NO. 32925-9

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

DON A. MOORE

APPELLANT,

V.

STATE OF WASHINGTON

RESPONDENT

BRIEF OF RESPONDENT

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was there a courtroom closure where all portions of jury selection occurred in the open courtroom?
2. Was the aggressor instruction properly given where the evidence showed the defendant provoked the need to act in self-defense?
3. Was counsel ineffective for not requesting a lesser include offense instruction that was not supported by the evidence?
4. Was counsel ineffective for not objecting to a comment regarding penalty where no prejudice can be shown?
5. Was counsel ineffective for not objecting ER 404(a)(1) rebuttal of character evidence that was offered by defense?
6. Was defendant properly sentenced to a firearm enhancement where it was charged in the information and found by the jury?

B. STATEMENT OF THE CASE

1. Substantive Facts

On April 20, 2013, the defendant murdered Bruce Molony. CP 56. The defendant was charged by information with first-degree premeditated murder RCW 9A.32.030(1)(a); and the special allegations of being armed with a deadly weapon other than a firearm, and a firearm pursuant to RCW 9.94A.825. *CP 81-83.*

In early April 2013, the defendant told a friend (James Blue) that somebody had been stealing scrap from his property. On April 8, the defendant told Mr. Blue "*I found out who was taking the stuff*." When asked if he was going to report it, the defendant said "*Yeah, probably*", and then he said, "*It probably won't do any good, and I'll probably have to deal with it or handle it myself.*" RP

297. Mr. Blue said he would not have been surprised if the defendant assaulted the person he believed took the scrap. RP 298.[1]

On Thursday, April 11, 2013, the defendant made contact with Deputy Dennis Irwin at the Sheriff's office. RP 269, 275. The defendant claimed that between January and the middle of March, he asked the victim, Bruce Molony, to watch his property, while the defendant was out of the area. RP 269,761-62.[2]

The defendant claimed that after he returned home in March, he noticed scrap items missing and felt Mr. Molony had taken them. RP 269, 765. The defendant did not report the theft allegations for over three weeks. RP 269, 273. As support for his allegation of theft, the defendant provided two lists he had prepared indicating items he claimed were stolen, but neither included any knives. 269-70, 272, 502.

On, Friday April 12, 2013, the defendant gave Deputy Irwin a receipt form a recycler that he asserted indicated that Mr. Molony had once sold some aluminum wheels and an electric motor for $55. RP 270, 272.[3] The defendant

---

[1] Chief Criminal Sheriff's Deputy Dave Rodriguez, testified the defendant came to the Okanogan County Sherriff's office on April 9, 2013, and quickly became so agitated that he began experiencing shortness of breath and complained of chest pains. RP 282.

[2] The defendant's residence was a converted cargo trailer near the town of Riverside. RP 293-294. The defendant's property had junk vehicles and parts the defendant sold for scrap or used for trade. RP 294, 758. The defendant's property was next to Highway 97 and not fenced. RP 757-58. The victim, Bruce Molony, lived on property directly across the valley from the defendant's property. The defendant could see Mr. Molony's property from his own property. RP 271, 512.

[3] Even if the receipt had been legitimate, there was no indication the items belonged to the defendant. RP 270-71.

also surveilled the victim's property and told Deputy Irwin he had only seen the victim there twice since mid-March. RP 273.

On Saturday, April 13, 2013, Deputy Irwin advised the defendant of the status of the investigation into the defendant's allegations. RP 274.[4] Deputy Irwin also told the defendant his scheduled days off were the following Monday, Tuesday, and Wednesday, but that he would resume the investigation upon his return. RP 274, 275. At that time, Deputy Irwin did not have information sufficient to establish probable cause for Mr. Molony's involvement in the alleged theft. RP 274. The defendant told the deputy that he had considered confronting the victim, but decided to let law enforcement handle it. RP 274-75. The defendant opined that Mr. Molony may be armed, and told the deputy that if the defendant confronted the victim, "someone" would get shot. RP 277, 279.

In the day leading up to the murder, the defendant visited the residence of Edward McIntyre and Ronald Skogstad. RP 305-08, 315-16. Mr. McIntyre testified the defendant came to his residence and was upset and raving about someone that had taken his property. RP 305-08. Mr. McIntyre overheard the defendant tell his roommate Mr. Skogstad "*I'll kill the son of a bitch*" in reference to the person he alleged took his property. RP 306, 501.

[4] Deputy Irwin did contact the recycler, but was unable to speak with the person who may have had knowledge about the alleged receipt. RP 278.

Mr. Skogstad testified the defendant was "pissed off" and saying "*I'm gonna kill that motherfucker*". RP 315, 316. Mr. Skogstad told the defendant "No, you're not." The defendant replied "*I'm gonna kill that fucker*." RP 315. Mr. Skogstad testified the defendant's threat was not a conditional threat. RP 318, 324. Mr. McIntyre and Mr. Skogstad knew the defendant owned a .22 caliber pistol. RP 307-08, 317. In fact, the defendant had recently traded his newer .22 to an individual for an older .22 of the same model. RP 317-18. Mr. Skogstad told the defendant to let the cops take care of it, and that he should not take the law into his own hands. RP 329.

On April 20, 2013, the day of the murder, William Chandler was visiting his mother's residence that was near Mr. Molony's property. RP 331-33. Mr. Chandler was outside and heard gunshots close by. RP 334-35, 340. He heard one shot, then a pause of up to 20 seconds, and then several more shots. RP 336-37. Mr. Chandler said the shots sounded like a smaller caliber gun, rather than a rifle. RP 341-42. Mr. Chandler stated his mother returned home around 4:00 pm, and that he heard the shots between 15 and 20 minutes *before* his mother's arrival. RP 337. After the police arrived, Mr. Chandler contacted them and told them about the timeline of the shots. RP 338, 394.

On April 20, Deputies were dispatched to the victim's residence, based on a call from the defendant. RP 283, 374-78, 383. The defendant did not make the call to 911 until approximately 4:15 pm. RP 343-44, 371, 384. The defendant

asked for Deputy Irwin. RP 374, 376. There was wind noise throughout the call, indicating the defendant was outside. RP 377, 379-380. In the 911 call, the defendant said he shot the victim in the chest and stabbed him several times. The defendant said the victim was "still down" when the defendant emptied a gun into him, and then the defendant stabbed the victim an unknown number of times with a knife he claimed the victim had dropped. RP 375, 378, 379.

When the dispatcher asked if the defendant could check on the victim to see if he was breathing, the defendant stated, "*Bruce ain't bleedin'. Bruce ain't doin' nothing. Bruce is dead*." Dispatch asked if the defendant could check and see if the victim was alive, the defendant stated, "*He is not alive, I assure you*". RP 378. The defendant claimed he was injured, but was not actively bleeding. RP 378. The defendant said the victim's death occurred approximately 10 minutes before he called 911. RP 375, 378, 380-81.

The arriving deputies observed that the defendant had gotten his vehicle stuck, some distance down the driveway from the victim's location. RP 344-45, 395-96, 516. Deputy Irwin continued up the driveway, where he saw the defendant squatted down near a low rock wall at the top of the driveway, not far from the victim. RP 347-48.

The defendant told Deputy Irwin that he was going to work on a truck at his own property and he found a clutch part was missing. He told the deputy that

he was initially still going to let the deputy handle the theft, but then he "just lost it". RP 350-51.

The victim was found lying on his stomach with his right arm folded underneath him. The victim was lying on the flat area created by a low rock retaining wall where he had been working, and his legs overhung the edge of the low wall. RP 284, 352-53, 385-86, 511, 534, 746-47. The back of the victim's shirt was covered with dirt indicating the victim had been rolled over from his back to his front before police arrived. RP 352-53, 385-86, 534, 746-47, CP 56-72 – Exhibits 1-4. RP 287, 392, 507.

A knife sheath had been placed in the back pocket of the victim's pants, but was not attached to a belt or the pants. RP 285, 398. The sheath had been placed between the victim's wallet and the victim's body in the pocket. RP 532-33. The pocket where the sheath had been placed was agape, which was inconsistent with the sheath having been in the victim's pocket before he was rolled over. RP 534-35, 536, 749.[5] The sheath was unique and was similar to a sheath found in the defendant's vehicle. Deputies learned the defendant had made both sheaths. RP 539, 566.

[5] After police arrived, the victim was turned to his back by attending medical personnel. RP 284, 392. Police later turned the victim toward his stomach, in order to view injuries to his back. They were able to observe the pocket containing the sheath was no longer agape, but flattened, from the victim being on his back. RP 535.

