent requirement manifestly clear to the average juror. The Court of Appeals decision conflicts with *Ferguson, Coleman,* and *Kyllo.* In addition, this case presents

[29] Furthermore, as noted, the court improperly applied an abuse-of-discretion standard to this constitutional error. Instead, the court should have reviewed the issue *de novo. Jones*, 168 Wn.2d at 719; *Iniguez*, 167 Wn.2d at 281.

significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(1), (2), (3), and (4).

D. The Supreme Court should accept review and hold that the trial court's response to a jury question misstated the law, commented on the evidence, and relieved the state of its burden to prove that Mr. Ralls acted with knowledge of "the" crime intended by the shooter. The Court of Appeals decision conflicts with *Miller*. In addition, this case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

When a deliberating jury "makes explicit its difficulties," the court should "clear them away *with concrete accuracy*." *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350 (1946) (emphasis added). A conviction for murder "ought not to rest on an equivocal direction to the jury on a basic issue." *Id.*, at 613. Furthermore, "the judge's last word is apt to be the decisive word." *Id*, at 612.

It is reversible error to answer a jury question with a response that is misleading, unresponsive, or legally incorrect. *United States v. Anekwu*, 695 F.3d 967, 986 (9th Cir. 2012). Here, because of an ambiguity in the jury's question about accomplice liability, the court's answer was potentially misleading, unresponsive, and legally incorrect. *See* Brief of Appellant Ralls, pp. 41-50.

1. The Supreme Court should clarify the standard for interpreting questions posed by a deliberating jury.

There do not appear to be any cases from any jurisdiction regarding the standard for interpreting jury questions. Due process likely requires courts to evaluate jury questions with care, attributing all meanings that a reasonable juror could have intended. In other words, a jury question

should be interpreted "the way a reasonable juror *could have*" intended it – the same standard used for evaluating an instruction to the jury. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997) (*Miller* II) (emphasis added) (citing *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)).

Here, the jury asked an ambiguous yes/no question: "If we determine a defendant is an accomplice, are they liable for the same crime?" CP 837. The question suggests that jurors intended the word "accomplice" to mean a "participant," generally, rather than a person legally responsible for the principal's crime. Had they intended the word "accomplice" to have its legal meaning—that is, one whose complicity in the principal's crime had been established beyond a reasonable doubt—they would not have asked the question. CP 837.

Furthermore, the question did not clarify whether jurors meant to ask about a participant's guilt for "the same crime" as the codefendant, or "the same crime" as the shooter. CP 837. This additional ambiguity made answering the question even more fraught.

Neither the judge nor the state showed any understanding of the ambiguities in the jury's question(s). Instead, both took it to be a self-answering tautology such as "Is an accomplice guilty as an accomplice?" Taking the question this way, both judge and prosecutor believed the answer to be "yes." RP (8/1/14) 2794, 2809, 2800, 2801, 2806, 2809.

Defense counsel twice pointed out the ambiguity, warning the

judge against "randomly guessing as to what they may be thinking," and asking "What if we're wrong?" RP (8/1/14) 2805. But the court did not heed counsel's warning, and answered (in part) "that a person *is* legally accountable for the conduct of another..." CP 838 (emphasis added).[30] Counsel again warned the judge: "[Y]ou modify instructions and you give answers to juries about instructions at your peril." RP (8/1/14) 2809.

Applying the *Miller* standard, the trial judge would have realized that the question could be read as more than a simple tautology. A "reasonable juror could have" intended the question in more than one way. *Miller* II, 131 Wn.2d at 90. Any answer should have taken into account the question's ambiguities. The Court of Appeals did not examine the question using the *Miller* standard. Op. 17-18. Like the trial judge and the prosecutor, the Court of Appeals failed to acknowledge the ambiguity in the question before evaluating the court's answer. Op. 17-18.

The Supreme Court should accept review to clarify the proper standard for interpreting jury questions. Because the proper standard can affect the accused person's due process and sixth amendment rights to a fair trial by an impartial jury, this case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

2. The trial court's answer to the jury's question misstated the law

[30] Contrary to Respondent's assertion, the judge did not simply "answer the question by reference to the original instructions." Brief of Respondent, p. 42. Defense counsel asked the judge to refer jurors to the instructions; the court declined to do so. RP (8/1/14) 2794-2795, 2805, 2808; CP 838.

and improperly commented on the evidenced.

To determine whether an instruction is misleading, courts look at "the way a reasonable juror *could have* interpreted the instruction." *Miller* II, 131 Wn.2d at 90; *Sandstrom*, 442 U.S. at 514. Here, "a reasonable juror could have interpreted the instruction" in a way that was misleading, unresponsive, and legally incorrect. *Miller* II, 131 Wn.2d at 90.

A reasonable juror "*could have* interpreted the [answer]" to mean "yes." *Id.* (emphasis added). Some jurors thus may have believed that Mr. Ralls, as a participant, was "liable for the same crime" as his codefendant and/or the shooter, regardless of whether or not he knew the general crime intended by the principal.[31] CP 837.

The court's answer must be understood in conjunction with the jury's question. In a vacuum, the court's general statements regarding the law may have been legally correct. However, the answer to a jury question should not be considered in a vacuum; instead, it must be scrutinized in relation to the question.[32]

When considered in relation to the question, the court's answer could be understood (by a reasonable juror) as permission to convict any participant of murder, even if he were ignorant of "the" crime intended by the principal. *Cf. State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713

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[31] And regardless of whether or not he "desire[d] to bring about" the crime intended by the principal. *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), *holding modified on other grounds by State v. Regan*, 97 Wn.2d 47, 640 P.2d 725 (1982).

[32] As noted, both question and answer should be evaluated to determine how "a reasonable juror could have" understood them. *Miller* II, 131 Wn.2d at 90.

(2000), *as amended on denial of reconsideration* (Mar. 2, 2001); *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). The court's answer to the jury's ambiguous question thus allowed jurors to convict Mr. Ralls as an accomplice even if they did not believe that he acted with general knowledge of the shooter's plan.[33] CP 837-838. This violated his Fourteenth Amendment right to due process, because it allowed conviction without proof of each element of the charged crime. *Roberts*, 142 Wn.2d at 513; *Cronin*, 142 Wn.2d at 579.

