

No. 36978-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CREEDE RAYMOND HARRIS,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

On Appeal from the Pierce County Superior Court
Cause No. 06-1-01467-9
The Honorable Thomas Felnagle, Judge

OPENING BRIEF OF APPELLANT

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I. SUMMARY OF THE CASE

In the early morning hours of March 28, 2006, Daniel Bills armed himself with a .357 caliber handgun and drove to Creede Harris' Puyallup apartment. He parked his car in front of Creede's apartment, and approached on foot.¹ Creede saw Daniel arrive and came outside. Daniel brandished his gun and threatened to kill Creede if Creede did not keep away from Daniel's girlfriend. Daniel then returned to his parked car; but instead of leaving, he turned on the car stereo, lit a cigarette, and drank a beer. In an effort to scare him away Creede and his roommate, Paul Bruglia, took a gun from Paul's room, and approached Daniel. But when Daniel raised his gun towards Creede, Creede fired a single shot that fatally wounded Daniel. The State charged Creede with second degree murder. Creede claimed at trial that he shot at Daniel in self defense. The jury rejected the State's theory that Creede intended to shoot Daniel, and convicted Creede of the lesser offense of second degree manslaughter.

¹ Because several witnesses share a last name, the parties in this case will be referred to by their first names.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. In convicting Creede Harris of second degree manslaughter, the State failed to present sufficient evidence to prove beyond a reasonable doubt that he was not acting in self defense.
2. The trial court erred when it gave a first aggressor jury instruction, Jury Instruction 26.
3. The trial court erred when it included family members' travel expenses in the total amount of restitution to be paid by Creede Harris.

B. Issues Pertaining to the Assignments of Error

1. Did the State present sufficient evidence to prove that Creede Harris was unjustified in shooting Daniel Bills, where the evidence presented by Creede showed that Daniel Bills was armed, had threatened to kill Creede, had parked outside Creede's apartment and was refusing to leave, and was raising a gun towards Creede just before Creede fired his gun, and where the State presented no evidence to contradict this testimony? (Assignment of Error 1)
2. Where the evidence showed that Daniel Bills showed up

uninvited at Creede Harris' apartment, drew a gun and threatened Creede, then refused to leave when asked and instead stayed out in front of the apartment in a parked car drinking beer and smoking cigarettes, did the trial court err when it told the jury that it should convict if it found that Creede was the first aggressor? (Assignment of Error 2)

3. Were travel expenses incurred by family members to attend Daniel Bills' funeral authorized by the restitution statute where there is no causal connection between Creede Harris' act and the expense? (Assignment of Error 3)

III. STATEMENT OF THE CASE

A. Procedural History

The State charged Creede Raymond Harris by Information with one count of second degree murder (RCW 9A.36.050).² (CP 1-2) The State also alleged that Creede was armed with a firearm at the time he committed the crime. (CP 1-2) The jury acquitted on the second degree murder charge, and instead found Creede guilty of second degree manslaughter while armed with a firearm. (CP

² The State charged alternative means of committing second degree murder: (1) by shooting Daniel Bills with the intent to cause his death; or (2) by shooting Daniel Bills while committing or attempting to commit the crime of assault in the second degree. (CP 1-2)

177, 180, 181; 10/05/07 RP 4)³

The trial court sentenced Creede to a standard range sentence totaling 63 months. (11/08/07 RP 25; CP 200-01) The court also imposed restitution in the amount of \$7,352.64, which included, over defense objection, travel costs incurred by Daniel's family. (01/04/08 RP 17, 20-21; CP 209-14, 227-28) This appeal follows. (CP 191)

B. Substantive Facts

Creede Harris and Paul Bruglia shared an apartment in Puyallup, Washington. (10/02/07 RP 878-79) They often socialized with sisters Jennifer and Allison Woslager, and Creede hoped to date Jennifer. (10/02/07 RP 883-84) Jennifer and Allison lived with their father, David Woslager. (09/25/07 RP 250; 09/27/07 RP 582) Jennifer's boyfriend Daniel Bills, and Allison's friend Mykel Racelis, also lived with the Woslagers. (09/24/07 RP 9; 09/25/07 RP 250; 09/27/07 RP 582-83, 597)