After medical personnel arrived, Deputy Irwin re-contacted the defendant. RP 353-54. The defendant said after he discovered the clutch part missing that he drove up to the victim's residence and told the victim to "*Get in the truck because we're gonna go to town and you're gonna buy – buy me a new clutch to replace the one you stole*." RP 354. The defendant claimed that the victim responded "*What*?" and then got up and came toward him with a knife. RP 354-55. [6]

The defendant said he emptied his pistol into the victim then dropped the pistol. However, the pistol and the knife were found next to the victim's body, where the victim had originally been sitting at the top of the low retaining wall. RP 287, 354-55, 367-68, 392, 387-88, 507. Yet, the defendant claimed that after he emptied his gun into the victim, the victim threw a rock (later said a board) that hit him on the head; so the defendant claimed he picked up the knife and stabbed the victim. RP 354, 367. [7]

The defendant's vehicle got stuck when he backed off the edge of the driveway after he killed the victim. RP 355. The defendant claimed he called 911

---

[6] In an interview conducted with the defendant, the day after the murder, he claimed the victim was sitting down on the rock retaining wall (where his body was found) and he didn't have anything in his hand. RP 560, 572. The defendant alternatively said that the victim stood up, the defendant pulled out his gun, and then claimed the victim displayed a knife; and/or that the victim came around the house and had something in his hand and swiped at him RP 561 576, 685.

[7] In the later interview, the defendant described being at arm's length when he first shot the victim, who fell, and that the defendant was even closer when he shot again. RP 562-63, 581-82, 589, 590. The defendant described shooting the victim from as close as two or three feet away, despite no evidence of soot or stippling. RP 580. The defendant said the victim was down on the ground when he began stabbing the victim. RP 564.

before he tried to drive away from the scene. He claimed that he backed his vehicle off the driveway because he was on the phone. RP 355-66, 367 395, 565.

The defendant purchased the vehicle only five days before the murder. The vehicle was not registered in the defendant's name. RP 396, 508. Inside the vehicle, officers found a large knife with a sheath, an air rifle with a scope, and a hat with a badge resembling a law enforcement badge. RP 290-91, 395-96, 517-18, 538.

The defendant was wearing a t-shirt, a shoulder holster, and a long sleeve work shirt that covered the t-shirt and holster. RP 356-57, 362. The t-shirt, holster, and work shirt were removed from the defendant at the scene and taken as evidence. RP 356. There were some cuts visible on the left front of the t-shirt, but none on the work shirt. RP 356-57, 358, 359, 361, 741. [8]

The injury to the defendant's abdomen and head were not bleeding when officers arrived and photographed them. RP 389-90.[9] The claimed stab wound to his abdomen was just above the defendant's pant line. RP 540-41. Officers observed that the defendant had wiped blood from a symmetrical object onto the top back of his pants. RP 541-42, 740. Despite the fact that the defendant claimed to have driven his vehicle *after* being injured, there was no blood staining

[8] The defendant wore the holster on his left, as he was right handed. RP 597.
[9] The minor injuries to the defendant's head that he attributed variously to a knife, rock, or board, were superficial scratches not consistent with either blunt trauma, or stabbing or slashing wounds. RP 545, 744-46.

found anywhere on his vehicle's upholstery, seats, gearshift, or steering wheel. RP 735-36.

In the pocket of the defendant's work shirt a handwritten note was found. RP 358. The defendant had written the note that stated:

> *I, Bruce Molony, hereby assign any and all interests I hold on the acreage I occupy. This conveyance satisfies all value of items stolen from Don Moore while I was housesitting from the 1st January '13, to 3-16-13. I further agree to leave Okanogan County.*

RP 360. The note then had an "*X*" followed by the printed name "*Bruce Molony*" and another "*X*" followed by a blank signature line. Also found in the defendant's pockets were a cell phone, his keys, and a pocketknife. RP 362.

Officers observed that the stab wounds to the victim's back did not show signs of active bleeding. RP 391. The victim suffered four gunshot wounds to the head, three of which caused injury to the skull and brain. RP 423-24. One of the shots traveled through the victim's cheek, from the victim's right and at a downward angle that fractured his jaw, and lodged beneath the jaw. RP 430. The downward angle would have required the muzzle of the gun to be above the height of the entry wound. RP 430-31. The victim was six feet, two inches tall. RP 431. Another of the shots entered the victim's left cheek, and lodged at the base of his skull. RP 432-33. Another of the shots went sideways through the victim's upper lip. RP 434-35. Another of the shots entered the victim's skull near the right ear canal, at a downward angel, and fragmented in the victim's brain. RP 436-39.

There was also a gunshot wound to the victim's chest causing damage to his right lung, one to the right shoulder, and a gunshot wound to the back of the left elbow. RP 424-444. [10] The shot to the victim's chest entered at fifty-seven inches in height, slightly to the victim's left at a downward angle. RP 439-41. The gunshot wounds were all directed toward the victim from his front. RP 750. The gunshot wounds did not show any evidence of soot or stippling that would indicate a shot from close proximity. RP 428-47. There were no latent prints recovered from the defendant's gun that was found near the victim. RP 411-413.

The victim suffered stab wounds all inflicted to his side and back, including two wounds to his upper right side that entered his chest cavity, three to the back of his neck, and three to his back. RP 424, 452-58, 459-463. The wounds to the victim's side were inflicted at a downward angle. RP 459. There were no knife wounds to the victim's front. RP 424, 452-58, 459-463. There was no evidence of cuts or stab wounds to the victim's hands to indicate he tried to repel the knife attack. RP 468-69.

The lack of bleeding and blood flow from the stab wounds to the back was indicative of being inflicted at or near the victim's death, where he had insufficient heart function to bring blood to the injury sight. RP 463-64, 473.

---

[10] Based on the location of the shot that struck the back of victim's elbow, it could be characterized as a defensive wound. RP 445-449. There was also a grazing gunshot wound across the victim's left lower leg. RP 424-444

.

Spent casings were located at the scene between the locations where the defendant initially parked and where the victim was found. RP 522-26, 553-555, 681 -682 CP 59-72 – Exhibits 58, 59, 65-70.

The defendant stated he had never observed the victim with a gun. The defendant said he "knew" at some point he was going to have a "showdown with this guy". RP 568. On the day of the murder, the defendant said he just lost it and said to himself "*I'm going over, today's the day. I'm gonna go over there and arrest that son of a bitch. And on the way to the sheriff's office, he's buying a clutch*." RP 569-70. When officers questioned the defendant on details of the victim's actions, the defendant was vague or claimed lack of memory of details. RP 571.

Regarding the note, he had in his pocket, the defendant said, "*... I wrote a piece of paper on -I was gonna have him sign it before shit hit the fan telling him. 'You're gonna sign over your goddamn property to me and get the hell out of this valley*." The defendant claimed he had a plan about how he was going to get the victim to sign over his property. RP 570.[11] However, the defendant said when the victim greeted him upon arrival, saying, "*What's happening*?" the defendant got "...*so goddamn mad, my -- whatever my plan was went out the window. I just told him, I said, 'Get in your truck. We're going to town to buy a clutch and then you're*

[11] The defendant also stated he would not have "arrested" the victim if the victim had signed the note giving the defendant his property. RP 826, 828. The defendant said he planned to take the victim at gunpoint if he did not sign the defendant's note. RP 829.

going to the sheriff's office.' And 'I know it was you.' I said, 'I know it was you'." RP 573, 576-77. The defendant also said he told the victim he was going to jail. RP 574-75.

No firearms were located in the victim's residence or his vehicle. RP 286. There was no evidence the victim owned a handgun. RP 289, 290. The victim had previously sold or pawned his hunting rifle and shotgun before the date he was murdered. RP 290. The defendant's neighbors had not seen the victim carrying a firearm or heard shooting from the victim's property. RP 703-04.

The defendant was arrested. In a jail phone call, the defendant stated:

> "*I just fuckin' exploded. If the son of a bitch wasn't right straight across the valley from me where I had to sit there and look at him, I probably could have handled it. But I was sittin' there all -- ever since I found out he did it, I've been just fuckin' stewin'.*

RP 601. In another jail phone call, the defendant stated:

> "*I'm gonna shoot 'em for not arresting Bruce too. Son of a bitch. I shouldn't be here because he shouldn't have been out of jail. Actually, I wouldn't have had to if they would have arrested the fucker when they should have and I wouldn't a had to go arrest him my fucking self. If he wouldn't have resisted arrest, he wouldn't have got shot*."