The court's response to the jury's ambiguous question did not make the relevant standard "manifestly apparent" to the average juror. *Kyllo,* 166 Wn.2d at 864. Instead, a reasonable juror "*could have* interpreted [it]"[34] to misstate the law, permitting conviction even absent proof beyond a reasonable doubt of the elements required for accomplice liability. This prejudiced Mr. Ralls, injecting into deliberations the problems identified by the Supreme Court in *Roberts* and *Cronin*.

The answer also was a comment on the evidence, implying that if Mr. Ralls qualified as an accomplice, he was guilty of murder by extreme indifference rather than some lesser crime. The judge should have directed jurors to read the instructions, as suggested by defense counsel. RP (8/1/14) 2794. Such a directive would have led jurors to realize that Mr.

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[33] And even if he did not have "'the criminal *mens rea* to aid or agree to aid the commission of a specific crime." *Ferguson*, 164 Wn. App. at 376 (quoting *Coleman*, 155 Wn. App. at 960-961).

[34] *Miller* II, 131 Wn.2d at 90 (emphasis added).

Ralls's knowledge[35] was critical to his liability for "the same crime" as the shooter (or, for that matter, "the same crime" as codefendant Miles).

The court's answer allowed jurors to infer that the judge believed Mr. Ralls *would* be guilty of murder if the jury found he was an accomplice to any crime.[36] This violated Wash. Const. art. IV, §16, and is presumed prejudicial. *Jackman*, 156 Wn.2d at 744. Furthermore, the record "does not affirmatively show that no prejudice could have resulted." *Id.* Accordingly, Mr. Ralls is entitled to a new trial.

The Court of Appeals failed to consider the court's answer in conjunction with the jury's question. Op. 17-18. When read in isolation, the answer might be legally correct; however, when read in conjunction with the question, a reasonable juror "*could have* interpreted the [answer]" to mean "yes." *Miller* II, 131 Wn.2d at 90 (emphasis added). This would have led jurors to dispense with the knowledge requirement, convicting Mr. Ralls of "the same crime" because he was a participant.

The Supreme Court should accept review, reverse Mr. Ralls's conviction, and remand the case for a new trial. The Court of Appeals decision conflicts with *Miller*. In addition, this case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

E. The Supreme Court should accept review and hold that the trial

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[35] And, as argued elsewhere in this brief, his intent or "'criminal *mens rea* to aid or agree to aid." *Ferguson*, 164 Wn. App. at 376 (quoting *Coleman*, 155 Wn. App. at 960-961).

[36] That this was the judge's belief in fact is evidenced from his assertion that the correct answer to the question was "yes." RP (8/1/14) 2794, 2809, 2800, 2801, 2806, 2809.

> judge violated Mr. Ralls's right to a fair trial by an impartial jury by seating an alternate juror who had been unconditionally excused, without ascertaining that she remained neutral, impartial, and untainted by outside influence. This case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(3) and (4).

The trial judge unconditionally discharged the alternate jurors at the start of deliberations. He did not admonish the alternates to remain free from improper influence, or to refrain from discussing the case. When one of the deliberating jurors did not show up, the judge seated an alternate juror over defense objection. The judge did not conduct a brief *voir dire* to ensure that the alternate remained impartial. RP (7/30/14) 2776; RP (7/31/14) 2787-2788.

This infringed Mr. Ralls's Fourteenth Amendment right to due process and his Sixth Amendment right to a jury trial.[37] It also violated CrR 6.5, which protects those constitutional rights. When a regular juror is discharged, the trial judge may only recall alternates who "are temporarily excused but not discharged." CrR 6.5. Here, the judge discharged the alternates at the close of the case. He did not temporarily excuse them from service. RP (7/30/14) 2776. In light of this, the alternates were not eligible to deliberate on Mr. Ralls's jury. CrR 6.5.

When jurors are temporarily excused (rather than discharged), the judge "shall take appropriate steps to protect alternate jurors from influ-

[37] It also violated his state constitutional right to a fair trial by an impartial jury under Wash. Const. art. I, §§3, 21, and 22.

ence, interference or publicity, which might affect that juror's ability to remain impartial." CrR 6.5. Here, the judge "thanked and excused the alternates." RP (7/30/14) 2776.[38] There is no indication that he admonished the alternates to refrain from discussing the case or to avoid publicity.[39] RP (7/30/14) 2776; CP 839-862. Thus, the judge did not take the "appropriate steps" required under CrR 6.5.

Before seating an alternate, the judge "may conduct brief *voir dire*" to determine the alternate juror's continuing impartiality.[40] CrR 6.5. Here, even though the trial judge failed to take "appropriate steps" to protect the alternates from improper influence, he did not *voir dire* the alternate prior to seating her. RP (7/31/14) 2787-2788.

During trial, the judge admonished jurors not to discuss the case with each other or with anyone else. *See, e.g.* RP (7/22/14) 2181; RP (7/23/14) 2282; RP (7/28/14) 2473; RP (7/29/14) 2632. The judge took no such precaution with the alternates, however. Instead, he thanked them and excused them. RP (7/30/14) 2776. By discharging them unconditionally, the judge disqualified them from returning to serve on the jury. CrR 6.5. He should not then have recalled one of the discharged alternates and

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[38] Curiously, the verbatim transcript does not quote the judge verbatim. RP (7/30/14) 2776.

[39] A pattern instruction outlines the admonitions a judge must direct at an alternate juror who is temporarily excused rather than discharged. WPIC 4.69.

[40] Where the judge has taken "appropriate steps" to protect jurors from outside influence, the failure to conduct *voir dire* is not error. *State v. Dye*, 170 Wn. App. 340, 349, 283 P.3d 1130 (2012) *affirmed on other grounds*, 178 Wn.2d 541, 309 P.3d 1192 (2013); *State v. Chirinos*, 161 Wn. App. 844, 848, 255 P.3d 809 (2011). But see *State v. Stanley*, 120 Wn. App. 312, 318, 85 P.3d 395 (2004) (noting error, but declining to consider whether such failure requires reversal).

seated her on the jury.

