

63016-4

63016-4

NO. 63016-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERICK DESHUM JORDAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN LUM

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

2010 APR 12 PM 4:26

COPIES OF THIS DOCUMENT
SHOULD BE FILED WITH THE
COURT AND THE PROSECUTOR
GENERAL'S OFFICE


TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	6
1. THE COURT'S CONCLUSION THAT THERE WAS NO REASON TO DOUBT JORDAN'S COMPETENCY WAS A PROPER EXERCISE OF ITS DISCRETION	6
a. Relevant Facts	7
b. Jordan's Right To Due Process Was Not Violated	9
2. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY AS TO JUSTIFIABLE HOMICIDE AND MANSLAUGHTER, FOR WHICH THERE WAS NO SUPPORT IN THE EVIDENCE	14
a. A Justifiable Homicide Instruction Would Have Been Error Because There Was No Evidence That Jordan Reasonably Believed That He Was In Danger Of Great Personal Injury Or Death When He Killed Maurice Jackson.....	15
b. There Was No Factual Basis To Instruct On Lesser Offenses Premised On The Use Of Excessive Force In Self Defense	22

3.	THERE WAS NO PROSECUTORIAL ERROR DURING REDIRECT EXAMINATION OF OFFICER PENDERGRASS OR DURING CLOSING ARGUMENT	24
4.	THE CONVICTIONS OF MURDER WITH A FIREARM ENHANCEMENT AND POSSESSION OF A FIREARM BY A FELON DID NOT VIOLATE DOUBLE JEOPARDY	32
5.	THE TRIAL COURT PROPERLY INCLUDED JORDAN'S TEXAS CONVICTION FOR VOLUNTARY MANSLAUGHTER IN JORDAN'S OFFENDER SCORE	36
6.	THERE WAS NOT CUMULATIVE ERROR THAT DEPRIVED JORDAN OF A FAIR TRIAL.....	45
D.	<u>CONCLUSION</u>	46

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Apprendi v. New Jersey, 530 U.S. 466,
120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... 33

Blakely v. Washington, 542 U.S. 296,
124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 33

Blockburger v. United States, 284 U.S. 299,
52 S. Ct. 180, 76 L. Ed. 306 (1932)..... 34

Drope v. Missouri, 420 U.S. 162,
95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)..... 9

Martin v. Ohio, 480 U.S. 228,
107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987)..... 43

Taylor v. Louisiana, 419 U.S. 522,
95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)..... 28

United States v. Garsson, 291 F. 646
(D.N.Y.1923) 28

Washington State:

In re Pers. Restraint of Fleming, 142 Wn.2d 853,
16 P.3d 610 (2001)..... 10, 13

In re Pers. Restraint of Lavery, 154 Wn.2d 249,
111 P.3d 837 (2005)..... 37, 44

Jones v. Hogan, 56 Wn.2d 23,
351 P.2d 153 (1960)..... 31

State v. Alexander, 64 Wn. App. 147,
822 P.2d 1250 (1992)..... 45

<u>State v. Berlin</u> , 133 Wn.2d 541, 947 P.2d 700 (1997).....	23
<u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	15, 16
<u>State v. Calle</u> , 125 Wn.2d 769, 888 P.2d 155 (1995).....	34, 35
<u>State v. Coe</u> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	45
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	30
<u>State v. Eldridge</u> , 17 Wn. App. 270, 562 P.2d 276 (1977), <u>rev. denied</u> , 89 Wn.2d 1017 (1978).....	9
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	25
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	37
<u>State v. Gonzales</u> , 111 Wn. App. 276, 45 P.3d 205 (2002), <u>rev. denied</u> , 148 Wn.2d 1012 (2003).....	27
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	25, 28, 30
<u>State v. Grier</u> , 150 Wn. App. 619, 208 P.3d 1231 (2009), <u>rev. granted</u> , 167 Wn.2d 1017 (2010).....	23
<u>State v. Griffith</u> , 164 Wn.2d 960, 195 P.3d 506 (2008).....	45
<u>State v. Heddrick</u> , 166 Wn.2d 898, 215 P.3d 201 (2009).....	10

<u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986).....	23
<u>State v. Jones</u> , 117 Wn. App. 89, 68 P.3d 1153 (2003).....	28
<u>State v. Kelley</u> , 146 Wn. App. 370, 189 P.3d 853 (2008), <u>affd.</u> , 168 Wn.2d 72 (2010).....	33
<u>State v. Kelley</u> , 168 Wn.2d 72, ___ P.3d ___ (2010).....	33, 34
<u>State v. Kirkman</u> , 159 Wn.2d. 918, 155 P.3d 125 (2007).....	29
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991), <u>cert. denied</u> , 506 U.S. 856 (1992).....	9, 11
<u>State v. Marshall</u> , 144 Wn.2d 266, 27 P.3d 192 (2001).....	9, 13
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	25, 28, 30, 31
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	29
<u>State v. Moran</u> , 119 Wn. App. 197, 81 P.3d 122 (2003), <u>rev. denied</u> , 151 Wn.2d 1032 (2004).....	30
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	37, 42
<u>State v. Nguyen</u> , 134 Wn. App. 863, 142 P.3d 1117 (2006), <u>rev. denied</u> , 163 Wn.2d 1053, <u>cert. denied</u> , 129 S. Ct. 644 (2008).....	33

<u>State v. Poston</u> , 138 Wn. App. 898, 158 P.3d 1286 (2007), <u>rev. denied</u> , 163 Wn.2d 1016 (2008).....	40
<u>State v. Read</u> , 147 Wn.2d 238, 53 P.3d 26 (2002).....	16, 21, 22
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995).....	31
<u>State v. Ryna Ra</u> , 144 Wn. App. 688, 175 P.3d 609, <u>rev. denied</u> , 164 Wn.2d 1016 (2008).....	21
<u>State v. Schaffer</u> , 135 Wn.2d 355, 957 P.2d 214 (1998).....	22, 23
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990), <u>cert. denied</u> , 498 U.S. 1046 (1991).....	31
<u>State v. Tessema</u> , 139 Wn. App. 483, 162 P.3d 420 (2007), <u>rev. denied</u> , 163 Wn.2d 1018 (2008).....	33
<u>State v. Thiefault</u> , 160 Wn.2d 409, 158 P.3d 580 (2007).....	44
<u>State v. Toney</u> , 149 Wn. App. 787, 205 P.3d 944 (2009).....	33
<u>State v. Valdobinos</u> , 122 Wn.2d 270, 858 P.2d 199 (1993).....	16
<u>State v. Villegas</u> , 72 Wn. App. 34, 863 P.2d 560 (1993), <u>rev. denied</u> , 124 Wn.2d 1002 (1994).....	42
<u>State v. Walker</u> , 136 Wn.2d 767, 966 P.2d 883 (1998).....	20

<u>State v. Walker</u> , 75 Wn. App. 101, 879 P.2d 957 (1994), <u>rev. denied</u> , 125 Wn.2d 1015 (1995).....	26
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008), <u>cert. denied</u> , 129 S. Ct. 2007 (2009).....	27
<u>State v. Wicklund</u> , 96 Wn.2d 798, 638 P.2d 1241 (1982).....	10
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	23

Constitutional Provisions

Federal:

U.S. Const. amend. V	25
U.S. Const. amend. VI	25

Washington State:

Const. art. I, § 3.....	25
-------------------------	----

Statutes

Washington State:

RCW 9.41.040.....	34, 35
RCW 9.94A.030	36, 39, 40
RCW 9.94A.525	37, 39, 40, 45
RCW 9.94A.530	45
RCW 9.94A.533	34

RCW 9A.08.010	40
RCW 9A.16.010	16
RCW 9A.16.020	15
RCW 9A.16.050	15
RCW 9A.16.060	43
RCW 9A.32.050	35, 38
RCW 9A.32.060	39
RCW 9A.32.070	40
RCW 9A.36.021	35
RCW 10.77.010.....	9
RCW 10.77.050.....	9
RCW 10.77.060.....	9, 10, 11

Other Jurisdictions:

Tex. Penal Code § 6.03 (1992)	40
Tex. Penal Code § 19.02.....	38
Tex. Penal Code § 19.04.....	38

Rules and Regulations

Washington State:

CrR 3.5..... 13
CrR 6.15..... 14
RAP 9.6..... 14

Other Authorities

2 Paul H. Robinson, Criminal Law
Defenses § 173 (1984)..... 43
Peter Westen and James Mangiafico,
The Criminal Defense of Duress,
6 Buff. Crim. L. Rev. 833 (2003)..... 43
Sentencing Reform Act 36, 39, 41, 42, 43

A. ISSUES PRESENTED

1. Whether the trial court's conclusion that there was no reason to doubt defendant Jordan's competency was an abuse of discretion where no evidence of mental disease or defect was presented.