RP 602. In yet another jail phone call made to Mr. Skogstad, the following exchange occurred:

> MR. MOORE: Yeah. I lost it –
>
> MR. SKOGSTAD: Well, you told me you were gonna do it, but I didn't think you were serious, brother.
>
> MR. MOORE: I lost it, bro.
>
> MR. SKOGSTAD: I know.
>
> MR. MOORE: Be careful you what say on this phone. I didn't tell you I was gonna do that. I told you I was gonna do it if he pulled a gun on me.

> MR. SKOGSTAD: You what?
>
> MR. MOORE: I told you I was gonna do that if he pulled a gun on me.
>
> MR. SKOGSTAD: You what? You told me a couple times you were gonna off him, and I said, 'Fuck, don't do it,' and you did it.
>
> MR. MOORE: You can't be talkin' on this phone, man. If he pulled a gun on me. I said if he pulls a gun on me –
>
> MR. SKOGSTAD: Okay. That's right. Sorry.

RP 318, 319, 322-23. Mr. Skogstad testified that when the defendant came to his residence before the murder, he did not recall the defendant ever telling him that the defendant would shoot the victim *if* the victim pulled a gun on him. RP 318, 325.

On direct examination of Mr. Skogstad, the State did not inquire of any prior violent acts committed by the defendant toward Mr. Skogstad. However, on cross-examination defense inquired about the length of the defendant's and Mr. Skogstad's friendship. RP 327. Defense asked if Mr. Skogstad knew the defendant's personality well. RP 326-27. Defense then asked Mr. Skogstad to describe the defendant's personality. To which Mr. Skogstad said "decent". RP 327. The defense then went on to ask Mr. Skogstad why he did not think the defendant would do anything after he made the threats, and Mr. Skogstad replied:

> "*Because I can't look at a friend who says somethin' like that - you just can't believe somethin' like that. I didn't think it was gonna happen... honest -- honestly with all my heart, I did not think it was gonna happen.*"

RP 327-28. Defense asked, "*You didn't believe anything like that would happen?*" Mr. Skogstad said "*No*." Defense asked, "*With Don*?", and Mr. Skogstad again stated "*No*."

Following the defendant's line of questioning, the State asked Mr. Skogstad on re-direct if the defendant had a temper. Mr. Skogstad said "Not that I saw." RP 329. The State asked Mr. Skogstad about a prior incident where the defendant grabbed him by the throat. RP 329. Mr. Skogstad stated:

> *"Yeah, but that was -- we'd been out on a road trip. We went and looked at a car and somethin' like that, him and I. He didn't have wheels, so we took my pickup. And -- and I don't know what happened. It just -- out of the clear blue, he reached out and grabbed my throat with his right hand, and I knocked it off with my right hand and told him he better not do that again. But that was the end of that*."

RP 329. The State asked if it was unexpected, and Mr. Skogstad said, *"I have no idea where it even came from."* RP 329.

The DNA sample from the blood on the defendant's t-shirt was from the defendant, who was the sole contributor. RP 657. The DNA samples from the blood on the front, and the back right pocket, of the defendant's pants were from the defendant, who was the sole contributor. RP 658-662. However, the DNA sample from the knife sheath that had been placed in the victim's pocket tested positive for both the victim's *and* the defendant's DNA. RP 655-56.

The defendant's t-shirt had three vertical cuts that were approximately parallel - one that was 1 ¼ inches long, one that was 3 ¼ inches long, and one that was 7 inches long. . RP 729-30, CP 59-72 – Exhibit 166. Examination of the

fibers of each defect indicated they were cut, not torn, and consistent with being caused by a knife. RP 730. The 7-inch cut had a "Y" shape that indicated two separate cutting motions. RP 731-32. The multiple cuts made to the defendant's shirt did not correspond to the single injury to the defendant's abdomen in either location, or length. RP 743-44.

At trial, the defendant indicated he had four or five contacts with Deputy Irwin, but became unhappy with law enforcement actions and decided he "didn't want him (Mr. Molony) out there anymore." RP 772, 775. The defendant drove to the victim's residence uninvited, armed with multiple knives and an unregistered .22 pistol. RP 775-76, 818, 838, 843. The victim was sitting on and working near a rock wall when the defendant arrived, and did not come toward the defendant. The defendant walked toward the victim. RP 780. The defendant said he continued to approach the victim as he was telling the victim he was "under arrest" and that he was not going to wait for the Sheriff's office. RP 781-82, 804, 838. [12]

On cross the defendant said the victim fell to the ground on his back after the *first* shot and that he did not let the victim get up. RP 818-19, 854, 855, 859. [13]

---

[12] The defendant said his gun was concealed by his outer shirt. RP 785-86, 805. The defendant had previously told police he had his gun out of the holster, holding near his waistline, as he approached the victim. RP 863.

[13] At trial, the defendant said he didn't remember details of stabbing the victim, but added new details about how he claimed the victim came at him. RP 787, 790, 805-806. The defendant testified the knife he used to stab the victim was his, but that it must have been stolen by the victim. RP 791, 793-94.

The defendant wanted to make sure he killed the victim and referred to the victim as “an enemy”. RP 821, 855, 856.

In contradiction to the recorded 911 call, the defendant claimed he called 911 immediately, and was in his vehicle while on the phone. RP 795-96, 845-46.

The defendant stated he had never seen the victim with a gun and that he was not fearful of the victim when he had invited the victim to watch his property. RP 813-14. The defendant stated he saw and spoke with the victim at least twice after the victim left the defendant’s property. In those meetings, the defendant did not tell the victim that he believed the victim had taken his property, or ask to come to the victim’s property to look for items. RP 816. The victim actually offered to try to help the defendant with his missing property. RP 814-15. The victim made no threats toward defendant during their contacts. RP 836.

2. Procedural Facts.

On September 9, 2014, jury selection began. During jury selection, the State began with the following introduction that included:

> ...My job as the prosecuting attorney representing the State is to present the evidence to prove to the jury beyond a reasonable doubt that the offense occurred. That burden is solely upon the State. The defense role is to basically argue or try to point out that reasonable doubt does exist. They may or may not present evidence. The burden remains with the State. The judge in this case, as you've already seen somewhat, makes decisions. He'll rule on objections if there is an objection that either party makes. *And if there is a verdict or a conviction at the end, the judge metes out punishment. The jury does not decide that part of it (emphasis added).* So what does that leave? Well, it leaves the most important thing which is the jury making a decision whether or not you as a juror, you are convinced -- it's proven to you beyond a reasonable doubt that the crime alleged was committed.

RP 156-57.[14] The State later said to the panel:

> ...But Ms. Maples had expressed some concern about being uncomfortable or unable to make a decision or make that verdict of trying to hold somebody accountable or find them guilty of in this case the charge is murder in the first degree. And that's a perfectly fine position to have. And we run into that not too regularly where somebody for reasons of conscience, religion, or whatever reason, really is not comfortable making that decision when it comes down to deliberating and making a decision either way. Does anybody find themselves in that position of -- Granted the charges in this case are serious.
> ...And I don't mean to diminish this in any way. This is a difficult process. It doesn't matter what case you would be sitting on. It has import and it has effect on people's lives, so I don't diminish the importance and the seriousness of it. But what I'm trying to find out is if that is something that when you're asked to make a decision that you just physically or mentally just could not do that.

RP 157, 159. The following exchange occurred:

> MR. SLOAN: Okay. Of this type specifically, this type of charge?
>
> JUROR NUMBER 72: Yes. I just -- I – I could not do it.
>
> MR. SLOAN: Okay. Your Honor based on that response, which was definitive, we would move to excuse Juror 72, Ms. Freeman.
>
> THE COURT: Ms. Freeman, there's -- there's a difference between "I don't know" and being unsure. But what I'm hearing you say is, no, you do know.
>
> JUROR NUMBER 72: I do know.
>
> THE COURT: Is that correct?
>
> JUROR NUMBER 72: I -- I cannot convict.
>
> THE COURT: And so our whole idea here is that we start the trial without feelings or opinions or attitudes one way or the other. You're kind of expressing a fairly concrete opinion. And so for that reason, I'm going to grant the State's request, and you'll be excused. Thank you. We appreciate your candor. Please leave your paddle right there on the chair. Juror Number 72 excused. Thank you.
>
> JUROR NUMBER 72: Thank you.

---

[14] The court advised the jury in concluding instruction number 1 that, "You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful. As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict." RP 898-899.