This is especially true because he failed to "take appropriate steps" to protect the alternates from outside influence. CrR 6.5. The problem was compounded by his failure to conduct brief *voir dire* to ensure that the alternate juror had refrained from discussions about the case and had avoided publicity. CrR 6.5.

Without consulting with either party, the judge summoned an alternate juror whom he'd previously discharged. Over objection, he announced his decision to seat the alternate in place of a regular juror who had a planned vacation. He did not provide either party the opportunity to question the alternate. RP (7/31/14) 2783-2785.

CrR 6.5 "clearly contemplate[s] a formal proceeding." *State v. Ashcraft*, 71 Wn. App. 444, 462, 859 P.2d 60 (1993). The matters addressed by CrR 6.5 "relate directly to a defendant's constitutional right to a fair trial before an impartial jury." *Id.*, at 462-63.[41]

By failing to comply with CrR 6.5, the trial judge violated Mr. Ralls's constitutional right to a fair trial by an impartial jury. *Id.;* U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§3, 21, 22.

The Court of Appeals erroneously refused to review Mr. Ralls's arguments. The court concluded that "the record is inadequate to permit

[41] Accordingly, violation of the rule can be raised for the first time on appeal as a manifest error affecting a constitutional right. *Id.* n. 7 (citing RAP 2.5(a)(3)). If defense counsel's objections were insufficient to preserve all the issues raised here, then the errors must be reviewed under RAP 2.5(a)(3).

evaluation of the trial court's instructions to the outgoing alternate jurors..." Op. 15.

This is incorrect: Mr. Ralls ordered a complete transcript of the relevant hearings, and Respondent did not raise any objection under RAP 9.5(c). The Verbatim Report of Proceedings indicates that the trial judge "thanked and excused" the alternate jurors. RP (7/30/14) 2776. This passage does not suggest that he instructed the discharged alternates in any way, and contrasts with the times he admonished jurors during trial not to discuss the case with each other or with anyone else. *See, e.g.* RP (7/22/14) 2181; RP (7/23/14) 2282; RP (7/28/14) 2473; RP (7/29/14) 2632.

If the state believes more occurred at this stage of the proceedings, it had a duty to object under RAP 9.5(c). Mr. Ralls did everything he could to ensure a complete record, and the record is adequate to address the issue. The Court of Appeals should have addressed it. The Supreme Court should accept review, reverse Mr. Ralls's conviction, and remand the case for a new trial. This case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(3) and (4).

F. The Supreme Court should accept review and hold that the evidence was insufficient to convict Mr. Ralls of murder by extreme indifference. The Court of Appeals decision conflicts with this court's decision in *Anderson*. In addition, this case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

1. Mr. Ralls was not guilty of murder by extreme indifference because the late-night shooting targeted only Houston and Jeter.

A person is not guilty of murder by extreme indifference if "'the

act causing a person's death was specifically aimed at and inflicted upon that particular person and none other.'" *State v. Anderson*, 94 Wn.2d 176, 187-192, 616 P.2d 612 (1980) (quoting *State v. Mitchell*, 29 Wn.2d 468, 484, 188 P.2d 88 (1947)); *see also State v. Berge*, 25 Wn. App. 433, 437, 607 P.2d 1247 (1980). An exception exists where the offender's attack necessarily endangers many others. *See, e.g., State v. Pastrana*, 94 Wn. App. 463, 473, 972 P.2d 557 (1999), *as amended* (May 21, 1999) (defendant fired from a moving car on a major freeway ramp in heavy traffic); *State v. Pettus*, 89 Wn. App. 688, 951 P.2d 284 (1998) (defendant shot numerous times from a moving car in a residential neighborhood near a school).

In this case, Mr. Ralls's companions directed their fire at Houston and Jeter. The other occupants of the jeep had already fled, and there were no bystanders endangered by the shooting. Furthermore, the shooting occurred late at night, and there was no evidence of any residences nearby whose occupants were put at risk. No one testified to bullets striking houses or going through walls. RP (7/2/14) 410-417, 445-446; RP (7/8/14) 880-903, RP (7/14/14) 1276-1277.

Under these circumstances, the evidence was insufficient to prove murder by extreme indifference. *Anderson*, 94 Wn.2d at 187-192. Mr. Ralls should not have been convicted of that crime, and the conviction violated his Fourteenth Amendment right to due process. *In re Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). The Court of Appeals erroneously concluded that the evidence was sufficient because the conflict took

place in a residential neighborhood, because Jeter was hit as he ran away, and because Houston's companions were nearby at the time of the shooting. Op. 7. This evidence does not support the verdict.

The mere fact that the neighborhood was residential does not mean that Mr. Ralls and his companions actually endangered anyone. No one testified about bullets hitting houses—except for the bullets Houston shot earlier in the day. In addition, Jeter, like Houston, was a target of the shooting. He had been with Houston during the shooting spree throughout the day. RP (7/1/14) 136; RP (7/7/14) 598. He was not a random bystander injured in crossfire; thus, the shots fired at him fall within the *Anderson* rule. *Anderson*, 94 Wn.2d at 187-192. Finally, no evidence established that Houston's companions – who fled the Jeep before the shooting started—were endangered in any way.

Under these circumstances, the evidence was insufficient to prove murder by extreme indifference. *Anderson*, 94 Wn.2d at 187-192. The conviction violated due process. *Martinez*, 171 Wn.2d at 364.

The Supreme Court should accept review and reverse Mr. Ralls's conviction for murder by extreme indifference. The Court of Appeals decision conflicts with *Anderson*. In addition, this case presents significant questions of constitutional law that are of substantial public interest. RAP 13.4 (b)(1), (3), and (4).

2. Mr. Ralls adopts the arguments raised in Mr. Miles's Petition for Review.

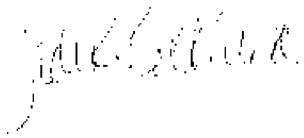
Pursuant to RAP 10.1(g), Mr. Ralls adopts and incorporates by reference Mr. Miles's arguments regarding the sufficiency of the evidence.