A few weeks prior to the charged incident, Jennifer and Mykel were at Creede and Paul's apartment. (09/24/07 RP 34; 10/01/07 RP 735-36; 10/02/07 RP 886-87) Daniel arrived later, and

³ References to the transcripts in this case will be to the date of the proceeding followed by the page number.

saw Creede and Jennifer coming out of Creede's bedroom together; Creede was shirtless and Jennifer was wearing his shirt. (09/24/07 RP 34-35; 10/01/07 RP 738; 10/02/07 RP 886-87) Daniel became enraged, and threatened to return with a gun and kill Paul and Creede. (09/24/07 RP 34-35, 38-39; 10/01/07 RP 738-39; 10/02/07 RP 888) Creede later heard from a mutual friend that Daniel had said he would "get" Creede. (10/02/07 RP 889) Creede and Paul were concerned by Daniel's threats to return with a gun, so they purchased a rifle from a friend. (10/02/07 RP 872-73, 890-91)

On the night of March 27-28, 2006, Paul, Creede, Allison, Mykel, their friend Lucia Mendez, and Paul's father Steve, were drinking and socializing at the apartment. (09/25/07 RP 253, 255; 10/01/07 RP 712, 714) Allison called Daniel late that night and asked for a ride home, but he angrily refused. (09/25/07 RP 263-64, 285-87) Allison then called her friend Joan Neslund, and asked her for a ride home. (09/24/07 RP 90, 91-92; 09/25/07 RP 264, 287) Rather than going home when Joan arrived, Allison instead drove around with Paul and Joan looking for a way to buy marijuana. (09/24/07 RP 91-92; 09/25/07 RP 287-88)

At approximately 1:30A.M., Daniel woke Jennifer and told

her he was going to drive to Creede and Paul's apartment to pick up Allison and Mykel. (09/24/07 RP 10-11) Daniel seemed angry, and said that if he went to the apartment he might get into a fight with Paul and have to "punch Paul's teeth in." (09/24/07 RP 13, 46, 47) Jennifer urged Daniel not to go, but he left at about 1:45 in David's Ford Bronco. (09/24/07 RP 13, 50)

Jennifer became concerned when they had not returned nearly an hour later. (09/24/07 RP 13, 14) She also noticed that Daniel had changed clothes and left his cellular phone, and was worried that Daniel was with another woman. (09/24/07 RP 15, 51, 52) She called Creede, who told her that Daniel had not come to his apartment, and that Allison and Mykel had not been picked up. (09/24/07 RP 14-15; 10/02/07 RP 898) Jennifer shared her concern that Daniel was cheating on her with another woman. (10/02/07 RP 898) Creede was upset by this conversation, but later calmed down and did not threaten or plan to harm Daniel. (10/01/07 RP 719-20, 742; 10/02/07 RP 899-900)

Daniel eventually arrived and parked in front of Creede and Paul's apartment. (10/02/07 RP 900) Creede testified that he heard the Bronco pull up, so he went outside to meet him. (10/02/07 RP 901) Creede observed that Daniel was intoxicated

and appeared "messed up." (10/02/07 RP 901-02)

Daniel pulled out a gun and threatened to kill Creede if he did not stay away from Jennifer. (10/02/07 RP 901-02) Creede backed away, and told Daniel to leave. (10/02/07 RP 902, 903)

But Daniel did not leave. (10/02/07 RP 903) Creede went inside and called Paul, who was still out with Allison and Joan. (09/24/07 RP 94; 09/25/07 RP 258; 10/02/07 RP 903) Creede was concerned and scared because he could see Daniel sitting in the Bronco, and knew Daniel was armed and had just threatened his life. (10/02/07 RP 903, 905)

As they returned to the apartment, Allison, Joan and Paul passed Daniel sitting in the Bronco with his seat back and his feet up on the dashboard. (09/24/07 RP 96, 103) Daniel acknowledged Joan as they drove past. (09/24/07 RP 103)

At about that same time (2:37A.M.), a neighbor called police to complain about a suspicious man sitting in a suspicious Bronco listening to loud music. (09/24/07 RP 133-34; 09/26/07 RP 403-04)

Paul asked to be dropped off at the corner away from the apartment building, and Joan complied. (09/24/07 RP 96-98; 09/25/07 RP 260) Paul entered his apartment, went into his room and grabbed a gun. (10/01/07 RP 722-23; 10/02/07 RP 903-04)