> MR. SLOAN: I'll go to the next paddle, Number 79, Ms. Edwards.
>
> JUROR NUMBER 79: Yeah. I'm so opposed to the death penalty, so I don't belong on a jury that's deliberating a capital case.
>
> MR. SLOAN: Okay. And just so you know, this is not a capital case.
>
> JUROR NUMBER 79: Oh. So then that's different.
>
> MR. SLOAN: Okay. With that knowledge, are -- what you're feeling on if you were asked to reach a decision in this case in the charge of first degree murder, are you -- are you capable of making that decision at the end of the case?

RP 161-162. There was no objection from the defendant or the court, nor any request for any limiting instruction. RP 162.[15]

After jury questioning, and the exercise of challenges for cause, the parties exercised peremptory challenges in open court. The parties noted their challenges on a jury-seating chart that was used as a "strike sheet". The strike sheet was made part of the record. RP 222-223. CP 215-221. See also Supplemental Clerk's Paper Index January 15, 2016 (Jury panel and strike sheets were filed 9/9/14).[16]

---

[15] During the same line of questioning, the following exchange occurred:

> MR. SLOAN: What's your thoughts on this?
> JUROR NUMBER 91: Well, considering the severity of it, I don't think I -- I definitely know that I couldn't, you know, really give a guilty/not guilty. I really couldn't.
> MR. SLOAN: So you're -- And, again, you've seen kind of the distinction. You're of the mind definitely you could not –
> JUROR NUMBER 91: Yeah.
> MR. SLOAN: -- act in that role?
> JUROR NUMBER 91: Not in the severity of this kind of case.
> MR. SLOAN: Your Honor, similarly, we would move to excuse Ms. Webster, Number 91, for cause. RP 163.

[16] The original strike sheet was maintained in the clerk's file. CP 215-221. A duplicate jury list was made by the clerk, indicating the challenges, and utilized by the clerk's office for processing payments. The duplicate list was kept in the clerk's box pending completion of those tasks. Supplemental Index CP 204-214.

The judge called the jurors who were not challenged, in order by juror number, to take seats in the jury box, leaving those subject to peremptory challenges seated. RP 223-225. No challenges or objections were made to either party's exercise of their peremptory challenges or the procedure used. RP 222-225.

Prior to trial, the State proposed WPIC 16.04, Aggressor instruction. RP 875, CP 91. The State also proposed WPIC 4.11 and 27.02, lesser included of Second Degree Murder. RP 875, PC 96, 98. Defense proposed a self-defense instruction, and commented that WPIC 16.04 was also an appropriate instruction. RP 876. Defense initially proposed WPIC 16.08, no duty to retreat, but withdrew it. RP 877, 882. The court agreed to give the self-defense instruction and the aggressor instruction. RP 879, 882.

The State also proposed, and the court gave, a special verdict form and instructions. CP 55, 94. Instruction 17 stated:

> For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime.
>
> A knife having a blade longer than three inches is a deadly weapon.
>
> A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

CP 94 (Instruction 16); See also WPIC 2.07.01; 2.07.02. The special verdict form inquired:

> QUESTION 1: Was the defendant armed with a deadly weapon that was knife having a blade longer than three inches, at the time of the commission of the crime?
> ANSWER: _____ (Write "yes" or "no")

> QUESTION 2: Was the defendant armed with a deadly weapon that was a pistol, revolver, or any other firearm, at the time of the commission of the crime? ANSWER: _____ (Write "yes" or "no")

CP 55. The special verdict instructions and inquiry required the jury to find unanimously the defendant was armed with a knife with a blade longer than 3 inches, and find the defendant was armed with a pistol, revolver, or any other firearm, in order to answer yes. CP 55, CP 93 (Instruction 17) See also WPIC 160.00. Defense did not object to the special verdict instructions or forms. RP 876.

The jury found the defendant guilty of first-degree murder and found the defendant was armed with a deadly weapon that was a knife with a blade longer than 3 inches, and a deadly weapon that was a pistol, revolver, or any other firearm. CP 55, 56.

C. ARGUMENT

1. AS JURY SELECTION OCCURRED IN AN OPEN COURTROOM, DEFENDANT FAILS TO SHOW ANY CLOSURE OF THE COURTROOM.

a. RAP 2.5(a)(3) Should Be Applied to Right to Public Trial Cases, As It Is To Other Constitutional Rights.

Ordinarily an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is manifest and truly of constitutional dimension. *State v. McFarland*, 127 Wash. 2d 322, 332-33, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995); *State v. Davis*, 41 Wash. 2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). Such a restriction is necessary because the failure to raise an objection in the trial court "deprives the trial court of [its] opportunity to

prevent or cure the error" thereby undermining the primacy of the trial court. *State v. Kirkman*, 159 Wash. 2d 918, 926, 155 P.3d 125 (2007); *State v. Scott*, 110 Wash. 2d 682, 687, 757 P.2d 492 (1988) (the constitutional error exception in RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below). A defendant attempting to raise a claim for the first time on appeal must show both a constitutional error and prejudice to his rights. *Kirkman*, 159 Wash. 2d at 926-27. A defendant can demonstrate actual prejudice on appeal by making a "plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case." *Kirkman*, 159 Wash. 2d at 935.

Prior to the adoption of RAP 2.5, the Washington Supreme Court held that a closed courtroom claim could be raised on appeal even if there was no objection on this ground in the trial court. *State v. Marsh*, 126 Wash. 142, 145-46, 217, 217 P. 705 (1923) P.705 (1923).

> At common law, constitutional issues not raised in the trial court were not considered on appeal, with just two exceptions. If a defendant's constitutional rights in a criminal trial were violated, such issue could be raised for the first time on appeal. Secondly, where a party raised a constitutional challenge affecting the jurisdiction of the trial court, an appellate court could also reach the issue.

State v. WWJ Corp., 138 Wash. 2d 595, 601, 980 P.2d 1257, 1260 (1999) (citations omitted). These common law rules were replaced in 1976 by the adoption of the Rules of Appellate procedure, and specifically RAP 2.5(a). *WWJ Corp.*, 138 Wash. 2d at 601. As noted in a recent opinion, see *State v. Beskurt*,

176 Wash. 2d 441, 449-50, 293 P.3d 1159 (2013) (Madsen, J., concurring), when the Supreme Court decided *State v. Bone-Club*, 128 Wash. 2d 254, 906 P.2d 325 (1995) in 1995, it cited to the rule in *Marsh*, 126 Wash. 142 without taking into consideration of the impact of RAP 2.5(a)(3). See *Bone-Club*, 128 Wash. 2d at 257. This failure to consider the impact of RAP 2.5(a)(3) has persisted in other decisions. *See, e.g., State v. Brightman*, 155 Wash. 2d 506, 514-15, 122 P.3d 150 (2005).

As three justices of the Supreme Court recently concluded, the appellate courts should refuse to apply a rule that conflicts with the Rules of Appellate Procedure and subverts the intent of RAP 2.5(a). *Beskurt*, 176 Wash. 2d at 449-51 (Madsen, J., concurring). The Court in *Bone-Club*, 128 Wash. 2d 254 did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court to be considered on appeal should be corrected.

Respect for stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. *State v. Devin*, 158 Wash. 2d 157, 168, 142 P.3d 599 (2006). In this instance, the rule is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure. It is harmful in at least three respects: 1) the trial court is denied the opportunity to correct any error when no objection is required to preserve the issue for review; 2) it allows a

defendant to participate in procedures and practices in the trial court that are to his benefit, yet still claim that these practices are the basis for error in the appellate court; and 3) as the *Marsh* rule does not require a defendant to show a manifest error or any actual prejudice before obtaining new trial, public respect for the court is diminished and judicial resources are wasted when retrial is given as a remedy when it is evident from the record that there is no prejudice to the defendant.

These harms can be seen in the case now before the court. The trial court had the parties indicate their peremptory challenges in writing on a paper that was passed back and forth; neither party voiced an objection to this procedure. The defendant exercised his peremptory challenges thereby eliminating venire persons he did not want on his jury. Had defendant objected to this procedure and argued it constituted a violation of his right to an open courtroom, the trial court might have opted for different procedure just to eliminate a potential claim. Defendant cannot articulate any practical and identifiable negative consequences to his trial or show that he was prejudiced by the use of the written process to indicate peremptory challenges. His failure to object to what he now claims was a courtroom closure and a denial of his right to a public trial coupled with his inability to establish resulting actual prejudice should preclude appellate review. Despite the fact that he cannot show any actual prejudice from

the procedures used, defendant nevertheless, argues that he is entitled to a new trial. This is an abuse of the judicial process that should not be condoned.