VI. CONCLUSION

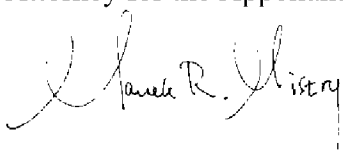
The Supreme Court should accept review, reverse the Court of Appeals, and dismiss the conviction with prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted September 13, 2016.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Anthony Ralls, DOC #964751
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

and I sent an electronic copy to

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

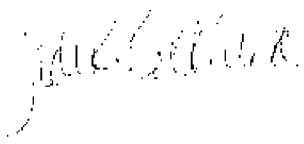
Stephanie Cunningham, attorney for co-defendant
SCCAttorney@yahoo.com

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 13, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

August 16, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NATHANIEL W. MILES, Appellant.	No. 46633-3-II (Consolidated) UNPUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. ANTHONY RALLS, Appellant.	No. 46636-8-II

BJORGEN, C.J. — Nathaniel Miles and Anthony Ralls appeal their 2013 convictions for first degree murder stemming from the 1988 killing of Bernard Houston. Miles argues that (1) his conviction was not supported by sufficient evidence of the necessary mens rea, and both Miles and Ralls argue that the trial court erred by (2) issuing jury instructions that misstated the law and commented on the evidence, (3) seating a dismissed alternate juror without instructing that juror to remain impartial or determining whether the juror had been tainted, (4) answering a jury question in a manner that misstated the law and commented on the evidence, and (5)

imposing discretionary legal financial obligations (LFOs) without first inquiring into Miles' and Ralls' ability to pay. Also, Miles and Ralls each filed supplemental briefs asking that appellate costs not be assessed against them.

We hold that (1) sufficient evidence supported Miles' conviction, (2) the jury instructions neither misstated the law nor commented on the evidence, (3) the record is insufficient to review whether the alternate juror was dismissed and whether the trial court properly instructed that juror, and (4) the trial court neither misstated the law nor commented on the evidence in its response to the jury question, but that (5) the trial court erred by failing to inquire into Miles' and Ralls' ability to pay before imposing discretionary LFOs. Accordingly, we affirm Miles' and Ralls' convictions but remand for the trial court to make an individualized inquiry into their abilities to pay discretionary LFOs, consistently with *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015). We also exercise our discretion not to impose appellate costs on either defendant.

FACTS

On August 28, 1988, Houston and a companion, both members of the Crips gang from the Hilltop neighborhood of Tacoma, committed three daytime drive-by shootings in the city's Eastside neighborhood. Several members of the Eastside Bloods gang, among them Miles and Ralls, then decided to go to the Hilltop area, find Houston and Michael Jeter, whom they suspected of being Houston's companion, and respond in kind. The group found Houston's vehicle, with Houston inside, and gunfire erupted. Houston was shot and killed in the encounter.

The initial police investigation following the shooting produced no arrests, but police received new information in 2001 and investigated further. Based on the results of this investigation, on July 29, 2014, the State charged Miles and Ralls with first degree murder of

Houston on two alternative theories: premeditated murder and murder with extreme indifference to human life.

1. Evidence Related to Self-Defense and Mens Rea

At trial, the State presented testimony that Miles and Ralls planned to retaliate against Houston and departed with others in two different cars to confront him. Witnesses testified that some among the group, including Miles and Ralls, had guns. At the time of the shooting, Houston was with three companions in a residential neighborhood in an area claimed by Houston's gang as its "turf." Report of Proceedings (RP) at 764-68, 870-75, 1407. According to one witness, Miles and Ralls' group arrived brandishing firearms and announcing their gang affiliation.

Houston's companions testified that they attempted to flee after seeing the cars, perceiving that a gunfight was likely. According to other witnesses, after Miles and Ralls' group arrived, Houston fired on them and Miles and Ralls' group returned fire. One of Houston's companions testified that he was shot in the leg as he ran away. Houston was shot in the head and killed.

2. Jury Instructions

Miles and Ralls proposed self-defense instructions that did not include information regarding either first aggression or retaliation by the defendants. The State proposed instructions on the legal effect of both first aggression and retaliation on the applicability of a self-defense homicide justification, which the trial court ultimately included in its instructions to the jury and which are set out in the Analysis section below. Miles and Ralls objected to the inclusion of these instructions.

The State also proposed an accomplice liability instruction, reproduced in the Analysis section below, modeled after 11 *Washington Practice Jury Instructions: Criminal* 10.51, at 217 (3d ed. 2008). The trial court gave this instruction, over defense objection.

3. Excusal and Seating of Alternate Juror

On the last day of trial, the trial court became aware that juror 4 did not want to deliberate the next day because it would interfere with a scheduled vacation. The trial court suggested replacing juror 4 with an alternate juror, but Ralls' counsel objected to the plan. The trial court left the jury intact.

Following closing arguments, the trial court "thanked and excused" the alternate jurors, and the jury began its deliberations. RP at 2776. The record does not reflect whether the trial court instructed the alternate jurors to remain impartial and refrain from discussing the case with others.

Juror 4 failed to show up the next day to deliberate, and the trial court replaced her with one of the excused alternates. Ralls objected to this replacement without elaboration as to his grounds for objection. With no further discussion or proceedings, the trial court seated the alternate juror and instructed the jury to "disregard all previous deliberations and begin deliberations anew." RP at 2788.

4. Jury Question

On the second day of deliberations, the jury sent a question to the trial court regarding the accomplice liability instruction. 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.

Clerk's Papers (CP) at 708.

Both Miles and Ralls asked the trial court to tell the jurors to refer to their instructions, with no further elaboration. The State requested that the trial court instruct the jury, "If you determine that a defendant is an accomplice to the charge you are deliberating on, they are guilty of that crime." RP at 2800.

Ultimately, the trial court disagreed with both proposals and issued the following response:

> Instruction #3 instructs you that each defendant's charge is to be assessed by you independently and so your verdict on one count as to one defendant should not control your verdict on any other count or as to the other defendant.
>
> Instruction #9 instructs that a person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime. Instruction #9 further defines when a person is an accomplice.

CP at 709. Both Miles and Ralls objected.

The jury acquitted Miles and Ralls of premeditated murder but convicted them of murder with extreme indifference to human life.