Creede took the gun and they went outside together. (10/01/07 RP 723; 10/02/07 RP 904) Lucia saw them leave and noticed that they had a gun. (10/01/07 RP 764)

Creede testified that he was scared and felt threatened, but he went outside hoping that they could get Daniel to leave and that Daniel would think they were not afraid of him. (10/02/07 RP 906, 907, 916) As Creede and Paul approached the Bronco, Creede held his gun up so Daniel would see it, and yelled at Daniel to leave. (10/02/07 RP 906, 907) Daniel screamed back, "mother fucker, make me." (10/02/07 RP 907) Creede saw Daniel raise his gun and was scared that he would shoot, so Creede fired a single shot. (10/02/07 RP 908, 909, 917) Creede immediately ran away and threw his gun over a fence. (10/02/07 RP 909) He did not intend to shoot or harm Daniel, and he did not know whether the bullet struck Daniel. (10/02/07 RP 909, 916)

Mykel and Lucia heard a gunshot coming from outside Creede and Paul's apartment. (10/01/07 RP 723, 769) Mykel went outside and saw Creede running away. (10/01/07 RP 723-24) Lucia also went outside and noticed a bullet hole in the passenger window of the Bronco, but did not see Daniel. (10/01/07 RP 770) Mykel and Lucia then returned to the apartment. (10/01/07 RP

770) A neighbor also heard a gunshot and heard a man cry for help. (09/26/07 RP 391-92) The neighbor looked out the window and saw the Bronco and heard the loud music, but did not see anything else suspicious. (09/26/07 RP 392-93)

Lucia called Jennifer in a panic and described what she had heard. (09/24/07 RP 16-18) Jennifer woke David and told him about the call. (09/24/07 RP 18; 09/27/07 RP 585-86) They immediately drove to Creede and Paul's apartment. (09/24/07 RP 18; 09/27/07 RP 586)

Puyallup police officers arrived at 2:41A.M. in response to the complaint about the suspicious vehicle and loud music. (09/24/07 RP 133-34, 135) They found the Bronco unoccupied but still running, with the stereo turned up very loud. (09/24/07 RP 136) They also noticed that the front passenger side window was broken. (09/24/07 RP 136) They searched the vehicle, and found an open and still-cold beer can in the center console cup holder, a .357 caliber handgun wedged between the front seat and the center console, a black holster for the handgun on the driver's floorboard, and an unspent .44 caliber bullet on the passenger floorboard. (09/24/07 RP 141, 142, 145, 147, 183-84)

As they were conducting the investigation of the Bronco,

David and Jennifer arrived at the scene. (09/24/07 RP 152-53; 09/27/07 RP 586-87) David explained that the Bronco and the .357 handgun belonged to him. (09/24/07 RP 152-53) He also told police that he was looking for Allison, who was at a party somewhere in Puyallup. (09/24/07 RP 209-10) He did not tell the officers that she was actually in the apartment building beside the Bronco. (09/24/07 RP 209-10; 10/01/07 RP 855-56) He also did not tell the officers that his daughter and friends had heard a possible gunshot. (09/24/07 RP 209-10; 10/01/07 RP 855-56)

Jennifer did not tell the officers that she suspected there might have been a confrontation between the driver of the Bronco and a resident of the nearby apartment. (09/24/07 RP 210) Neither Allison, Lucia nor Mykel came outside to tell police what they observed and heard. (09/25/07 RP 262-63; 10/01/07 RP 725-26; 770-71) Unaware of this important information, the police ended their investigation, turned the Bronco and .357 handgun over to David, and left the scene. (09/24/07 RP 154, 212, 216, 218; 10/01/07 RP 856)

Jennifer subsequently went to Creede and Paul's apartment and told Allison and Mykel to come home with her. (09/25/07 RP 265; 10/01/07 RP 727) They left in the Bronco, but drove around

trying to find Daniel, Creede or Paul. (09/24/07 RP 21-22; 10/01/07 RP 728) David knocked on the door of the apartment, but receiving no answer, he went to a nearby 7-11 convenience store, bought coffee and donuts, then returned and parked in front of the apartment to see if Daniel would come back. (09/27/07 RP 593, 594)