This court should find that defendant's failure to object brings this issue under RAP 2.5(a)(3) and that he has failed to show an issue of truly constitutional magnitude that has caused him actual prejudice. As such, this court should refuse to review the claim.

b. The Courtroom Was Open Throughout Voir Dire Proceedings.

A criminal defendant's right to a public trial is found in Wash. Const. art. I, § 22, and the Sixth Amendment to the United States Constitution; both provide a criminal defendant the right to a "public trial by an impartial jury". The state constitution also provides that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. Wash. Const. art. I, § 10; *State v. Lormor*, 172 Wash. 2d 85, 91, 257 P.3d 624 (2011); *Seattle Times Co. v. Ishikawa*, 97 Wash. 2d 30, 36, 640 P.2d 716 (1982); *Press-Enter. Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v. Sublett*, 176 Wash. 2d 58, 72, 292 P.3d 715 (2012).

"There is a strong presumption that courts are to be open at all trial stages." *Lormor*, 172 Wash. 2d at 90. The right to a public trial includes voir dire. *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. *State v. Momah*, 167 Wash. 2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, *Bone-Club*, 128 Wash. 2d at 257 (no spectators allowed in courtroom during a suppression hearing) and *State v. Easterling*, 157 Wash. 2d 167, 172, 137 P.3d 825 (2006) (all spectators, including co-defendant and his counsel, excluded from the courtroom while co-defendant plea-bargained); 2) the entire voir dire is closed to all spectators, *Brightman*, 155 Wash. 2d at 511; 3) and is implicated when individual jurors are privately questioned in chambers, see *Momah*, 167 Wash. 2d at 146 and *State v. Strode*, 167 Wash. 2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the *Bone-Club* factors).

When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect. *In re Orange*, 152

Wash. 2d 795, 807-8, 100 P.3d 291 (2004), *as amended on denial of reconsideration* (Jan. 20, 2005).

In the case now before the Court, defendant argues that the procedure used by the court for exercising peremptory challenges constituted a courtroom closure. The record shows the following occurred: At the close of questioning, the attorneys started the peremptory challenge process. Next, the court read off the names of the venire persons who would sit as jurors on the case. The written sheet indicating the peremptory challenges used by each side was filed in the clerk's file, thereby making it a public document. No objections were raised regarding either party's use of peremptory challenges.

Defendant has failed to identify any ruling of the court that closed the courtroom to any person. All jury selection was conducted in the courtroom as opposed to the judge's chambers or the jury room. Defendant can point to no Washington case that has found a courtroom closure under these circumstances. Rather, defendant argues that conducting the peremptory challenge process in writing effectively "closed" the courtroom. [17]

[17] The right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *Brightman*, 155 Wash. 2d at 514 (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996)). But not every interaction between the court, counsel, and defendants will implicate the right to a public trial. Sublett, 176 Wash. 2d at 71.

To decide whether a particular process must be open to the press and the general public, the court in *Sublett*, 176 Wash. 2d 58 adopted the "experience and logic" test formulated by the United States Supreme Court in *Press-Enter. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). *Sublett*, 176 Wash. 2d at 73, 141.

> The first part of the test, the experience prong, asks, "whether the place and process have historically been open to the press and general public". The logic prong asks, "whether public access plays a significant positive role in the functioning of the particular process in question". If the answer to both is yes, the public trial right attaches, and the *Waller* or *Bone-Club* factors must be considered before the proceeding may be closed to the public. We agree with this approach and adopt it in these circumstances.

Sublett, 176 Wash. 2d at 73. Applying that test, the court held that no violation of Sublett's right to a public trial occurred when the court considered a jury question in chambers. *Sublett*, 176 Wash. 2d at 74-77. "None of the values served by the public trial right is violated under the facts of this case... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." *Sublett*, 176 Wash. 2d at 77.

Division III of the Court of Appeals addressed whether challenges for cause done in a sidebar constituted a courtroom closure under the experience and logic test in *State v. Love*, 176 Wash. App. 911, 309 P.3d 1209 (2013), *aff'd,* 183 Wash. 2d 598, 354 P.3d 841 (2015). As to the experience prong, the court concluded:

> The history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some

> evidence that they are conducted privately. Our experience does not require that the exercise of these challenges be conducted in public.

Love, 176 Wash. App. at 919. Under the logic prong, the court found that none of the purposes of the public trial right were furthered by a party's actions is making a challenge for cause or a peremptory challenge as a challenge for cause creates an issue of law for the judge to decide and a peremptory challenge "presents no questions of public oversight." *Love*, 176 Wash. App. 911. The court concluded that use of a side bar to conduct challenges for cause did not constitute a courtroom closure. *Love*, 176 Wash. App. at 920.

Upon review, the Supreme Court, in *Love*, 183 Wash. 2d at 607, found that observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available.[18] The public was present for and could scrutinize the selection of the jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury section. The procedures used comported with the minimum

---

[18] Appellant appears to assert based on the comment that "*The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available*" from *Love*, 183 Wash. 2d 598, 183 Wn.2d at, 607, that to comport with public trial requirements, these documents would have to be *immediately* filed and available. Clearly, this argument does not follow from the comment in *Love*, 183 Wash. 2d 598. Transcripts from trial proceedings, and documents created or discussed during trial, would rarely be immediately available for public inspection.

guarantees of the public trial right and find no closure here. *Love*, 183 Wash. 2d at 607.

In the case now before the court, defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during the voir dire process. The record indicates that all of voir dire and the exercise of peremptory challenges were carried out in an open courtroom. Peremptory challenges were made by the attorneys in open court, albeit by a written process. Presumably, defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. The written record of the process was reviewed by the court and filed in the clerk's file, making it available for public inspection. None of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory challenges. The record offers no basis to assume that anything occurred during this process other than the written communication, among counsel and the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge. Anyone can subsequently look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. [19]

[19] Additionally, both the prosecution and defense are forbidden from removing a juror with a peremptory challenge for an improper purpose. Thus, if there was a concern that a juror was being removed for an improper reason, it is immaterial which party exercised a peremptory against that juror. Any potential juror who felt that he or she was being improperly removed from the jury could

Defendant has failed to identify any closure of the courtroom during voir dire and fails to show how the procedures used in an open court undermined the purposes of the public trial right. Anyone sitting in the courtroom would know which jurors were excused for cause and why. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made and the party who made it. This document is easily understood, and it was made part of the court record, available for public scrutiny. These procedures satisfied the court's obligation to ensure the open administration of justice.

c. Defendant did not present competent evidence to support the claim that the strike sheets were not part of the publicly available file.

The record offered by the defendant does not support the absence of the strike sheet, or a delay in placing the strike sheet, in the clerk's file. Defendant asserts the absence of the strike sheet based on reference to the clerk's electronic docket and the attorney's email exchanges with a staff member at the clerk's office. The emails and the docket are not the clerk's file or the official record of the trial. From the emails (CP 178-81), it is apparent that Appellant's attorney did not actually review the clerk's file, but rather sent an email asking a staff person to provide docket numbers. The attorney was advised the strike sheets were not

raise his or her concern with the trial court. Under the written process used here, the court would know who had exercised its peremptory against that person and could decide whether it was necessary for that party to explain its reasons for doing so. The procedure used below protects the values of the public trial right.

input into the "docketing" so there was no assigned docket number. The attorney again requested docket numbers, but did still did not apparently seek review of the actual physical file, or ask if the requested documents were contained within the clerk's physical file. See CP 178-81.

The accuracy of, and reliance upon, docket notations is questionable; as the notes do not indicated who made the notations, or whether they were made in court or out of court.[20] The notes and emails are not sworn or signed, nor is their accuracy affirmed in any manner by any party.

The records offered by defendant are hearsay and would not be admissible under the evidence rules. Moreover, they do not satisfy any standard of admissibility under ER 803(10) - Absence of public record or entry. The rule requires such evidence be in the form of a certification in accordance with ER 902 (self-authentication), or testimony. The proponent of the evidence is required to establish by certificate under ER 902 or by live testimony that a diligent search failed to disclose the record in question.[21] The records offered are not sufficient to prove the absence of the record.

Jury selection was part of trial record. The issue raised by defendant is not only speculative, but is contradicted by the presence of the actual records in

[20]The Acords docket, is not a complete or official record of the file, and is not determinative of the documents contained within the physical file. As an example, reference to a "Letter review" between the 12/11/13 and 12/16/13 does not include a separate docket entry for the letter that was reviewed.