2. Whether the trial court properly refused a justifiable homicide instruction where Jordan pointed a gun at the unarmed victim, threatened him, then shot him in the face and chest, and where there was no evidence that Jordan was in fear at any time or that he had any reason to fear the victim.

3. Whether the trial court properly refused instructions as to lesser offenses of manslaughter where there was no evidence that Jordan reasonably believed that he was in imminent danger of serious personal injury or that he acted other than intentionally when he fatally shot the victim.

4. Whether Jordan failed to preserve his claims of prosecutorial misconduct by failing to object or request curative instructions.

5. Whether Jordan failed to show any prosecutorial error in asking an officer whether she ever had observed a person who was lying change his story.

6. Whether the defendant failed to show any prosecutorial error in asserting in closing argument that the victim in this case was a human being who matters as much as any of us.

7. Whether the convictions of murder in the second degree with a firearm enhancement and unlawful possession of a firearm in the first degree did not violate the double jeopardy clause because the legislature intended that punishment and the separate crimes are not the same in law or fact.

8. Whether the trial court properly included Jordan's Texas conviction for voluntary manslaughter in Jordan's offender score, as it was legally comparable to at least the Washington crime of manslaughter in the first degree.

9. Whether the cumulative error doctrine is irrelevant to this case.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Erick Jordan, was charged by amended information with one count of murder in the second degree with a firearm enhancement for the killing of Maurice Jackson, and one count of unlawful possession of a firearm in the first degree, both

occurring on July 13, 2007. CP 11-13. His codefendant, Marcus Dorsey, was charged with two counts of assault in the second degree, relating to shots fired at police officers who responded to the scene. CP 11-13.

Jordan and Dorsey were jointly tried in King County Superior Court, the Honorable Dean Lum presiding. 1RP 1-2.¹ A jury found Jordan guilty as charged. CP 14-16. Based on an offender score of eight on the murder conviction, Jordan received a standard range sentence of 417 months on the murder conviction (including the firearm enhancement) and 75 months on the firearm conviction, to run concurrently. CP 169-75.

2. SUBSTANTIVE FACTS

On July 13, 2007, defendant Erick Jordan stood facing an unarmed man, Maurice Jackson, pointing a gun at Jackson. 6RP 6-8; 13RP 683-84. Jordan's friend Marcus Dorsey was with him. 6RP 76-82, 102-03; 11RP 102-03, 488-93. Both Jordan and

¹ The verbatim report of proceedings consists of 15 volumes, which will be referred to in this brief as follows: 1RP (5-29-08); 2RP (5-30-08); 3RP (6-4-08); 4RP (6-5-08); 5RP (6-9-08); 6RP (6-10-08); 7RP (6-16-08); 8RP (6-17-08); 9RP (6-18-08); 10RP (6-19-08); 11RP (6-23-08); 12RP (6-24-08); 13RP (6-25-08); 14RP (6-26-08); and 15RP (1-15-09).

Dorsey had loaded .38 caliber revolvers. 7RP 88-92; 11RP 333-40; 12RP 529. As Jackson stood silently, empty-handed, Jordan said, "Do you want me to shoot you motherfucker?", then shot and killed Jackson. 6RP 6-7. Jordan made two statements to police and in both he denied knowing anything about a shooting. Ex. 151; 9RP 55-56, 64, 68-69; 10RP 163-66.

Three independent civilian witnesses saw the killing:

Sanaival from outside a bar where he worked, a short distance away, and Ryan and Rafi from their respective apartments above the scene. 4RP 11, 19-20; 6RP 2-6; 13RP 674-79. The area is well lit. 6RP 21. The two who saw Jackson before he was shot— saw that he was standing quietly or backing up when he was shot—they saw nothing in Jackson's hands. 6RP 6-8; 13RP 683-84.

Sanaival, who was closest, heard Jordan's threat and said that he appeared angry and not afraid. 6RP 8. Witness Rafi testified that when Jackson was shot he was standing facing the shooter, with his hands at his sides, and did not seem to be threatening. 13RP 683-84. None of these witnesses saw anyone else standing near the victim at the time. 4RP 21; 6RP 12; 13RP 687-88.

Two police officers who saw the killing saw Jordan standing in the street, shooting multiple times toward Jackson (although the

officers could not see the victim from their vantage point). 6RP 36-39, 56, 76-79, 128-29. Officer Harris noticed that the man standing with Jordan also had a gun. 6RP 81.

Police officers were approaching the scene as Jackson was killed and immediately attended to him – no weapons were found near him or on his person. 4RP 80-99; 7RP 7-9, 13. There was no evidence to suggest that Jordan had had any prior contact with Jackson – Dorsey, who came to the bar that night with Jordan, testified that he did not know Jackson. 11RP 514.

Minutes before the killing, there was a loud disturbance involving 10 to 12 people in the same general area, which caused witness Ryan to call 911. 4RP 10; Ex. 12, 16. That disturbance broke up when two shots were fired; those shots can be heard on the 911 recording, and two .40 caliber shell casings were later recovered in that area. 4RP 17, 85-96; Ex. 12. The killing occurred over a minute later – the timing is clear because the fatal shots also were recorded during the same 911 call. 9RP 150-51; Ex. 12.

After Jordan shot Jackson, Jordan and Dorsey ran away as police drove up. 6RP 36-39, 76-79. Dorsey fired his gun while the police were searching for the suspects, and was arrested when he tried to get into his car. 8RP 26-35, 63; 11RP 483-85, 488-93.

Dorsey was carrying a .38 caliber revolver. 8RP 33, 37; 9RP 10-14.

Jordan ran a short distance and apparently broke into the home of an elderly woman to try to hide from police but eventually ran out again and was caught. 8RP 12-16; 9RP 86-106. He had a .38 caliber revolver in his pocket that was determined to have fired the bullets that killed Maurice Jackson and were recovered from his body. 7RP 88-92; 9RP 106; 10RP 258-59; 11RP 344.

The victim of the shooting, Maurice Jackson, died immediately. 7RP 9, 30-31. He had been shot in the face and in the chest, and died as a result of the multiple gunshot wounds. 10RP 248-57.

C. ARGUMENT

1. THE COURT'S CONCLUSION THAT THERE WAS NO REASON TO DOUBT JORDAN'S COMPETENCY WAS A PROPER EXERCISE OF ITS DISCRETION.

Jordan claims that the trial judge violated due process by finding that there was no doubt as to Jordan's competency to stand trial without ordering an evaluation of his competency by mental health professionals. This claim is without merit. There was no

evidence that Jordan had any mental disorder or that he was not competent to stand trial. Under the circumstances, the conclusion that an expert evaluation of competency was not necessary was not an abuse of discretion and did not violate Jordan's right to due process.

a. Relevant Facts.

This case was filed on July 17, 2007. CP 1. After the case was assigned to a court for trial, defense counsel asked the court to have a "competency colloquy" with his client. 1RP 4-5. Defense counsel explained the reason for the request as follows:

[T]his week, I have had some problems communicating with my client. And there has been the issue raised of competency, although I'm not sure that's what it is, or what is going on. This has happened to him before.

And if I might let the court know, early on, back in, I believe, September, Mr. Jordan was attacked in the jail by someone. And he just sort of went bonkers. And since then, he has been in protective custody on the 11th floor of the jail.

And last Saturday night someone attacked him there. [A person] secluded themselves in the day room or bathroom. And when [Jordan] was let out of his cell for his one hour out a day, that person then charged him.

And he has been out, now, on the 7th floor. But he is on suicide watch. And I don't know the background of that, at all.... I went up to visit him twice yesterday, but I couldn't tell whether he was understanding what I was telling him, because he would go from being very uncommunicative to focused on things outside of the issues that we had to deal with at trial.

1RP 4.

The prosecutor did not object to a colloquy by the court, but she noted that although there may be some difficulty in communication, defense counsel had not yet articulated any mental health issue or mentioned any treatment or evaluation.

1RP 5. Defense counsel did not respond to this assertion. 1RP 5-6.

The court conducted a colloquy with the defendant and concluded that "the court doesn't have concerns about competency." 1RP 6-10. The court concluded that some of Jordan's comments referred to larger religious and social issues, and that Jordan appeared to be motivated by understandable frustration with the situation. 1RP 8-9. The colloquy and the court's findings are attached as Appendix 1.