5. Sentencing

Miles and Ralls were each sentenced to 333 months' imprisonment. The trial court also imposed LFOs totaling $2,800, of which $2,000 were for discretionary LFOs. The trial court did not inquire as to whether Miles and Ralls would be able to pay the LFOs, but neither Miles nor Ralls objected to their imposition.

Miles and Ralls appeal their convictions and the LFOs imposed as part of their sentences.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Miles argues that the evidence presented to the jury was insufficient to establish that he acted with extreme indifference to human life. We disagree.

In a criminal trial, the State bears the burden of proving all elements of the charged offenses beyond a reasonable doubt. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). We review de novo whether the evidence before the jury was sufficient to support a verdict of guilt, viewing all evidence in the light most favorable to the State. *Id.* We consider circumstantial evidence and direct evidence to be equally reliable for this purpose. *State v. Ozuna*, 184 Wn.2d 238, 248, 359 P.3d 739 (2015). We will conclude that the evidence is sufficient to support the jury's verdict if any rational trier of fact could have found the elements of the charged crimes beyond a reasonable doubt. *Rich*, 184 Wn.2d at 903.

The jury found Miles and Ralls guilty of first degree murder with a mens rea of extreme indifference to human life. Under Washington's first degree murder statute,

> (1) A person is guilty of murder in the first degree when:
> . . . .
> (b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person.

RCW 9A.32.030; *see also* CP at 744 (jury instruction). To prove murder with this mens rea, the State must prove 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. Henderson, 180 Wn. App. 138, 145, 321 P.3d 298 (2014), *aff'd*, 182 Wn.2d 734 (2015) (quoting *State v. Yarbrough*, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009)). This requires proof that the defendant created "a very high degree of risk, which 'elevates the level of recklessness to an extreme level, thus manifesting an extreme indifference to human life.'" *Henderson*, 180 Wn. App. at 145 (internal quotation marks omitted) (quoting *State v. Dunbar*, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991)).

To prove that the defendant acted with extreme indifference to human life, the State must prove that the defendant acted without regard to human life *in general*, as opposed to acting without regard to the life of the victim specifically. *State v. Pettus*, 89 Wn. App. 688, 694, 951 P.2d 284 (1998), *abrogated on other grounds by State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005); *State v. Berge*, 25 Wn. App. 433, 437, 607 P.2d 1247 (1980). Washington courts have found that the evidence did not support a verdict of extreme indifference where the defendant fired a gun wildly at the victim in the defendant's own home, *Berge*, 25 Wn. App. at 434, 436-37; or where the defendant placed a toddler into a bath of extremely hot water, *State v. Anderson*, 94 Wn.2d 176, 178-79, 192, 616 P.2d 612 (1980).

Washington courts, however, have found that the evidence was sufficient to support a conviction where the defendant engaged in a drive-by shooting in a residential neighborhood, *Pettus*, 89 Wn. App. 691-92, 695; and where the defendant fired a gun at a vehicle through his car window while driving down the highway, *State v. Pastrana*, 94 Wn. App. 463, 469, 473, 972 P.2d 557 (1999), *abrogated on other grounds by Gamble*, 154 Wn.2d 457. The distinction between the two lines of cases is that in the former, "only the life of the victim was endangered," while in the latter the defendants "created a grave risk of death to others who were in the vicinity." *Pastrana*, 94 Wn. App. at 473.

Miles argues that the jury could not have found beyond a reasonable doubt that he created a grave risk of death to others in the vicinity because evidence showed that he was specifically targeting Houston and posed no danger to others. However, like the defendant in *Pettus*, Miles and Ralls chose to fire their weapons at their intended victim in a residential neighborhood. Evidence showed that Houston's companions were nearby at the time of the shooting, and that the shooting took place near residences. Further, a 24-hour convenience store was nearby with

the owners inside, and one of Houston's companions tried to run to the store to hide. The owners, though, would not open the door because they heard gunfire. The evidence showed that Miles and Ralls' group fired multiple shots toward Houston. One of those shots hit one of Houston's companions, who was fleeing toward the convenience store.

Although Miles may have been targeting Houston, his actions put others at the scene or in the nearby residences at risk of death from stray bullets, ricochet or crossfire. The evidence supported a finding beyond a reasonable doubt that Miles acted with extreme indifference to human life and, therefore, that the evidence against Miles was sufficient to support the jury's verdict.

II. JURY INSTRUCTIONS

Miles and Ralls argue that the trial court committed instructional error by issuing (1) self-defense instructions that emphasized the legal effect of retaliation and provocation, and (2) an accomplice liability instruction that misstated the applicable mens rea. We disagree and hold that the trial court did not err by issuing the challenged instructions.

In general, we review the trial court's choice of jury instructions for an abuse of discretion. *State v. Green*, 182 Wn. App. 133, 152, 328 P.3d 988, *review denied*, 337 P.3d 325 (2014). A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *State v. Robinson*, 193 Wn. App. 215, 217-18, 374 P.3d 175 (2016). Jury instructions must be supported by substantial evidence. *Green*, 182 Wn. App. at 152; *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005). Such instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *State v. Soper*, 135 Wn. App. 89,

101, 143 P.3d 335 (2006). We review de novo whether instructions are legally correct. *Douglas*, 128 Wn. App. at 562.

1. Self-Defense Instructions

Miles and Ralls challenge the trial court's instructions to the jury regarding the applicability and contours of the law of self-defense, arguing that (1) the instructions were not supported by the evidence and misstated the applicable law, and (2) the instruction on retaliatory action amounted to judicial commentary on the evidence. We disagree with both arguments.

A. Instructional Error

Jury instruction 18 described the general law of self-defense:

> It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP at 730. Instruction 19 described the effect of the defendant's provocation or aggression on the lawfulness of subsequent deadly force used in self-defense:

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

CP at 730-31. Instruction 19A then distinguished retaliation and revenge from lawful self-defense: "The right of self-defense does not permit action done in retaliation or in revenge." CP at 732.