[21] The records offered are also not the type permitted on review under RAP 9.1(a).

the clerk's physical file. The clerk's file is the court record, and it is notice to the world of what it contains and all interested persons have access to it. *Shumate v. Ashley*, 46 Wash. 2d 156, 157, 278 P.2d 787, 788 (1955).

The strike sheets were properly made part of the clerk's file. RCW 2.32.050 sets out the powers of court clerks, and RCW 36.23.030 sets out the records to be kept by the Superior Court Clerk.[22] The strike sheets are not formal pleadings, orders, decrees, or judgments, and not delivered for the purpose of filing per court rule or statute. As such, there is not a requirement to assign them a "docket" number. The strike sheets would fall within the "records, files, and other books and papers appertaining to the court" that are to be kept by the clerk. The absence of an assigned docket number is not determinative of whether or not the strike sheet is part of the record. The strike sheets were in the publicly available

[22] RCW 2.32.050, states in part: ... it is the duty...of each county clerk for each of the courts for which he or she is clerk:...(2) To record the proceedings of the court; (3) To keep the records, files, and other books and papers appertaining to the court; (4) To file all papers delivered to him or her *for that purpose* in any action or proceeding in the court as directed by court rule or statute (emphasis added);...
RCW 36.23.030 states in part The clerk of the superior court ...shall keep the following records: (1) A record in which he or she shall enter all appearances and the time of filing *all pleadings* in any cause; (2) A docket in which before every session, he or she shall enter the titles of all causes pending before the court at that session in the order in which they were commenced, beginning with criminal cases, noting in separate columns the names of the attorneys, the character of the action*, the pleadings on which it stands* at the commencement of the session. One copy of this docket shall be furnished for the use of the court and another for the use of the members of the bar; (3) A record for each session in which he or she shall enter the names of witnesses and jurors, with time of attendance, distance of travel, and whatever else is necessary to enable him or her to make out a complete cost bill; (4) A record in which he or she shall record the daily proceedings of the court, and *enter all verdicts, orders, judgments, and decisions thereof*, *which may, as provided by local court rule, be signed by the judge*; but the court shall have full control of all entries in the record at any time during the session in which they were made;...(emphasis added)...

file. Defendant cannot show with any credible evidence that they were unavailable.

2. THE TRIAL COURT CORRECTLY GAVE THE AGGRESSOR INSTRUCTION.

a. The claim of error should not be reviewed for the first time on appeal.

It has long been the law in Washington that an appellate court may refuse to review any claim of error that was not raised in the trial court. RAP 2.5(a); *State v. Lyskoski*, 47 Wash. 2d 102, 108, 287 P.2d 114 (1955). The underlying policy of the rule is to encourage the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial. *Scott*, 110 Wash. 2d at 685. The rule comes from the principle that trial counsel and the defendant are obligated to seek a remedy to errors as they occur, or shortly thereafter. *State v. O'Hara*, 167 Wash. 2d 91, 97-98, 217 P.3d 756, 760 (2009), *as corrected* (Jan. 21, 2010), as corrected (Jan. 21, 2010).

The general rule that an assignment of error be preserved includes an exception when the claimed error is a manifest error affecting a constitutional right. RAP 2.5(a), supra. In analyzing the asserted constitutional interest, the court does not assume the alleged error is of constitutional magnitude. *Scott*, 110 Wash. 2d at 687. If a court determines the claim raises a manifest constitutional error, it may still be subject to a harmless error analysis. *McFarland*, 127 Wash. 2d at 333;

State v. Lynn, 67 Wash. App. 339, 345, 835 P.2d 251 (1992). S*ee also Scott*, 110 Wash. 2d 682 (holding because nothing in the constitution requires the meaning of particular terms in a jury instruction to be specifically defined, the defendant's unpreserved claim regarding the jury instructions did not constitute constitutional error and, thus, was not properly preserved for appellate review).

b. The State met the evidentiary burden to warrant the aggressor instruction.

When a defendant seeks to have the jury instructed on self-defense, the State may seek to have the jury provided with a first aggressor instruction—an instruction providing that if the jury finds the defendant provoked the need to act in self-defense, his or her claim for self-defense must fail. *See State v. Bea*, 162 Wash. App. 570, 57, 254 P.3d 948 (2011).

Because a first aggressor instruction potentially removes self-defense from the jury's consideration, relieving the State of its burden of proving that a defendant did not act in self-defense, the instruction should be given only sparingly. *Bea*, 162 Wash. App. at 575–76 (citing *State v. Douglas*, 128 Wash. App. 555, 563, 116 P.3d 1012 (2005); *State v. Riley*, 137 Wash. 2d 904, 910 n. 2, 976 P.2d 624 (1999)). It is error to give such an instruction when it is not supported by the evidence. *State v. Wasson*, 54 Wash. App. 156, 158–59, 772 P.2d 1039 (1989) (citing *State v. Brower*, 43 Wash. App. 893, 901, 721 P.2d 12 (1986); *State v. Upton*, 16 Wash. App. 195, 204, 556 P.2d 239 (1976)).

Nevertheless, when there is credible evidence from which the jury could reasonably find that the defendant provoked the need to act in self-defense, it is not error to provide the instruction. *Riley*, 137 Wash. 2d at 909–10. An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. *State v. Davis*, 119 Wash. 2d 657, 666, 835 P.2d 1039 (1992)

Whether sufficient evidence supported the first aggressor instruction is a question of law and is, therefore, reviewed de novo. *State v. Stark*, 158 Wash. App. 952, 959, 244 P.3d 433 (2010). When determining whether evidence was sufficient to support the giving of an instruction, the court views the supporting evidence in the light most favorable to the party who requested the instruction; accordingly, the State needed only to produce some evidence that the defendant was the first aggressor to meet its burden of production. *See Bea*, 162 Wash. App. at 577.

Here, evidence at trial showed that the defendant, after stating he was going to kill the victim, went armed and uninvited to the victim's residence, threatened the victim with forcible and unlawful imprisonment, and then killed the victim. *Only* the defendant's varying and self-serving versions of events support his claim that the victim stole anything from him, or that the victim moved toward the defendant when he confronted the victim.

The physical evidence and testimony did not support any claim or presumption that the victim ever had the opportunity to move toward the defendant, let alone stand up. On the contrary, the testimony and physical evidence that included: the location of the body, the location of the weapons and casings, the debilitating and lethal nature of the gunshot wounds and their downward trajectories, and the lack of stippling or residue, showed the victim did not move from his original position at the low rock wall, and that he ended up on his back at that location.

The evidence also included: the 911 made 30-35 minutes after the murder, cuts made to the defendant's shirt, the lack of blood in the car, the defendant's non-serious injuries, the lack of the victim's DNA on the defendant, and the placement of the sheath on the victim, support a completely different set of events than the defendant tried to offer.

The evidence also indicated the defendant shot the victim, attempted to leave the scene, got his vehicle stuck, and then walked back up near the victim. He made cuts to his shirt and then inflicted minor injury to himself to make it appear as if he had been attacked. The evidence indicated the defendant rolled the dying victim over to his stomach and inflicted numerous stab wounds to the victim.

Contrary to defendant's argument and citation to *Riley*, 137 Wash. 2d 904, the defendant did not offer mere nonthreatening words as provocation.[23] The defendant expressed his intent to kill the victim, armed himself, and then entered the victim's property to confront and kill the victim.

Even if one were to accept at face value the defendant's story that he intended to effectuate an unlawful arrest and imprisonment of the victim, the victim would have been legally permitted to resist such unlawful action and would have had no duty to retreat. *See State v. McCrorey*, 70 Wash. App. 103, 851 P.2d 1234 (1993) *abrogated by State v. Head*, 136 Wash. 2d 619, 964 P.2d 1187 (1998) (person being illegally arrested may use reasonable and proportional force to resist arrest); *State v. Hiatt*, 187 Wash. 226, 237, 60 P.2d 71, 75 (1936) (one who is where he has a lawful right to be is under no obligation to retreat when attacked).

In this case, the State met its burden of production by producing some evidence that the defendant provoked the need to act in self-defense. Ultimately, it is the function of the jury to assess the credibility of a witness and the reasonableness of the witness's responses. *E.g., State v. Demery*, 144 Wash. 2d

[23] Appellant's reliance on *Brower*, 43 Wash. App. 893, is similarly misplaced. *See State v. Wingate*, 155 Wash. 2d 817, 822, 122 P.3d 908, 910 (2005), (finding *Brower*, 43 Wash. App. 893, dealt with an unconstitutionally vague aggressor instruction that used the term "unlawful act" that created a necessity to respond in self-defense, rather than an intentional act that is reasonably likely to provoke a belligerent response, as the present instruction does).