There was no further reference to any question as to competency during the remainder of the trial, which continued over four weeks (May 29 through June 26, 2008). 1RP 1; 14RP 1. The record reflects that Jordan spoke coherently with the court and consulted regularly with defense counsel during the course of the trial. 7RP 2-3; 11RP 322-23; 12RP 642.

b. Jordan's Right To Due Process Was Not Violated.

An accused in a criminal case has a fundamental right not to be tried while incompetent. Drope v. Missouri, 420 U.S. 162, 171-72, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); State v. Eldridge, 17 Wn. App. 270, 279, 562 P.2d 276 (1977), rev. denied, 89 Wn.2d 1017 (1978). The failure to observe procedures adequate to protect this right is a denial of due process. State v. Marshall, 144 Wn.2d 266, 279, 27 P.3d 192 (2001).

In Washington, an incompetent person may not be tried, convicted, or sentenced for an offense so long as the incapacity continues. RCW 10.77.050. A defendant is incompetent if he or she "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(14); see also State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992).

RCW 10.77.060 provides that if a court finds there is a "reason to doubt" a defendant's competency, the court shall have the defendant evaluated by professionals who will report on the

defendant's mental condition. RCW 10.77.060(1)(a).² The procedures set out in the competency statute (chapter 10.77 RCW) are mandatory and not merely directory. State v. Wicklund, 96 Wn.2d 798, 805, 638 P.2d 1241 (1982).

The determination of whether a competency examination should be ordered is within the discretion of the trial court. State v. Heddrick, 166 Wn.2d 898, 903, 215 P.3d 201 (2009). A court's conclusion regarding the existence of a reasonable doubt concerning a defendant's competency is reviewed for an abuse of discretion. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

Defense counsel at trial did not contend that Jordan was not competent, but asked the court to have a colloquy with Jordan because counsel and Jordan were having trouble communicating. 1RP 4. The description of that difficulty was that within the week before trial, Jordan was not responding to counsel and was talking

² In pertinent part, RCW 10.77.060(1)(a) provides:

Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

about matters unrelated to the trial. 1RP 4. Neither of these problems indicates that a mental disease or defect was interfering with this communication.

Defense counsel did not request a professional competency evaluation under RCW 10.77.060, before or after the court's colloquy. It appears that although he may have had a concern based on his difficulty conversing with Jordan about the trial, he did not have any evidence suggesting that Jordan had a mental disorder. His concern appeared to be based on Jordan's reactions when he was twice attacked by other inmates in the jail, and placement on suicide watch after the second attack. 1RP 4.

After the court's colloquy, the court asked both counsel if there was "anything further on the colloquy?" 1RP 8. Both counsel responded that they had nothing further. This indicates that defense counsel did not believe any further questions were necessary to evaluate whether there was a reason to doubt Jordan's competency.

A motion to determine competency is not sufficient to create a reasonable doubt as to competency. Lord, 117 Wn.2d at 901. The Supreme Court concluded that the trial court in Lord did not abuse its discretion in finding no reason to doubt competency

despite testimony by a jail officer that Lord was ranting and raving, and said that he had talked with the devil, who asked him to drink his own blood to prove his innocence. Id. at 901-04. Lord also had told the officer that Lord wanted to be restrained in court because Lord was afraid of what he would do to his attorney. Id. at 901-02.

Jordan's statements during the colloquy did not show evidence of a mental disorder that would interfere with the his competency to stand trial. Although Jordan was not articulate, he expressed concern that he was being associated with gang activity and noted that the proceedings in court were only a part of the situation, saying "That's the court up above, and I ain't going to try to get away with nothing I done." 1RP 6-8.

Further, on June 24th, more than three weeks later, defense counsel represented that he and Jordan had been discussing specific considerations concerning whether Jordan would testify at trial for weeks. 12RP 642. Defense counsel stated that the testimony of the codefendant caused Jordan to rethink the matter, and Jordan confirmed that to the court. Id. Defense counsel indicated that the two then discussed it one last time and Jordan agreed that he should not testify. Id. It is clear that Jordan understood the proceedings and was able to assist his attorney.

The defendant's claim that the result in Marshall, supra, controls this case is unwarranted. The defendant's brief states only that "Marshall's lawyer alerted the court to competency concerns" and the Supreme Court determined that formal competency proceedings were required. App. Br. at 11. However, in that case the defense lawyer presented testimony from a neurologist, a psychiatrist and a neuropsychologist, who all testified that Marshall had significant brain damage. Marshall, 144 Wn.2d at 270-72. The psychiatrist also testified that the jail had diagnosed Marshall as a paranoid schizophrenic a few weeks before he entered his plea and that he was delusional. Id. at 271-72. These facts could hardly contrast more with the vague difficulty in communication described by the defense counsel in this case.³

Finally, the record does not permit review of Jordan's appearance, demeanor, and conduct during the proceedings, which are factors necessarily considered by the court below. Fleming, 142 Wn.2d at 863. Jordan has not shown an abuse of discretion in the trial court's finding that Jordan was referring to social and

³ Likewise, the defendant's assertion that he told the court he did not understand the proceedings (App. Br. at 7) is misleading because it is taken out of context. The court had just read to Jordan his rights relating to testimony at a CrR 3.5 hearing (1RP 9) and it can hardly be surprising that a nonlawyer would not immediately grasp those rights.

religious matters and expressing his frustration with the situation, but that there was no doubt as to Jordan's competency.

2. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY AS TO JUSTIFIABLE HOMICIDE AND MANSLAUGHTER, FOR WHICH THERE WAS NO SUPPORT IN THE EVIDENCE.

Jordan argues that the trial court erred in refusing to instruct the jury on the defense of justifiable homicide and the lesser offenses of manslaughter in the first and second degree.⁴ These claims should be rejected because there was no evidence that Jordan reasonably believed that he was in danger of great personal injury when he pointed his gun at an unarmed Maurice Jackson and shot Jackson in the face and chest. The basis for the request for manslaughter instructions was the theory that Jordan used excessive force in self defense, so without any evidence to support a theory of self defense, the trial court also was required to refuse the manslaughter instructions.

⁴ Although Jordan submitted instructions to the trial court, 11RP 323, the proposed instructions were not filed as required by CrR 6.15 and have not been designated to this Court as required by RAP 9.6(b)(1)(F).

- a. A Justifiable Homicide Instruction Would Have Been Error Because There Was No Evidence That Jordan Reasonably Believed That He Was In Danger Of Great Personal Injury Or Death When He Killed Maurice Jackson.

Homicide is justifiable in the State of Washington if the slayer reasonably believes that the person slain intends to inflict death or great personal injury, the slayer reasonably believes that there is imminent danger of that harm being accomplished, and the force used by the slayer is no more than what a reasonably prudent person would consider necessary under the circumstances as they appeared to the defendant. RCW 9A.16.020(3), 9A.16.050(1); State v. Brightman, 155 Wn.2d 506, 519-20, 122 P.3d 150 (2005). The defendant is entitled to an instruction on justifiable homicide if he has raised "some credible evidence, from whatever source" to establish that the killing was justified. Brightman, 155 Wn.2d at 520. The court views the evidence from the standpoint of a reasonable person who knows what the defendant knows, applying both a subjective and an objective test. Id. If there is no credible evidence in the record to support the defense, the trial court must refuse the instruction. Id.

Deadly force is justified only where it is "objectively reasonable, considering the facts and circumstances as they were

understood by the defendant." Brightman, 155 Wn.2d at 521. The shooting of a firearm constitutes deadly force. RCW 9A.16.010(2). A justifiable homicide instruction must be based on some evidence that the use of deadly force was necessary under the circumstances. Brightman, 155 Wn.2d at 523.

When the trial court has refused to instruct the jury on self defense because there was no evidence that the defendant subjectively believed that he was in imminent danger of great personal injury, that decision is reviewed for abuse of discretion. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). Discretion is abused when it is exercised in a manifestly unreasonable manner or based on untenable reasons. State v. Valdobinos, 122 Wn.2d 270, 279, 858 P.2d 199 (1993). The trial court in this case rested its decision on the absence of a factual basis for the justifiable homicide instruction. 13RP 709.⁵ The court correctly found that there was no factual support for such an instruction.

⁵ The trial court indicated its belief that there were ethical problems with claiming self defense in this case, where the defendant told police and prosecutors that he did not fear the victim, but the court ultimately did not rely on that basis for refusing the instruction. This is clear not only in its ruling, but also because the court explicitly delayed ruling until it heard the evidence from the final eyewitness. 13RP 651-68, 708-09.