Ralls argues that instruction 19A misstated the law regarding killings "done in retaliation" because "[e]ven if the slayer has other thoughts or feelings, a homicide is justifiable if it qualifies as self-defense." Br. of Appellant (Ralls) at 18. However, our Supreme Court has

held that the exact language used in instruction 19A correctly states the law regarding retaliatory killings. *State v. Studd*, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999). There is a fundamental distinction between actions taken to retaliate and actions taken in self-defense, and that distinction revolves around the reasonable anticipation of imminent danger. *See State v. Janes*, 121 Wn.2d 220, 240, 850 P.2d 495 (1993). We follow the court in *Studd* and hold that instruction 19A, considered in the context of the trial court's instructions to the jury as a whole, adequately conveyed this distinction.

Miles and Ralls both argue that the trial court erred by giving instruction 19 regarding the effect of the defendant's provocation. According to our Supreme Court, "[a]n aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight." *State v. Riley*, 137 Wn.2d 904, 910, 976 P.2d 624 (1999). Here, testimony showed that Ralls had chased Houston from Ralls' neighborhood following shootings earlier in the day and that Miles and Ralls were among a group that descended on Houston's vehicle that night, displaying firearms and announcing their gang affiliation. Testimony also placed the events in the context of an escalating pattern of violence between the gangs. This evidence was sufficient for the jury to find that Miles and Ralls provoked a violent response from Houston, and therefore, that their own violent response was unjustified. Given this evidence and the importance of the instruction to the State's theory of the case, the trial court did not err in instructing the jury on the law regarding provocation.[1]

Ralls argues that his and Miles' acts could not be provocative as a matter of law because they were lawful acts and, therefore, that the trial court erred in instructing the jury on

[1] It likely would have been error for the trial court to *deny* such an instruction, as it was supported by substantial evidence and was crucial to the State's theory of the case.

provocation. As Ralls notes, words alone do not qualify as provocation. *Riley*, 137 Wn.2d at 910-11. Ralls asks us to extend this principle and hold that lawful acts in general cannot constitute provocation as a matter of law.

However, a defendant may provoke a victim, and thereby negate the possibility that the defendant acted in self-defense, by intentionally acting in a manner the victim reasonably perceives as a threat to use unlawful deadly force.[2] *See State v. Wingate*, 155 Wn.2d 817, 823, 122 P.3d 908 (2005). A defendant's provocative acts must be considered in context, even if the individual acts were not unlawful. *See Riley*, 137 Wn.3d at 909-10. As long as the victim reasonably perceived an imminent threat to use unlawful deadly force, an aggressor/provocation instruction of the sort given here is proper. *Id.* The evidence shows that Miles and Ralls engaged in activities that Houston may reasonably have perceived as threatening deadly force under the circumstances. Miles and Ralls sought Houston out with a plan to retaliate. They also displayed firearms and announced their group affiliation. Therefore, the trial court did not abuse its discretion in giving instruction 19.

B. Judicial Commentary on the Evidence

Both Miles and Ralls argue that the trial court improperly commented on the evidence by issuing instruction 19A. Specifically, they argue that the retaliation instruction improperly emphasized the State's main argument—that Miles and Ralls were aggressors in the altercation, motivated by vengeance to retaliate against Houston. We disagree.

[2] Ralls also argues that instruction 19 did not adequately convey that provocation is subject to an objective reasonableness standard. However, the first sentence of the instruction clearly defined provocation as "any intentional act reasonably likely to provoke a belligerent response." CP at 731. This was an accurate statement of law. *See Wingate*, 155 Wn.2d at 821-22.

The trial court may not comment on the evidence before the jury, as such commentary may unduly influence the jury's deliberations. *State v. Hermann*, 138 Wn. App. 596, 606, 158 P.3d 96 (2007). "A jury instruction can constitute a comment on the evidence if it reveals the court's attitude toward the merits of the case or the court's evaluation of a disputed issue." *Id.* "'A jury instruction that does no more than accurately state the law pertaining to an issue, however, does not constitute an impermissible comment on the evidence by the trial judge.'" *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015) (quoting *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001)). "We review jury instructions de novo, within the context of the jury instructions as a whole." *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Judicial commentary on the evidence is presumptively prejudicial, "unless it affirmatively appears in the record that no prejudice could have resulted from the comment." *State v. Lane*, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995)).

An instruction that indicates what weight the jury should give to particular evidence constitutes improper commentary on that evidence. *Hermann*, 138 Wn. App. at 607. However, it is unclear how an instruction simply distinguishing retaliation from self-defense could favor any particular view on the evidence. The instruction at issue did not promote the State's interpretation of the evidence simply because it was important to the State's argument, just as instructing the jury on self-defense did not favor the defendants' interpretation of the evidence. Had the instruction stated that any particular evidence indicated retaliation rather than self-defense, it would have been a comment on the evidence, *see Hermann*, 138 Wn. App. at 606-07, but instruction 19A included no such statement. The fact that the State crafted its closing argument around the instruction did not transmute it into judicial commentary.

Moreover, as noted above, our Supreme Court has approved of the exact language used in instruction 19A. *Studd*, 137 Wn.2d at 550. The court in *Studd* specifically noted that the language "correctly state[s] the law, and [does] not unfairly emphasize the State's theory of the case or, in any way, comment upon the evidence." *Id.*; *see also State v. Cook*, 86 Wn. App. 1099 (1997) (unpublished case, reviewed in *Studd*) (noting that the language "supported the State's theory"), *aff'd sub nom. Studd*, 137 Wn.2d 533. Accordingly, we hold that the trial court did not comment on the evidence by issuing instruction 19A.

2. Accomplice Liability Instruction

Miles and Ralls argue that the trial court also erred by giving the jury an instruction that misstated the law of accomplice liability by mischaracterizing the mens rea requirement. We disagree.

Instruction 9 stated:

> 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. A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the crime.
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he either:
>
> (1) solicits, commands, encourages, or requests another person to commit the crime; or
> (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

CP at 721.