753, 762, 30 P.3d 1278, 1283 (2001). In this case, the jury did not accept the defendant's story as credible in light of the evidence.

3. THE DEFENDANT WAS NOT ENTITLED TO A LESSER-INCLUDED MANSLAUGHTER INSTRUCTION, AND COUNSEL WAS NOT INEFFECTIVE FOR NOT REQUESTING ONE.

a. The facts did not support a lesser-included instruction of manslaughter.

A court's review of an ineffective assistance of counsel claim is de novo. *State v. Powell*, 150 Wash. App. 139, 152, 206 P.3d 703 (2009). To prove ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that this performance prejudiced him. *State v. Thomas*, 109 Wash. 2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wash. 2d at 335, as amended (Sept. 13, 1995).

Counsel's performance is deficient if it falls below an objective standard of reasonableness, *State v. Stenson*, 132 Wash. 2d 668, 705, 940 P.2d 1239 (1997), but legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel. *In re Hubert*, 138 Wash. App. 924, 928, 158 P.3d 1282 (2007). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *Powell*, 150 Wash. App. at 153.

Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, *and* the failure to request the instruction caused prejudice. *State v. Thompson*, 169 Wash. App. 436, 495, 290 P.3d 996, 1028 (2012).

A lesser-included offense instruction need not be given if unsupported by the evidence. *State v. Benn*, 120 Wash. 2d 631, 659-60, 845 P.2d 289, 306 (1993); *State v. Workman*, 90 Wash. 2d 443, 447–48, 584 P.2d 382 (1978). [24]

First and second-degree manslaughter *may* be lesser-included offenses of premeditated murder and instructions should be given to a jury when the facts support such an instruction (emphasis added). *State v. Warden*, 133 Wash. 2d 559, 563, 947 P.2d 708, 710 (1997).

Under the Washington rule, a defendant is entitled to an instruction on a lesser-included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. *Workman*, 90 Wash. 2d at 447-48. Second, the evidence in the case must support an inference that the lesser crime was committed. *Workman*, 90 Wash. 2d at 447-

[24] Under *RCW 10.61.006,* both the defendant and the State have the right to present a lesser-included offense to the jury. *State v. Witherspoon*, 180 Wash. 2d 875, 886, 329 P.3d 888, 894 (2014), *as corrected* (Aug. 11, 2014), as corrected (Aug. 11, 2014). Accordingly, Appellant's argument that defense counsel did not pursue an "all or nothing strategy" by not objecting to the State's proposed lesser-included instruction of intentional murder in the second degree, is unsupported and irrelevant to the issue of ineffective assistance of counsel.

48. Under the second prong of *Workman*, the evidence must affirmatively establish the defendant's theory of the case; it is not enough that the jury might disbelieve the evidence pointing to guilt. *State v. Fernandez-Medina*, 141 Wash. 2d 448, 456, 6 P.3d 1150 (2000).

Even if the defendant had requested a lesser-included instruction of manslaughter, he would not have been entitled to it. In order for a person charged with murder to be entitled to an instruction on the lesser-included offense of first-degree manslaughter, "there must be substantial evidence that affirmatively indicates that manslaughter was committed to the exclusion of first or second degree murder". *State v. Adams*, 138 Wash. App. 36, 48, 155 P.3d 989, 996 (2007) (quoting *State v. Perez-Cervantes*, 141 Wash. 2d 468, 481, 6 P.3d 1160 (2000)).

As in *Adams*, 138 Wash. App. 36, the defendant failed to show that his acts were merely reckless rather than intentional. There was no evidence to support the inference that the lesser crime of manslaughter was committed. Where the defendant testified the killing was an intentional act, a jury could not find that he caused the victim's death with only a reckless state of mind.

Defendant cites to *State v. Schaffer*, 135 Wash.2d 355957 P.2d 214 (1998) for support. The evidence in *Schaffer*, according to the Supreme Court, was sufficient to support a finding that the defendant recklessly or negligently used excessive force to repel the danger he perceived. Given that the victim was

unarmed, the court found Schaeffer might have honestly and reasonably have believed himself in imminent danger, yet honestly but *unreasonably* believed that he needed to respond with deadly force.

The present case differs, in that the evidence is not sufficient to support a finding that the defendant used excessive force, given that he claimed he was facing a man with a deadly weapon. The defendant could not honestly and reasonably have believed he was in danger without also honestly and reasonably believing that he needed to respond with deadly force. Also contrary to *State v. Schaffer*, 135 Wash. 2d 355, 358, 957 P.2d 214 (1998), the State in this case did not concede there was evidence to permit the jury to find the defendant acted in the reasonable belief he was in imminent danger.

Even if we assume that the evidence was sufficient to warrant a manslaughter instruction, the evidence was overwhelming that the defendant intended to kill the victim when he shot the victim repeatedly, and then stabbed the prone victim numerous times. The defendant state he wanted to ensure the victim was dead.

There is no likelihood the jury would have believed that the defendant did not intend to kill the victim, but instead, recklessly used more force than was necessary. Also unlike *Schaffer,* (where the jury found to defendant guilty of second-degree murder instead of first-degree murder*),* the jury in this case was unanimous in finding the defendant committed murder with premeditated intent.

b. Counsel was not ineffective for not requesting a manslaughter instruction.

Defendant asserts that he received ineffective assistance of counsel due to his trial attorney's failure to request a lesser-included offense instruction.

As discussed above, the two-part *Strickland* test to determine whether a defendant received effective assistance of counsel would apply. *Strickland*, 466 U.S. at 687; *State v. Cienfuegos*, 144 Wash. 2d 222, 226–27, 25 P.3d 1011 (2001).

As noted above, the defendant was not entitled to a lesser-included offense instruction of manslaughter under the facts of this case. Trial counsel was not ineffective for failing to request the lesser-included offense instruction.

However, even assuming the defendant could show he was entitled to the instruction, he cannot demonstrate deficient performance, nor show prejudice.

The jury had the opportunity to find second-degree murder, and flatly rejected it. The defendant cannot show that the jury would not have found him guilty of the first-degree murder if given the alternative charge of manslaughter.

The defendant cannot demonstrate that the outcome of the trial would have been different had a manslaughter instruction been provided to the jury, he cannot demonstrated prejudice, and his claim of ineffective assistance of counsel fails.

4. COUNSEL WAS NOT INEFFECTIVE FOR NOT OBJECTING TO COMMENTS IN JURY SELECTION.

Defendant claims his counsel was ineffective for failing to object to the State's response to a juror's question that it was not a capital case. A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Brown*, 132 Wash. 2d 529, 561, 940 P.2d 546, 564-65 (1997), *as amended* (Aug. 13, 1997)). Failure to object to an improper comment constitutes waiver of error unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. *Id.* Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request. *Id*.

Before the question was asked by the juror in this case, the State told the jury panel that they had no part in sentencing if a guilty verdict was rendered. The court also instructed the jurors "*You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.*"

Even after the question was answered, it did not diminish the gravity of the charge being considered for the jurors. Directly after the question was answered, another juror was excused for cause, because he stated he could not render a decision in such a serious case.

Here the claim that counsel's performance was deficient is based on a claim the he failed to object to an erroneous oral "instruction".

Under *Strickland*, even if deficient performance were found, the defendant must demonstrate that the deficient performance prejudiced the defense such that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Townsend*, 142 Wash. 2d 838, 847-49, 15 P.3d 145, 149-50 (2001) (quoting *State v. Lord*, 117 Wash. 2d 829, 883-84, 822 P.2d 177 (1991).

The Defendant does not suggest that the jury would have acquitted, but instead argues it "could have persuaded the jury to reject Mr. Moore's self-defense claim". This argument does not logically follow, nor does it rationally support a reasonable probability the result would have been different. Here the jury was asked to consider first-degree premeditated murder. Premeditation is "the deliberate formation of and reflection upon the intent to take a human life" and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short". *Townsend*, 142 Wash. 2d at 847-49 (quoting *State v. Gentry,* 125 Wash.2d 570, 597-98, 888 P.2d 1105 (1995); *State v. Ollens*, 107 Wash. 2d 848, 850, 733 P.2d 984 (1987)). Premeditation can be inferred from circumstantial evidence, including evidence of motive and the method of killing. *State v. Elmi*, 138 Wash. App. 306, 314, 156 P.3d 281 (2007), *aff'd,* 166 Wash. 2d 209, 207 P.3d 439 (2009). Sufficient

evidence of premeditation may be found where multiple wounds are inflicted by various means over a period of time. *State v. Allen*, 159 Wash. 2d 1, 8, 147 P.3d 581 (2006);

There was substantial evidence of premeditation. The defendant traded for an unregistered gun, bought a different car that was not registered to him, and told friends he was going to kill the victim shortly before he committed the murder.