There was no evidence that Jordan was in fear when he shot Maurice Jackson. There was evidence of only one statement made by Jordan at the time of the shooting. When Jordan stood pointing his gun at Jackson, Jordan said, "Do you want me to shoot you motherfucker?", then shot Jackson. 6RP 6-7. Jordan made two statements to police and in both denied knowing anything about any shooting. Ex. 151; 9RP 55-56, 64, 68-69; 10RP 163-66.

There was no evidence that Jordan was outside when the confrontation occurred minutes before the murder or that he saw or heard the shots fired at that time. Eyewitness Ryan, who saw most of the activity in the street, could not say whether the shooter was involved in the earlier confrontation. 4RP 36, 52. Codefendant Dorsey testified that he went outside the bar and met a man across the street before the shooting, but stated that it was not Jordan whom he met there. 11RP 475-76, 533. He did not know whether Jordan had left the bar before he did. 11RP 527-28. At least one person sitting at the bar outside which these events occurred did not hear the initial shots. 6RP 4.

Jordan's behavior did not indicate that he was in any fear. Three independent civilian eyewitnesses testified that the shooter was standing at a distance from Jackson, in the open, his arms

extended and his gun pointed at the victim, with another man (Dorsey) to his side or close behind the shooter. 4RP 18-21; 6RP 6-12, 26; 13RP 678-84. Jordan said, "Do you want me to shoot you motherfucker?", then shot Jackson multiple times. 6RP 6-7. Two police officers who saw the shooting saw Jordan standing in the street, shooting multiple times toward Jackson (although the officers could not see Jackson from their vantage point). 6RP 36-39, 56, 76-79, 128-29. Officer Harris noticed that the man standing with Jordan also had a gun. 6RP 81.

There was no evidence suggesting that Jackson was armed or threatening in any way. Witness Sanaival explained that the victim was backing up and the witness could see nothing in the victim's hands when Jordan shot him. 6RP 6-8. Sanaival said that the shooter appeared angry, not afraid. 6RP 8. All three witnesses who could see Jackson said that no one else was standing near him at the time. 4RP 21; 6RP 12; 13RP 687-88. Witness Rafi said that when the victim was shot he was standing facing the shooter, with his hands at his sides, and did not seem to be threatening. 13RP 683-84. Police were approaching the scene as Jackson was killed and immediately attended to him – no weapons were found near him or on his person. 4RP 80-99; 7RP 7-9, 13. There was no

evidence to suggest that Jordan had had any prior contact with the victim that would warrant fear – Dorsey, who came to the bar that night with Jordan, testified that he did not know the victim. 11RP 514.

At trial and on appeal, defense counsel proffered theories that might constitute self defense, but cited no evidence that the defendant had an actual subjective, reasonable belief that Jackson (or anyone else) posed an imminent danger of serious injury to the defendant or anyone else. Jordan relies on two facts in evidence in this appeal: the two shots fired a minute before the murder, and a statement made by Jordan as he was transported to the police station. App. Br. at 34. The shots fired do not establish Jordan's state of mind, especially since there is no evidence that Jordan heard them, let alone that they frightened him. There is no evidence that the shots were heard by or had any connection with Jordan, Dorsey, or victim Jackson, the only three men involved in the fatal shooting incident.

The statement relied upon as evidence that Jordan acted in self defense is: "I tapped at him. He tapped at me, the police ... came and I had to run." 9RP 68. That is a paraphrase by the prosecutor of one statement that the defendant made in the police

car. 9RP 68. The prosecutor then played the video recording of those statements for the jury. 9RP 69. The video provides the context for the quoted statement:

JORDAN: So, he hit me, I tapped at him, the police came, I had to run from y'all and here I am now that's just what it was. I didn't ... assault him or hurt him and all that kind of way and he didn't hurt me. I'm talking to y'all and telling you the truth. ...

OFFICER: Why'd you shoot at him?

JORDAN: No, ma'am, I ain't shoot at him.

...

OFFICER: Okay, there was a shooting out here tonight.

JORDAN: It wa...it didn't have nothing to do with me and him.

Ex. 151.

The officer who heard the statement understood the reference to "tapping" to mean that Jordan was describing fighting. 9RP 68. Jordan denied shooting the man he had fought with, so his description of this fight does not provide any evidence of a fight with Jackson. Even if there had been a previous fight between Jordan and Jackson, an ordinary fist fight (or the threat of one) does not justify the use of deadly force. State v. Walker, 136 Wn.2d 767, 777, 966 P.2d 883 (1998). The defendant also does not indicate that he ever was in fear of the man with whom he claimed to have fought, nor did he have significant injuries that

would suggest that his opponent was a deadly threat in unarmed combat.

The Washington Supreme Court has affirmed the refusal of a justifiable homicide instruction where the slayer was getting the worst of a fist fight with the victim, and testified that he was afraid the victim would kill him when he stabbed the victim, killing him. Walker, supra; see also Read, 147 Wn.2d at 243-44 (instruction properly refused where the defendant testified that the victim was angry and stepped toward him moving his arms, and the defendant did not have a clear exit); State v. Ryna Ra, 144 Wn. App. 688, 706-07, 175 P.3d 609, rev. denied, 164 Wn.2d 1016 (2008) (instruction properly refused where the defendant testified that the victim ran toward the SUV in which the defendant sat, kicked it, and tried to reach through the window to grab the defendant).

There was no evidence that Jordan saw or heard any shots before he killed Maurice Jackson, that he was afraid of Jackson, or that he had any reason to fear great personal injury at the hands of Jackson, an unarmed man. Therefore, there was no evidence that the defendant actually and reasonably believed that deadly force was necessary, so there was no factual support for a justifiable homicide instruction. The trial court's refusal of a justifiable

homicide instruction also may be affirmed on the basis that, as a matter of law, under these circumstances, no person would be justified in the use of deadly force. Read, 147 Wn.2d at 243. The trial court properly refused that instruction.

b. **There Was No Factual Basis To Instruct On Lesser Offenses Premised On The Use Of Excessive Force In Self Defense.**

Jordan claims that the court should have given instructions for the lesser crimes of manslaughter in the first and second degree based on a defense theory that Jordan used excessive force in self defense. This argument should be rejected because no evidence at trial supports an inference that only the lesser crime was committed.

If a person reasonably believes that he or she is in imminent danger of serious injury, but recklessly or negligently uses more force than reasonably necessary to repel that attack, that use of force constitutes manslaughter. State v. Schaffer, 135 Wn.2d 355, 358, 957 P.2d 214 (1998).

A defendant is entitled to a lesser included offense instruction when (1) each of the elements of the lesser crime is a necessary element of the greater crime (legal prong); and (2) the

evidence supports an inference that only the lesser crime was committed (factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Manslaughter in the first and second degree satisfy the legal prong of the Workman test when the charged crime is intentional murder, as in this case. State v. Berlin, 133 Wn.2d 541, 551, 947 P.2d 700 (1997).

In order to satisfy the factual prong, there must be evidence both that the defendant acted with a reasonable belief that the use of deadly force was necessary, and that he recklessly or negligently, as opposed to intentionally, used force that was more than necessary. Schaffer, 135 Wn.2d at 358; State v. Grier, 150 Wn. App. 619, 636-39, 208 P.3d 1231 (2009), rev. granted, 167 Wn.2d 1017 (2010). It is not a defense to murder that the slayer acted based on an honest but unreasonable belief that he or she was in imminent danger of serious injury. State v. Hughes, 106 Wn.2d 176, 188-89, 721 P.2d 902 (1986).

The evidence in this case did not satisfy the factual prong of Workman, so the trial court properly refused to instruct as to manslaughter. There is no evidence that Jordan had a reasonable belief that he was in danger of imminent harm, as discussed in the previous section, and there is no evidence to support the theory

that when Jordan stood across from the unarmed Jackson, pointed the gun at Jackson, and shot Jackson in the face and the chest, he acted recklessly or negligently, and not intentionally.

3. THERE WAS NO PROSECUTORIAL ERROR DURING REDIRECT EXAMINATION OF OFFICER PENDERGRASS OR DURING CLOSING ARGUMENT.

Jordan argues that he was deprived of a fair trial because the trial prosecutor committed misconduct during redirect examination of a witness and in her rebuttal closing argument. More specifically, Jordan claims that the prosecutor improperly impugned the defense attorney by stating that he was trying to make a point during cross-examination, improperly elicited opinion evidence, and improperly appealed to passion in her argument.