Miles and Ralls contend that the mens rea necessary to establish accomplice liability is intent to aid the principal in the commission of the crime or initiate the criminal enterprise. However, it is clear that knowledge, not intent, is required to satisfy the mens rea element of accomplice liability. The applicable statute, RCW 9A.08.030, mirrors the elements of instruction 9, requiring that an accomplice aid or abet in the commission of the crime "[w]ith knowledge that it will promote or facilitate the commission of the crime." RCW 9A.08.020(3)(a). Interpreting this requirement, our Supreme Court recently noted that

> a jury can convict a defendant as an accomplice even if that defendant has only "knowledge that [his or her acts] will promote or facilitate the commission of a crime," not intent.

State v. Walker, 182 Wn.2d 463, 493, 341 P.3d 976 (alteration in original) (quoting *State v. Hoffman*, 116 Wn.2d 51, 104, 804 P.2d 577 (1991)), *cert. denied*, 135 S. Ct. 2844 (2015).

We have also held that accomplice liability based on aiding the principal in commission of the crime "'requires the criminal mens rea to aid or agree to aid the commission of a specific crime *with knowledge the aid will further the crime*.'" *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011) (emphasis added) (quoting *State v. Coleman*, 155 Wn. App. 951, 960-61, 231 P.3d 212 (2010)). This knowledge requirement ensures that an accomplice's actions are "directed at and likely to incite or produce imminent lawless action" without prohibiting "mere advocacy of law violation" in general. *Ferguson*, 164 Wn. App. at 376. Thus, one is an accomplice within the meaning of RCW 9A.08.020(3)(a) when one aids or agrees to aid in the commission of the crime with the mens rea of knowledge that the aid will further the crime.

Instruction 9 plainly expressed that Miles and Ralls could be considered accomplices only if they acted "with knowledge that it will promote or facilitate the commission of the crime." CP at 721. The trial court did not err by giving the jury that instruction.

III. SEATING THE ALTERNATE JUROR

Miles and Ralls argue that the trial court violated their rights to an impartial jury by excusing the alternate jurors without taking proper steps to ensure that they remained untainted, and then recalling and seating an alternate juror. However, because the record is inadequate to permit evaluation of the trial court's instructions to the outgoing alternate jurors, we do not review whether the trial court took appropriate steps to ensure that the alternate jurors were protected from influences which might affect their ability to remain impartial.

Replacement of jurors implicates a defendant's constitutional right to an impartial jury. *State v. Feliciano Chirinos*, 161 Wn. App. 844, 848, 255 P.3d 809 (2011). We review a trial court's decision to seat an alternate juror for an abuse of discretion. *State v. Johnson*, 90 Wn. App. 54, 73, 950 P.2d 981 (1998). As noted above, a trial court abuses its discretion when acts in a manifestly unreasonable manner or bases its decision on untenable grounds. *Robinson*, 193 Wn. App. at 217-18.

Excusal and recall of alternate jurors is governed by CrR 6.5. That rule reads in relevant part:

> Alternate jurors who do not replace a regular juror may be discharged or temporarily excused after the jury retires to consider its verdict. When jurors are temporarily excused but not discharged, the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror's ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations. Such alternate juror may be recalled at any time that a regular juror is unable to serve, including a second phase of any trial that is bifurcated. If the jury has commenced deliberations prior to replacement of an initial juror with an alternate juror, the jury shall be instructed to disregard all previous deliberations and begin deliberations anew.

When temporarily excusing an alternate juror, the trial court must instruct that juror "to continue to abide by her obligation to not discuss the case." *Feliciano Chirinos*, 161 Wn. App. at 850; *see*

also State v. Dye, 170 Wn. App. 340, 349, 283 P.3d 1130 (2012), *aff'd*, 178 Wn.2d 541 (2013). Before seating a temporarily excused alternate juror the trial court may, at its discretion, conduct a hearing to determine whether the alternate juror remains impartial and otherwise fit for service on the jury. *Dye*, 170 Wn. App. at 349; *Feliciano Chirinos*, 161 Wn. App. at 848-49.

The trial court decided to replace juror 4 with an alternate because juror 4 refused to deliberate. The alternative possibilities were to have juror 4 arrested or to delay deliberations, which the trial court considered but rejected as impractical. Because the trial court understood juror 4's refusal to deliberate as being related to a planned vacation, it was reasonable to conclude that seeking juror 4's arrest would not allow for deliberations that day. Allowing a break in deliberations would delay the verdict in a trial that had already lasted a month, but restarting deliberations would have little effect because the jury had only deliberated "for about three minutes" at that point. RP at 2786.

However, Miles and Ralls argue that the trial court fully dismissed the alternate jurors at the conclusion of the trial rather than temporarily excusing them, and therefore did not instruct them to remain impartial and avoid discussing the case with others. Unfortunately, the record does not reflect what exactly occurred. The transcript states only that "[t]he Court thanked and excused the alternates." RP at 2776. The official minutes are similarly terse: "Court thanks, releases alternate jurors." CP at 860. These are mere summary descriptions from which we cannot divine what the trial court actually said to the alternate jurors. The record does not reflect whether the trial court gave any particular instructions or whether it indicated to the alternate jurors that they might be recalled. On this available record, we are unable to determine whether the trial court temporarily excused or dismissed the alternate jurors or, if it temporarily excused

them, whether it properly instructed them to refrain from discussing the case or issued other instructions protecting them from undue influences.

The appellant bears the burden of providing an adequate record, including a transcription of any portion of the proceedings necessary to determine whether the trial court abused its discretion by failing to give an instruction. *See* RAP 9.2(b); *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012). When faced with an inadequate record, we may decline to review an issue. RAP 9.10; *State v. Wade*, 138 Wn.2d 460, 465, 979 P.2d 850 (1999). Here, the appellants have made a good faith effort to provide an adequate record, providing both a transcription of the relevant proceeding and the official minutes, but neither document describes the portion of the proceedings in sufficient detail to permit review. Matters outside of the record are better addressed in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335 n.5, 899 P.2d 1251 (1995).

IV. JURY QUESTION

Miles and Ralls argue that the trial court erred by answering a question from the jury in a manner that misstated the law and commented on the evidence. We disagree.

A. Misstatement of Law

We review for an abuse of discretion a trial court's decision to answer a question from the jury. *State v. Becklin*, 163 Wn.2d 519, 530, 182 P.3d 944 (2008). As noted supra, a trial court abuses its discretion when it acts in a manifestly unreasonable manner or bases its decision on untenable grounds. *Robinson*, 193 Wn. App. at 217-18. We review the legal accuracy and sufficiency of the response de novo. *Becklin*, 163 Wn.2d at 525, 530.