The defendant sough to ensure the victim's death, then waited for over ½ hour to call 911, and even refused to check to see if he was still alive at the request of the 911 operator. The evidence overwhelmingly supported a finding of premeditation. The evidence in this case was remarkably similar to the facts in *Townsend*, 142 Wash. 2d at 847-49.

As in *Townsend*, 142 Wash. 2d 838, counsel's failure to object to the statements informing the jury that this was not a capital case in no way affected the outcome. *Townsend*, 142 Wash. 2d at 849. The defendant has failed to show that he was prejudiced in any way. It follows that he has failed to satisfy the second prong of the *Strickland* test. *See also State v. Hicks*, 163 Wash. 2d 477, 181 P.3d 831 (2008) (despite several mentions that the case was not a capital case, there was no showing that the defendants were deprived of a fair trial or that

the trial outcome likely would have differed, where the jurors took their duty seriously, and abundant evidence supported the convictions).[25]

5. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO TESTIMONY GIVEN AFTER DEFENSE ELICITED TESTIMONY ABOUT THE DEFENDANT'S CHARACTER.

Defense counsel elicited testimony from Mr. Skogstad about the defendant's character and peaceful disposition, by asking about defendant's personality and why the witness thought the defendant would not carry out the murder. The State was entitled to inquire into specific instances after that testimony was elicited. The defendant did not object, and there was no legal basis for defense to object after offering the character evidence.

Under ER 404(a) evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same. It explicitly permits rebuttal of defendant's character evidence. [26]

---

[25] Moreover, unlike *Townsend, State v. Mason*, 160 Wash. 2d 910, 929, 162 P.3d 396 (2007) and *Hicks*, 163 Wash. 2d at 483, where the trial courts expressly informed the jury that the death penalty was not at issue, in the present case the information was a single response for the State's attorney, which does not imply the same weight or authority as if it were offered or endorsed by the judge.

[26] However, where the evidence not objected to is ER 404*(b)* evidence, the Court should not address the argument for the first time on appeal. *See State v. Boast*, 87 Wash. 2d 447, 451, 553 P.2d 1322 (1976) (party may assign error in appellate court only on specific ground of evidentiary objection made at trial). The evidence could also have been considered separately under ER 404(b). When the defense raises an issue in cross-examination or in the defense case, which invites response, the State may disprove the issue with extrinsic evidence pursuant to ER 404(b). This allows the State to complete the story about the matter partially raised by the defense. *See generally State v. Bennett,* 42 Wn. App. 125, 708 P.2d 1232 (1985); *State v. Beel*, 32 Wash. App.

Evidence offered under ER 404(a) (1) "does not prove or disprove an element of a charged crime nor prove or disprove a particular defense. Its relevance is to permit, but not require, the jury to infer from the particular character trait that it is unlikely or improbable that the defendant committed the charged act." *State v. Thomas*, 110 Wash. 2d 859, 865, 757 P.2d 512 (1988).

ER 404(1)(a) permits the State to offer evidence to rebut the defendant's evidence of good character. The State is not allowed to do so until the defendant introduces evidence of good character. It is well settled that when a party opens up a subject of inquiry on examination, he contemplates that the rules will permit cross-examination within the scope of that examination. *E.g., State v. Gefeller*, 76 Wash. 2d 449, 455, 458 P.2d 17 (1969). Similarly, a criminal defendant who places his character in issue may be examined as to specific acts of misconduct unrelated to the crime charged. E.g., *State v. Brush*, 32 Wash. App. 445, 448, 648 P.2d 897 (1982).

The defense had no basis to object to Mr. Skogstad's testimony after eliciting character evidence.[27] The failure to object does not support defendant's claim of ineffective assistance of counsel.

6. **THE DEFENDANT WAS PROPERLY SENTENCED TO A FIREARM ENHANCEMENT BASED ON THE INFORMATION AND THE UNANIMOUS JURY FINDING.**

437, 442-43, 648 P.2d 443 (1982); *State v. Griggs*, 33 Wash. App. 496, 469, 656 P.2d 529 (1982); Washington Practice, Evidence, supra § 120, at 432.

[27] The testimony could also have been elicited as impeachment of Mr. Skogstad pursuant to ER 607 and 608.

Defendant asserts the trial court erred in imposing a firearm enhancement, claiming the jury did not make the necessary factual finding. The argument is entirely without merit based the information and the special verdict form.

The process for submitting a deadly weapon special verdict is set out in RCW 9.94A.825. The statute applies to deadly weapons, of which firearms are included.

The State charged in the information, that at the time of the commission of the crime, the defendant was armed with a deadly weapon other than a firearm, *and* at the time of the commission of the crime, the defendant was armed with a firearm. The information set forth the specific statutes authorizing the deadly weapon and firearm enhancement and penalties.[28]

The Defendant cites *State v. Recuenco*, 163 Wash. 2d 428, 180 P.3d 1276, 1278 (2008), where the jury, returned a special verdict finding that the defendant was armed with a deadly weapon during the commission of the second-degree assault. However, the information did not contain an allegation that a firearm enhancement applied, nor did the jury return a special verdict that the defendant was armed with a firearm. The Court held that the imposition of a firearm enhancement based on only a special verdict finding of a deadly weapon,

[28] The information cited RCW 9.94A.825, RCW 9.94A.533(4)(a),(d) and RCW 9.94A.533((3)(a),(d).

was a sentencing error that was not subject to harmless error analysis, because the information, jury instructions, and special verdict form included *only* a deadly weapon allegation, without reference to a firearm.

The *Recuenco* Court concluded that, under Washington law, harmless error analysis did not apply when the trial court imposes a sentence not authorized by the jury's finding. The court explained that, because the firearm allegation was *never* charged or submitted to the jury, there was nothing erroneous about the jury's deadly weapon finding, but that it a cannot be harmless to sentence someone for a crime not charged, not sought at trial, and not found by a jury. *Recuenco*, 163 Wash. 2d at 436, 442.

The defendant's reliance on *Recuenco*, 163 Wash. 2d 428 is misplaced. The Court need look no further than the information, which shows that the firearm enhancement was charged. The deadly weapon enhancement statue RCW 9.94A.825 defines deadly weapons to include firearms, and as there is no comparable statute specifically authorizing a firearm special verdict, it provided a basis for the jury's firearm special verdict.

Thus, because it was charged in the information, the trial court did not exceed its authority by imposing the firearm enhancement. Moreover, the jury special verdict was in agreement with the information and the statute. See *In re Pers. Restraint of Rivera*, 152 Wash. App. 794, 218 P.3d 638, 641 (2009), *aff'd*

sub nom. In re Jackson, 175 Wash. 2d 155, 283 P.3d 1089 (2012) (a sentencing court does not exceed its authority by imposing a firearm enhancement when the jury returns a special verdict making a deadly weapon finding if the firearm enhancement was properly charged and the fact that a firearm was used is necessarily reflected in the jury's verdict).

The jury specifically found the defendant was armed with a deadly weapon that was a knife, and specifically found the defendant was armed with a deadly weapon that was *a pistol, revolver, or any other firearm*. Aside from the fact that the case involved an admitted shooting, the jury unambiguously found the defendant was armed with a firearm.

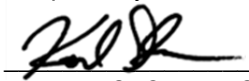
Even if the reviewing court could find any instructional error pertaining to the firearm, it would be harmless as the firearm finding was reflected in the verdict and did not render the judgment and sentence invalid on its face.

D. CONCLUSION

For the forgoing reasons, the claims made on appeal should be denied and the defendant's conviction and sentence affirmed.

Dated this 21st day of May 2016

Respectfully Submitted by:



KARL F. SLOAN, WSBA #27217
Okanogan County Prosecuting Attorney

I, Karl Sloan, do hereby certify under penalty of perjury that on May 21, 2016, I provided by email service a true and correct copy of the Respondent's Brief to:

E-mail: wa.appeals@gmail.com
JILL S. REUTER
Nichols Law Firm, PLLC
Attorney for Appellant
P.O. Box 19203
Spokane, WA 99219

Karl F. Sloan, WSBA# 27217
Attorney for Respondent