These claims should be rejected. The question at issue was not improper and the reference to defense counsel was not demeaning. The prosecutor's assertion in her rebuttal argument that the murdered victim was a human being who mattered was not an appeal to passion. Even if the remarks were improper, a curative instruction would have been sufficient to ameliorate any resulting prejudice, but none was requested. Further, there is not a

substantial likelihood that these remarks had an impact on the jury's verdict in light of the overwhelming evidence of the defendant's guilt. This Court should affirm the convictions.

The United States and Washington Constitutions guarantee every defendant a fair trial. U.S. Const. amend. V, VI; WA Const. art. I, § 3. A defendant who claims on appeal that prosecutorial misconduct deprived him of a fair trial bears the burden of establishing that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). If misconduct is proven, it is grounds for reversal if the defendant establishes a substantial likelihood that the improper conduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

No objection was made to any of the remarks now challenged. 9RP 67-68; 14RP 736, 811-12. A defendant who does not make a timely objection at trial waives any claim on appeal unless the misconduct in question is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" that could not have been neutralized by a curative instruction to the jury. Fisher, 165 Wn.2d at 747 (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)).

The challenged remarks during redirect examination of Officer Pendergrass are the following:

Q. Defense counsel is trying to imply that the fact that Mr. Jordan was in the back of your car and that his story was kind of constantly shifting about what had happened, that that made you confused. Is that what happened?

A. No.

Q. Is it fair to say that sometimes when people aren't telling the truth that their stories change?

Mr. Abernethy: Objection, Your Honor.

The Court: Sustained. Form of the question.

Q. Have you ever been around somebody who is not telling the truth and the story kind of keeps changing from time to time, "Yeah, that is what I mean. That's the story."?

A. All too frequently.

9RP 67-68. The objection made to the second question in this series was the single word "objection," which is insufficient to preserve an objection when the basis of the objection is not apparent. State v. Walker, 75 Wn. App. 101, 109, 879 P.2d 957 (1994), rev. denied, 125 Wn.2d 1015 (1995). The trial court did not perceive the basis of the objection to be that the question called for improper opinion evidence; it understood the basis of the objection and sustained it as an objection to the form of the question, which was leading. 9RP 68. There was no articulated objection to the substance of the two questions now challenged or any claim during

the questioning or afterward that the questions or answers constituted improper opinion evidence. 9RP 68.

Jordan appears to claim that stating that defense counsel was "trying to imply" that Jordan's changing story made the officer confused was demeaning to defense counsel. App. Br. at 37. There is nothing negative in this reference. The role of both attorneys is to try to flesh out the evidence as it is presented, and there is no negative connotation to the words used. The phrase does not approach the references found to be improper in other cases. E.g. State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009) (defense counsel's "mischaracterizations," "twisting" facts and "hoping that you are not smart enough to figure out" what they are doing were improper although not reversible); State v. Gonzales, 111 Wn. App. 276, 283, 45 P.3d 205 (2002), rev. denied, 148 Wn.2d 1012 (2003) (prosecutor stated that his job and oath is to see justice served, while defense counsel's responsibility is to his client).

Jordan also claims that the second question asked the witness to comment on Jordan's veracity. App. Br. at 37-38. The prosecutor was responding to the defense counsel's suggestion that Jordan's changing story indicated that he was confused,

making the point that another explanation for a changing story is that the person is not telling the truth. 9RP 67-68. The officer was not asked and did not give her opinion as to whether Jordan fell into the former or the latter category.⁶ This contrasts starkly with the case on which Jordan relies, where the court found improper a detective's testimony that he told the defendant that "I didn't believe him." State v. Jones, 117 Wn. App. 89, 91-92, 68 P.3d 1153 (2003).

The question and response indicating that sometimes people who are lying change their stories was not prejudicial; that concept is within the common experience of all people.

Juries embody "the commonsense judgment of the community." Taylor v. Louisiana, 419 U.S. 522, 530, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). Only with the greatest reluctance and with clearest cause should judges—particularly those on appellate courts—consider second-guessing jury determinations or jury competence. As Judge Learned Hand wrote, "Juries are not leaves swayed by every breath." United States v. Garsson, 291 F. 646, 649 (D.N.Y.1923).

⁶ Jordan also cites the prosecutor's argument in closing that the evidence established that Jordan was not telling the truth about his name or in the statements he made to Officer Pendergrass and to detectives (that he knew nothing about the shooting), and that he did not tell the truth because he was guilty. 14RP 735-36. It is unclear if he is suggesting that this argument was improper. A prosecutor is permitted to argue that the defendant is guilty based on inferences from the evidence presented. McKenzie, 157 Wn.2d at 59-60. A prosecutor is permitted to argue inferences from the evidence, including as to veracity. Gregory, 158 Wn.2d at 810, 863-64.

State v. Kirkman, 159 Wn.2d. 918, 938, 155 P.3d 125 (2007). The jury was instructed that it was the sole trier of fact and the sole judge of the credibility of the witnesses. CP 181-83. The jury is presumed to follow instructions when there is no evidence that they were confused or unfairly influenced. State v. Montgomery, 163 Wn.2d 577, 595-96, 183 P.3d 267 (2008). Jordan has cited no such evidence in this case.

Finally, Jordan asserts that the following portion of the State's rebuttal closing was "an impassioned plea" to vindicate the rights of the murdered victim, Maurice Jackson:

[T]he hardest thing about prosecuting a homicide or murder case is we all never get to meet the victim. For that I am sorry. We didn't get to know a lot about him. But the one thing I hope that you recall during your deliberations is that he does matter. He matters the same that any of us matter. And he matters not only for what happened to him, but what matters about this case is [] what is happening out in these neighborhoods, out on city streets. People pulling out guns in public. You know why they do that? Because they are relying on the code of silence. You don't pull your gun out in public and shoot and kill somebody in a crowd, unless you think that nobody will tell on you.

But the good news is that people are starting to tell. And we are thankful for that.

14RP 811-12. It is hard to imagine how a reference to a victim could be less impassioned, as this argument merely stated that the

prosecutor was sorry that the jury did not hear much about Maurice Jackson, who matters as every human being matters. Cf. McKenzie, 157 Wn.2d at 60 (reference to "lost innocence" of 12-year-old victim of sexual abuse was improper but not reversible); State v. Moran, 119 Wn. App. 197, 219-20, 81 P.3d 122 (2003), rev. denied, 151 Wn.2d 1032 (2004) (suggestion that jury verdict would "quiet [the victim's] spirit" was improper but not reversible).

Further, the reference to a shooting on a public street was a fair reply to the defense closing argument. Arguments that would otherwise be improper are nonetheless permissible when they are a fair reply to the defendant's arguments, unless such arguments go beyond the scope of an appropriate response. State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984). The prosecutor's remarks must not be viewed in isolation, but "in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given." Gregory, 158 Wn.2d at 810.

Jordan's defense counsel conceded in his closing argument that the gun recovered from Jordan's pocket fired the bullets that killed Maurice Jackson, and argued that Jordan was shooting at

shadows. 14RP 766-68. The prosecutor's reference to the code of silence appears to be an attempt to explain why a man would intentionally shoot another man on a public street. The defendant offers no suggestion as to how this reference was prejudicial to him, particularly where the prosecutor pointed out that some of the eyewitnesses in this case did testify.

The Supreme Court recognizes the reality that the absence of an objection by defense counsel "*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial." McKenzie, 157 Wn.2d at 53 n.2 (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991)). That court has stated, "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the misconduct as a life preserver ... on appeal." State v. Russell, 125 Wn.2d 24, 93, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995) (citing Jones v. Hogan, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)).

The jury in this case was informed by the court's written instructions that the lawyers' statements and arguments are not evidence and that the jury is the sole judge of the credibility of

witnesses. CP 182-83. The jury also was instructed that sympathy and prejudice should not play a part in their deliberations. CP 184.

The challenged questions and argument were proper. Even if they were improper, Jordan has not explained why any prejudice could not have been cured and how they could have affected the verdict given the overwhelming evidence of Jordan's guilt. Five eyewitnesses (three civilians, all with different perspectives, and two officers) saw Jordan facing the unarmed Jackson, with gun drawn, and shoot Jackson in the face and the chest. Jordan fled on foot and was finally apprehended with the murder weapon in his pocket. Any error in the challenged remarks was insignificant in the context of this case.

4. THE CONVICTIONS OF MURDER WITH A FIREARM ENHANCEMENT AND POSSESSION OF A FIREARM BY A FELON DID NOT VIOLATE DOUBLE JEOPARDY.