The jury sent the trial court the following question during deliberations:

> 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.

CP at 708. The trial court responded:

> Instruction #3 instructs you that each defendant's charge is to be assessed by you independently and so your verdict on one count as to one defendant should not control your verdict on any other count or as to the other defendant.
>
> Instruction #9 instructs that a person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime. Instruction #9 further defines when a person is an accomplice.

CP at 709. This response departed from the instructions already given to the jury only in that it added that the jury must assess each defendant's charges independently. The second paragraph of the response explained only that under instruction 9 the jury must independently determine whether each defendant was an accomplice.

Miles and Ralls argue that the trial court's response implied to the jury that it need not consider whether each defendant had knowledge that his companions planned to commit the crime. They assert that a reasonable juror could read the court's answer as a "yes" answer, that both defendants may be liable for the same crime. Br. of Appellant (Ralls) at 43. As they point out, such a response would be a misstatement of law because each of the defendants' charges required a separate mens rea and therefore constituted separate crimes. However, a juror could not reasonably read the trial court's measured response as simply answering "yes." The trial court directed the jury to the definition of "accomplice" in instruction 9, which clearly states the mens rea requirement. By instructing the jury that it must independently assess whether each defendant was an accomplice as defined in instruction 9, it accurately stated the applicable law. *See* RCW 9A.08.030; *see also.State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245 (2010). The trial court's response was an adequate and proper instruction to the jury.

2. Judicial Commentary on the Evidence

Miles and Ralls also argue that the trial court's response constituted judicial commentary on the evidence. We disagree.

A trial court commits presumptively prejudicial error by commenting on the evidence before the jury. *Hermann*, 138 Wn. App. at 606. Miles and Ralls state that "[t]he jury's question suggested that consensus had been reached that [they were] an accomplice to *some* crime," apparently to argue that the trial court's response solidified this consensus. Br. of Appellant (Ralls) at 46 (emphasis omitted) (italics in original). This is not a fair reading of the jury's question. The jury requested clarification as to the meaning of its instructions and did not suggest that it had decided any issue of fact or developed any particular consensus. In this context, the trial court's response cannot be considered commentary on any evidence before the jury, as it neither discusses nor colors that evidence. Miles' and Ralls' argument fails.

V. LFOs

Miles and Ralls argue that the trial court erred by imposing discretionary LFOs as part of their sentences without first inquiring into their ability to pay those LFOs. Although neither defendant objected to the imposition of the LFOs, we exercise our discretion to review the issue and remand for an individualized determination into their ability to pay them.

At sentencing,

> [t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).[3] In *Blazina*, our Supreme Court held that under this statute a sentencing court must make an "individualized inquiry into the defendant's current and future ability to pay" on the record before imposing discretionary LFOs. 182 Wn.2d at 837-38.

The court in *Blazina* also reaffirmed that we may, in our discretion, decide not to review a claimed violation of RCW 10.01.160(3) if the defendant failed to object to the imposition of the LFOs below. 182 Wn.2d at 834. In general, we will not review issues the defendant did not raise before the trial court. RAP 2.5(a). However, imposition of discretionary LFOs with neither court inquiry nor defense objection is often appropriate grounds for review. *See State v. Marks*, 185 Wn.2d 143, 145-46, 368 P.3d 485 (2016); *State v. Lyle*, ___ Wn.2d ___, 365 P.3d 1263 (2016); *see also State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011).

Here, the circumstances indicate that both Miles and Ralls may be unable to pay their LFOs. The trial court found both defendants indigent. "Although the ways to establish indigent status remain nonexhaustive . . . if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Further, at the time of their release Miles and Ralls would be convicted murderers fresh from serving lengthy prison terms. To say the least, this would put a significant damper on their ability to secure gainful employment. While neither of these factors is dispositive of their ability to pay, both suggest that the defendants face significant impediments warranting further inquiry. Under the circumstances, our review is warranted.

The State argues that even if we review the issue we should not find any violation of RCW 10.01.160(3) because the trial court was aware of Miles' and Ralls' circumstances and "it cannot be said that the trial court had no information before it from which an individualized

[3] The statute was amended in 2015. The amendment does not affect the issues in this case.

inquiry could be made." Br. of Resp't at 45. However, the record does not reflect that the trial court performed any such inquiry. Our Supreme Court was quite clear in *Blazina* that the record must show that the sentencing court conducted an individualized inquiry. 182 Wn.2d at 839. We may not assume that the sentencing court conducted the necessary inquiry and found that Miles and Ralls were able to pay the LFOs simply because it was *possible* that it did so.

Because the record shows that the trial court failed to conduct an individualized inquiry into Miles' and Ralls' ability to pay, it erred under *Blazina* by imposing discretionary LFOs at sentencing. Accordingly, we remand for the trial court to individually inquire into Miles' and Ralls' abilities to pay discretionary LFOs consistently with *Blazina*.

VI. APPELLATE COSTS

Miles and Ralls argue in their supplemental briefs that if the State substantially prevails in this appeal, we should decline to impose appellate costs on them. Under RCW 10.73.160(1),[4] we have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *Sinclair*, 192 Wn. App. at 389. Once an order of indigency is issued, that status is presumed to continue through appellate review. RAP 15.2(f).

Miles and Ralls were declared indigent, no evidence has been offered to rebut the presumption of continued indigency, and they will each serve lengthy prison sentences. Under these circumstances, we exercise our discretion to deny appellate costs in the event the State requests them.

[4] The statute was amended in 2015. The amendments do not affect the issues in this case.

CONCLUSION

We affirm Miles' and Ralls' convictions but remand for the trial court to individually inquire into Miles' and Ralls' abilities to pay discretionary LFOs consistently with *Blazina*. We also decline to impose appellate costs on either defendant.

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

BJORGEN, C.J.

We concur:

WORSWICK, J.

LEE, J.

BACKLUND & MISTRY

September 13, 2016 - 1:25 PM

Transmittal Letter

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