Jordan argues that his conviction of a firearm enhancement was a violation of double jeopardy because the murder charged included an alternative means of felony murder by assault with a firearm. The predicate argument that a new double jeopardy

analysis is warranted by Apprendi v. New Jersey⁷ and Blakely v. Washington⁸ and the specific argument that a firearm enhancement on an assault with a firearm conviction violates double jeopardy both were rejected by the Washington Supreme Court in State v. Kelley, 168 Wn.2d 72, 76-84, ___ P.3d ___ (2010).

Although the Supreme Court's decision in Kelley was issued after Jordan's opening brief was filed, Jordan inexplicably failed to cite in his brief four published appellate decisions that rejected this argument between 2006 and 2009. State v. Toney, 149 Wn. App. 787, 797-98, 205 P.3d 944 (2009); State v. Kelley, 146 Wn. App. 370, 374-75, 189 P.3d 853 (2008), aff'd, 168 Wn.2d 72 (2010); State v. Tessema, 139 Wn. App. 483, 492-93, 162 P.3d 420 (2007), rev. denied, 163 Wn.2d 1018 (2008); State v. Nguyen, 134 Wn. App. 863, 866-69, 142 P.3d 1117 (2006), rev. denied, 163 Wn.2d 1053, cert. denied, 129 S. Ct. 644 (2008). It is clear that Jordan was aware of this line of authority, as he noted that the issue was in the Supreme Court in the Kelley case. App. Br. at 42 n. 6. The appellate court decision in Kelley also relies on Nguyen, supra.

⁷ 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

⁸ 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Jordan also argues that in some way his conviction for unlawful possession of a firearm violated double jeopardy, asserting that he was "punished thrice" for shooting Maurice Jackson. App. Br. at 45. There can be no double jeopardy violation in the imposition of a firearm enhancement and the conviction for unlawful possession of a firearm because both statutes expressly endorse punishment under both provisions. RCW 9.41.040(6); RCW 9.94A.533(3)(e). If the legislature intends to impose multiple punishments, that punishment does not violate the double jeopardy clause. Kelley, 168 Wn.2d at 77.

While there is no express provision that the legislature intends both murder and unlawful possession of a firearm to be punished, the elements of the two crimes are not concurrent. When there is no express legislative intent, Washington courts apply the Blockburger⁹ test: in order to be the same offense for purpose of double jeopardy, the crimes must be the same in law and in fact. State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). If each offense includes elements not included in the other, the offenses are different and each may be punished. Id.

⁹ Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

RCW 9A.32.050(1)(b) prohibits killing a person in the course or furtherance of a felony assault, including assault with a deadly weapon. RCW 9A.36.021(c). RCW 9.41.040 prohibits possession of a firearm by a person convicted of a felony. As being a convicted felon is not an element of murder in the second degree, and causing a death is not an element of unlawful possession of a firearm, the crimes are not the same.

The presumption that crimes are not the same offense when their elements differ may be overcome with clear evidence of contrary legislative intent. Calle, 125 Wn.2d at 780. The different purposes served by the statutes and the placement of the offenses in different chapters of the criminal code, however, is evidence that the legislature intended to punish them as separate offenses. Calle, 125 Wn.2d at 780. Jordan has not offered any evidence to the contrary—indeed, a claim that the legislature intended that convicted felons should enjoy immunity from a violation of RCW 9.41.040 if they use the firearm to assault or kill is incredible.

5. THE TRIAL COURT PROPERLY INCLUDED JORDAN'S TEXAS CONVICTION FOR VOLUNTARY MANSLAUGHTER IN JORDAN'S OFFENDER SCORE.

Jordan argues that his Texas conviction for voluntary manslaughter should not have been included in his offender score because it is not legally comparable to the Washington crime of murder in the second degree, based on the elements of the crimes, the defenses available in each state, and the procedure applied in the courts of each state. This claim is without merit, as at the least the elements of that Texas crime are comparable to Washington's manslaughter in the first degree, which is scored the same as murder in the second degree. Moreover, legal comparability under the Sentencing Reform Act ("SRA") does not require that all possible defenses and procedures in the foreign state be identical to those in Washington.

Jordan does not dispute that the State proved with certified documents that he had a 1992 Texas conviction for voluntary manslaughter.

The legislature has manifested its intent that out-of-state convictions be included in a defendant's criminal history under the SRA. RCW 9.94A.030(12) explicitly defines "criminal history" as

being the defendant's prior convictions, "whether in this state, federal court, or elsewhere." RCW 9.94A.525(3) provides that "[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law."

If the defendant does not agree that his out-of-state conviction is comparable to a Washington felony, the court applies a two-part test to determine comparability. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the sentencing court compares the elements of the out-of-state offense with the elements of the comparable Washington crime. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the results of the comparison show that the elements of the crimes are "substantially similar," or if the foreign jurisdiction defines the crime more narrowly than Washington, the out-of-state conviction counts toward the defendant's offender score. Lavery, 154 Wn.2d at 255; State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). If the Washington statute defines the offense more narrowly than the foreign statute, the court proceeds to conduct a factual comparability analysis. Morley, 134 Wn.2d at 606. Factual comparability requires the sentencing court to determine whether

the defendant's conduct, as evidenced by the indictment or information, or the records of the foreign conviction, would have violated the comparable Washington statute. Lavery, 154 Wn.2d at 255.

Jordan was convicted by a jury in Texas in 1992 of voluntary manslaughter. CP 56.¹⁰ The elements of Jordan's Texas conviction for voluntary manslaughter were that he intentionally or knowingly caused the death of another person, but acted "under the immediate influence of sudden passion arising from adequate cause." CP 44,48; Tex. Penal Code §§ 19.02 and 19.04 (1992) (attached as Appendix 2). The trial court found that this crime was comparable to murder in the second degree in Washington. 15RP 19-20.

The elements of murder in the second degree comparable to Texas voluntary manslaughter are that the slayer intentionally caused the death of another. RCW 9A.32.050(1)(a). The State concedes that Jordan could have been convicted in Texas of knowingly causing the death of another, which would not be legally

¹⁰ The certified copies of the documents relating to Jordan's Texas manslaughter convictions and his prior Washington convictions were admitted as exhibits at the sentencing hearing. 15RP 15-17. The references in this brief are to the copies of those documents attached to the State's sentencing memorandum. CP 17-144.

comparable with a Washington murder. Nevertheless, the Texas crime is legally comparable to manslaughter in the first degree in Washington. The elements of that crime that are comparable to Texas voluntary manslaughter are that the slayer recklessly caused the death of another person. RCW 9A.32.060(1)(a).

Both murder in the second degree and manslaughter in the first degree are defined as serious violent offenses under the SRA. RCW 9.94A.030(41)(a). Any out-of-state conviction for an offense that is comparable to either crime should count as three points in the offender score for a current murder charge. RCW 9.94A.030(41)(b); RCW 9.94A.525(9).¹¹

Jordan claims that the elements of Texas voluntary manslaughter are "substantially broader than any potentially comparable Washington" crime because the mental state required for the Texas crime (intentionally or knowingly) is less than that required for murder. App. Br. at 18-20. The Texas definition of "knowingly" is narrower than the Washington definition of "recklessly," which is the mental state required for manslaughter in

¹¹ The prosecutor incorrectly scored this prior conviction as two points, and the trial court repeated that error. CP 21, 170, 175. If Jordan is resentenced, that error should be corrected, making his offender score 9 if the Texas crime is comparable to either murder in the second degree or manslaughter in the first degree.

the first degree. Compare Tex. Penal Code § 6.03 (1992) with RCW 9A.08.010(c) (both statutes are attached as Appendix 3). As a result, any conviction for voluntary manslaughter in Texas would require conduct constituting at least manslaughter in the first degree under Washington law.

Because counting the Texas crime as manslaughter in the first degree results in a higher offender score than the court actually applied, there is no reversible error in the court's finding the crime comparable to murder in the second degree. This Court may affirm on any basis supported by the record. State v. Poston, 138 Wn. App. 898, 904-05, 158 P.3d 1286 (2007), rev. denied, 163 Wn.2d 1016 (2008).¹²

Jordan also claims that his Texas crime is not legally comparable to a Washington homicide conviction because there are details of the doctrine of justifiable homicide and the way in which instructions are handled that differ in Washington and Texas. He complains, for example, that Texas does not recognize the

¹² Even if the Texas definition of "knowingly" was comparable only to negligence under RCW 9A.08.010, the Texas crime would be comparable to manslaughter in the second degree, RCW 9A.32.070, which is defined as a violent offense under RCW 9.94A.030(50), and would score as two points under RCW 9.94A.525(9), which was the number of points attributed to this conviction in the trial court.

Washington doctrine that there is no duty to retreat before using deadly force, and that Texas employs a different standard of review for the language in jury instructions.

Jordan is incorrect in his assertion that the burden of proof as to self defense differs between Texas and Washington. The Texas jury was instructed that the State had the burden of disproving self defense beyond a reasonable doubt. CP 55.

Jordan also is incorrect in his assertion that the standard for justifiable homicide is narrower in Texas because deadly force is lawful only if the slayer believes he is under attack with deadly force, while in Washington a slayer need fear only great personal injury. The jury in Texas was instructed that the definition of deadly force is: "force that is intended or known by the person using it to cause, or in the manner of its use or intended use is capable of causing death or serious bodily injury." CP 54. The Texas slayer may respond with deadly force if he believes that he is being attacked with force capable of causing death or serious bodily injury, a standard comparable to that in Washington.

In any event, no case has held that an out-of-state conviction is legally comparable only if the foreign state offers the identical defenses as in Washington, and nothing in the SRA requires the

court to examine all available defenses in the foreign state and compare them to Washington defenses before scoring the out-of-state conviction. In Morley, the Washington Supreme Court rejected a similar argument, holding that a military court martial qualified as a prior criminal conviction despite substantial differences in the court martial procedures and Washington criminal procedure. The Court reasoned:

We cannot believe any state's procedures and court rules would *fully* comply with all of Washington's rules and statutes of criminal procedure. If we required prior out-of-state convictions to conform to Washington procedures before allowing those convictions to be counted under the SRA, every single out-of-state conviction would be excluded from consideration. Such a result is clearly contrary to the purposes of the SRA.

The Legislature intended sentencing courts to include out-of-state convictions when making sentencing calculations under the SRA.

134 Wn.2d at 597. The court further observed that setting such a high standard would be contrary to the purposes of the SRA, which was designed “to ensure that defendants with equivalent prior convictions are treated ‘the same way, regardless of whether their prior convictions were incurred in Washington or elsewhere.’” Id. at 602 (quoting State v. Villegas, 72 Wn. App. 34, 38-39, 863 P.2d 560 (1993), rev. denied, 124 Wn.2d 1002 (1994)).

It is unlikely that any two states offer identical defenses under their criminal codes and common law. For example, in contrast with Washington and Texas, some states do place the burden of establishing self-defense on the defendant. Martin v. Ohio, 480 U.S. 228, 107 S. Ct. 1098, 94 L. Ed. 2d 267 (1987). There are a variety of formulations for the defense of insanity throughout the states. See 2 Paul H. Robinson, Criminal Law Defenses § 173, at 280-313 (1984). The same is true with respect to the duress defense; some states limit the defense to situations where death is threatened, while Washington allows the defense where there is a threat of death or grievous bodily injury. Id. at § 177, at 359-60; RCW 9A.16.060(1); see also Peter Westen and James Mangiafico, The Criminal Defense of Duress, 6 Buff. Crim. L. Rev. 833, 837 (2003) ("[d]efenses of duress differ considerably from jurisdiction to jurisdiction"). If Jordan's argument is accepted, it is likely that few out-of-state convictions would be legally comparable. Such a result would be clearly contrary to the purposes of the SRA.

The State is unaware of any published decision where the elements of the out-of-state crime were substantially similar to the comparable Washington offense, but the court held that the out-of-

state conviction was not legally comparable because the possible defenses in the foreign state differed. In Lavery, upon which Jordan relies, the Supreme Court held that the *elements* of federal bank robbery were not substantially similar to the crime of robbery in Washington because the crimes had different mens rea. 154 Wn.2d at 255-56. When discussing the significance of the differences in mens rea, the Court simply observed that Lavery would have had defenses to the crime in Washington not available in federal court. Id. at 256. The Court did not hold that different defenses, on their own, would justify a finding that the crimes were not comparable.

Finally, should this Court conclude that the Texas voluntary manslaughter conviction is not legally comparable to manslaughter in the first degree, the proper remedy is to remand for a resentencing hearing where the State may attempt to establish the factual comparability of the offenses. State v. Thiefault, 160 Wn.2d 409, 417, 158 P.3d 580 (2007). The only comparability argument made in the trial court was that the "sudden passion" element of the Texas law was not comparable to Washington law, but the trial court properly noted that that element, which mitigates a Texas murder down to manslaughter, would not constitute even

diminished capacity in Washington. 14RP 20. The State should be given the opportunity to respond to the comparability of defense argument first raised on appeal. Thiefault, 160 Wn.2d at 417. Further, RCW 9.94A.525(21) and RCW 9.94A.530 now specifically provide that the parties may provide all relevant evidence regarding criminal history at any resentencing. State v. Griffith, 164 Wn.2d 960, 969-70, 195 P.3d 506 (2008) (J. Madsen, concurring).¹³

6. THERE WAS NOT CUMULATIVE ERROR THAT DEPRIVED JORDAN OF A FAIR TRIAL.

Cumulative trial errors may deprive a defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cases in which courts have found that cumulative error justifies reversal include multiple significant errors. E.g. Coe, supra (discovery violations, three types of bad acts evidence improperly admitted, impermissible use of hypnotized witnesses, improper cross-examination of the defendant); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (improper hearsay as to details of child sex abuse and identity of abuser, court challenged defense

¹³ At resentencing, any subsequent convictions, including for the burglary in the first degree pending at the time of this trial, King County No. 07-1-04419-8 (CP 18, 139-44), also will be counted in his offender score.

attorney's integrity in front of jury, counselor vouched for credibility of victim, prosecutor misconduct).

The only trial errors alleged relate to three issues: failure to order expert evaluation of competency; failure to instruct on the lesser offenses and lawful force; and prosecutorial misconduct. If there is error as to either of the first two, it is reversible. Only one claimed trial error is not automatically reversible error, so the cumulative error doctrine is inapplicable.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Jordan's convictions and the sentences imposed.

DATED this 12TH day of April, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Donna L. Wise
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Appendix 1

Appendix 1

1 THE COURT: OKAY.

2
3 EXAMINATION

4 BY THE COURT:

5 Q. GOOD MORNING, MR. JORDON.

6 A. GOOD MORNING. HOW ARE YOU?

7 Q. GOOD. AND YOURSELF?

8 A. I'M HERE.

9 Q. I UNDERSTAND THAT. NOW, MR. JORDON HAVE YOU HAD
10 A CHANCE TO TALK TO MR. ABERNETHY, ABOUT YOUR CASE?

11 A. I TALKED TO HIM YESTERDAY.

12 Q. AND HAVE YOU HAD ANY CHANCE TO TALK THIS MORNING,
13 AT ALL, OR JUST NOT MUCH?

14 A. I HAVEN'T TALKED TO HIM, AT ALL, THIS MORNING.

15 Q. I UNDERSTAND IT IS A TOUGH SITUATION, SIR, I
16 REALLY DO. BUT YOUR ATTORNEY NEEDS FOR YOU TO CHAT
17 WITH HIM ABOUT YOUR DEFENSES, AND HOW YOU ARE GOING TO
18 PROCEED.

19 A. I'M CONFUSED ABOUT THE WHOLE THING, TO TELL YOU
20 THE TRUTH.

21 Q. I UNDERSTAND IT IS A TOUGH SITUATION. THERE ARE
22 A LOT OF THINGS GOING ON. BUT THERE ARE THINGS HE CAN
23 HELP YOU OUT ON. DO YOU UNDERSTAND WHAT YOU ARE BEING
24 CHARGED ON? I DON'T WANT TO COMMENT ON THE FACTS, BUT
25 YOU UNDERSTAND?

1 A. IF -- WHATEVER THEY SAY I'M CHARGED WITH, I'M
2 CHARGED WITH.

3 Q. DO YOU KNOW HOW MANY TIMES YOU HAVE MET WITH YOUR
4 COUNSEL?

5 A. I MET WITH HIM OVER NINE MONTHS OR SO, SO
6 PROBABLY ABOUT SIX OR SEVEN TIMES.

7 Q. WELL, IT IS IMPORTANT THAT YOU TALK WITH HIM
8 FURTHER, ABOUT WHAT IS GOING ON HERE. AND I KNOW IT
9 IS A TOUGH SITUATION, SIR. I RECOGNIZE THAT YOU ARE
10 NOT HAPPY ABOUT THE SITUATION, AND NOR WOULD ANYBODY
11 BE IN YOUR SITUATION. BUT IT IS IMPORTANT THAT YOU
12 COOPERATE WITH MR. ABERNETHY, AND HELP HIM HELP YOU.
13 DO YOU UNDERSTAND THAT? AND I DON'T WANT YOU TO TALK
14 ABOUT THE FACTS.

15 A. NO. I'M TALKING ABOUT THE FACT THAT IT IS LIKE
16 BEING BEFRIENDED TO THE CASE, BEING BEFRIENDED AND
17 ESPECIALLY GANG GROUND, LIKE BE NICE TO YOU, GAIN
18 INFORMATION OUT OF YOU. AND I'M THINKING TO MYSELF,
19 LIKE I'M NOT A MEMBER OF A GANG. WHAT IF THEY GET TO
20 MY SON, WHO IS 13? HE MIGHT WANT TO GET IN A GANG,
21 AND THAT HURT ME WHEN I HEARD THAT. I AIN'T WITH NO
22 GANG.

23 THAT'S THE TYPE -- THERE IS ALREADY ENOUGH
24 STUFF GOING ON. DON'T USE ANYTHING TO TRY TO
25 INCRIMINATE ME. AND THAT'S THE THING THAT BOTHERS ME

1 THE MOST. I FEEL BAD ABOUT THIS. YOU ARE ALL JUST A
2 SMALL FRAGMENT OF WHAT IS GOING ON. THIS IS NOTHING,
3 YOU FEEL ME.

4 THAT'S THE COURT UP ABOVE, AND I AIN'T GOING
5 TO TRY TO GET AWAY WITH NOTHING I DONE. THIS IS NOT
6 THE WHOLE CASE.

7 Q. I UNDERSTAND.

8 JUST FOR THE RECORD, THE DEFENDANT HAS
9 POINTED UP TO HEAVEN. AND SO HE OBVIOUSLY HAS
10 RELIGIOUS ISSUES HE IS THINKING OF.

11 AND I UNDERSTAND THAT, SIR.

12 THE COURT: COUNSEL, ANYTHING FURTHER ON
13 THE COLLOQUY?

14 MS. SNOW: NOT FROM THE STATE.

15 MR. ABERNETHY: NO, YOUR HONOR.

16 THE COURT: BASED ON THE COLLOQUY, THE COURT
17 DOESN'T HAVE CONCERNS ABOUT COMPETENCY. I UNDERSTAND
18 THE DEFENDANT IS GOING THROUGH A TOUGH TIME. AND HE
19 IS CHARGED WITH VERY, VERY SERIOUS EVENTS. AND THERE
20 ARE ISSUES THAT HE HAS TO DEAL WITH, IN TERMS OF WHAT
21 HIS SON HAS TO PERCEIVE. AND OBVIOUSLY, ALL OF US
22 HAVE TO DEAL WITH SOME LARGER RELIGIOUS AND SOCIAL
23 ISSUES, THAT ARE LARGER THAN US.

24 AND I THINK THAT'S WHAT THE DEFENDANT IS
25 REFERRING TO. AND I SENSE A FEELING OF FRUSTRATION.

1 AND I FIND THIS IS NOT A COMPETENCY ISSUE, BUT PERHAPS
2 UNDERSTANDABLE FRUSTRATION IN THE SITUATION. AND
3 THAT'S NOT TO MINIMIZE IT, OR NOT TO SAY THAT -- MAKE
4 ANY VALUE COMMENT ON IT. IT IS JUST WHAT IT IS. BUT
5 IT IS NOT COMPETENCY.

6 AND SO, COUNSEL, LET ME PROCEED AT THIS TIME.
7 IT IS MY UNDERSTANDING THAT THERE WILL BE A
8 STIPULATION, BUT LET ME READ THIS TO BOTH THE
9 DEFENDANTS, MR. DORSEY AND MR. JORDON.

10 IT IS MY DUTY TO INFORM YOU THAT YOU MAY, BUT
11 NEED NOT, TESTIFY AT A PRETRIAL HEARING ON THE
12 CIRCUMSTANCES SURROUNDING ANY STATEMENT OFFERED
13 AGAINST YOU. NUMBER TWO, IF YOU DO TESTIFY AT A
14 PRETRIAL HEARING, YOU WILL BE SUBJECT TO CROSS-
15 EXAMINATION WITH RESPECT TO YOUR CREDIBILITY. AND
16 THREE, IF YOU DO TESTIFY AT THE PRETRIAL HEARING, YOU
17 DO NOT, BY SO TESTIFYING, WAIVE YOUR RIGHT TO REMAIN
18 SILENT DURING TRIAL. AND FOUR, IF YOU DO TESTIFY,
19 NEITHER THIS FACT NOR YOUR TESTIMONY AT THE PRETRIAL
20 SHALL BE MENTIONED TO THE JURY.

21 MR. ABERNETHY, YOU AND YOUR ATTORNEY, WILL BE
22 DRAFTING A STATEMENT. BUT HAS YOUR ATTORNEY EXPLAINED
23 THIS?

24 THE DEFENDANT: SOME STUFF, BUT I DON'T
25 UNDERSTAND THIS.

1 THE COURT: I JUST READ THE RULE, BUT WILL YOU
2 DISCUSS IT WITH YOUR CLIENT FURTHER?

3 MR. JORDAN, DO YOU HAVE ANY OTHER QUESTIONS?

4 THE DEFENDANT: I'M HERE, AND I'M JUST GOING
5 ALONG.

6 THE COURT: WILL YOU PLEASE FURTHER DISCUSS
7 THIS MATTER WITH YOUR CLIENT?

8 AND I BELIEVE WE ARE NOT AT THE HEARING, YET.
9 AND WE WILL MAKE A SCHEDULE AND THEN TAKE A BREAK AND
10 CALL YOUR WITNESSES.

11 THE COURT: AND SO, YOU ARE GOING TO WANT TO
12 CALL THREE WITNESSES?

13 MS. SNOW: YES.

14 THE COURT: AND PROBABLY THE DETECTIVE WILL GET
15 HERE IN A WHILE?

16 MS. SNOW: RIGHT.

17 THE COURT: THAT WILL TAKE MOST OF THE
18 MORNING, I WOULD THINK.

19 MS. SNOW: I THINK THE TESTIMONY, AT THIS TIME,
20 ITSELF, WILL PROBABLY BE ABOUT AN HOUR.

21 THE COURT: DO YOU AGREE WITH THE TIME?

22 MS. ATWOOD: YES.

23 MR. ABERNETHY: WE DO, YOUR HONOR. YOUR HONOR,
24 I WOULD ASK THE COURT TO CONSIDER, AS A MATTER OF
25 HOUSEKEEPING OR SCHEDULING, THE FACT THAT I WOULD LIKE

Appendix 2

Appendix 2

Texas Penal Code § 19.02 (1992)

MURDER.

(a) A person commits an offense if he:

- (1) intentionally or knowingly causes the death of an individual;
- (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
- (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

Texas Penal Code § 19.04 (1992)

VOLUNTARY MANSLAUGHTER.

(a) A person commits an offense if he causes the death of an individual under circumstances that would constitute murder under Section 19.02 of this code, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause.

(b) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(c) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

(d) An offense under this section is a felony of the second degree.

Appendix 3

Appendix 3

Texas Penal Code § 6.03 (1992)

DEFINITIONS OF CULPABLE MENTAL STATES.

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(c) A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

RCW 9A.08.010 GENERAL REQUIREMENTS OF CULPABILITY.

(1) Kinds of Culpability Defined.

(a) **INTENT.** A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) **KNOWLEDGE.** A person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

(c) **RECKLESSNESS.** A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

(d) **CRIMINAL NEGLIGENCE.** A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

(2) **Substitutes for Criminal Negligence, Recklessness, and Knowledge.** When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

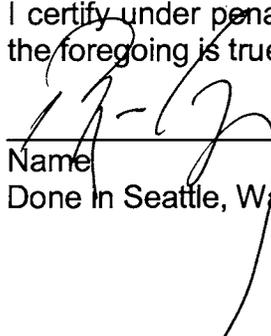
(3) **Culpability as Determinant of Grade of Offense.** When the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly, or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

(4) **Requirement of Wilfulness Satisfied by Acting Knowingly.** A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

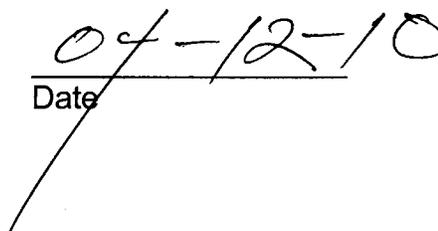
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan F. Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. ERICK DESHUM JORDAN, Cause No. 63016-4-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 APR 12 PM 4:26