Around 4:00A.M., Jennifer drove the Bronco past the apartment, and noticed a pair of white shoes in the grass across from the apartment building. (09/24/07 RP 22-23, 24) She stopped the car and ran to the spot, where she found Daniel lying dead on the ground. (09/24/07 RP 22-23) A neighbor heard her screaming, and called 911. (09/26/07 RP 407-08)

Daniel exhibited no signs of life when medical aid arrived. (09/25/07 RP 313) Police subsequently noticed a cigarette butt and ash from a burned out cigarette on the ground next to Daniel's head. (10/01/07 RP 805) They also found a rifle in the bushes nearby. (09/25/07 RP 321) A few hours later, Creede walked out from behind some nearby bushes and was arrested without incident. (09/25/07 RP 227, 231, 247)

Daniel died as a result of a single bullet wound to his chest and abdomen. (09/27/07 RP 639) The medical examiner also

noted abrasions primarily on the front and right side of Daniel's face, likely produced by small shards of glass projected towards Daniel after the bullet struck the glass on the passenger side window. (09/27/07 RP 658-60) The medical examiner testified that Daniel would not have lost consciousness immediately, and could have remained mobile for up to five minutes or more. (09/27/07 RP 671-72)

The examiner testified that Daniel's injuries were consistent with the defense's explanation that Daniel was sitting in the Bronco, leaning forward, turning towards the passenger side with his hand raised when he was shot. (09/27/07 RP 676, 691-92, 693) Additionally, Daniel's blood alcohol level was .19, and he had a significant amount of methamphetamine in his system. (09/27/07 RP 679, 680) Methamphetamine can cause a person to become violent, paranoid, or increasingly angry, and alcohol can reduce a person's inhibitions. (09/27/07 RP 683)

David testified that he owned the .357 handgun, and he usually takes it with him wherever he goes. (09/27/07 RP 602) David did not put the handgun into the Bronco that night. (09/27/07 RP 602) Daniel knows where David keeps the handgun. (09/27/07 RP 602)

IV. ARGUMENT & AUTHORITIES

A. The State failed to disprove Creede's claim that his actions were justified because he acted in self-defense.

Where a defendant presents evidence that he reasonably believed the victim was about to harm him or another person and he acted in self defense, the State must prove the absence of self defense beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 496, 656 P.2d 1064 (1983); State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004); State v. Douglas, 128 Wn. App. 555, 563, 116 P.3d 1012 (2005).

A claim of self defense is judged by a subjective standard. McCullum, 98 Wn.2d at 488-89. The jury must "view the evidence from the defendant's point of view as conditions appeared to him or her at the time of the act." McCullum, 98 Wn.2d at 488-89 (citing State v. Wanrow, 88 Wn.2d 221, 234-36, 559 P.2d 548 (1977)). Thus, the jury must view the claim of self defense "from the defendant's perspective in light of all that [he] knew and experienced with the victim." State v. Allery, 101 Wn.2d 591, 594, 682 P.2d 312 (1984) (citing Wanrow, 88 Wn.2d at 235-36).

In this case, the undisputed evidence established that Daniel did not call Mykel or Allison or anyone else at the apartment to

notify them that he was coming. (09/25/07 RP 263; 10/01/07 RP 757; RP10/02/07 899, 901-02) Before he left, he armed himself with David's .357 caliber handgun. (09/24/07 RP 142, 145, 147; 09/27/07 RP 602; 10/02/07 RP 901-02) He did not immediately go to the apartment, and when he finally did arrive he appeared to be, and in fact was, under the influence of methamphetamine and alcohol. (09/24/07 RP 13, 14; 09/27/07 RP 679, 680; 10/02/07 RP 901-02)

Creede testified that Daniel brandished the .357 handgun and threatened to kill Creede if he did not stay away from Jennifer. (10/02/07 RP 901-02) He refused to leave when asked. (10/02/07 RP 902, 903) Creede saw that he continued to sit outside the apartment, and knew that he was armed and had made several threats on his life. (10/02/07 RP 888, 889, 902, 903, 905-06) Even though the engine was running when Creede and Paul approached the Bronco, and even though Creede again told Daniel to go away, Daniel made no attempt to leave and instead raised his gun towards Creede. (09/24/07 RP 136; 10/02/07 RP 907, 908) Only then did Creede fire a shot, and only because he believed Daniel was going to shoot him first. (10/02/07 RP 908-09) The State did not present any evidence to contradict Creede's testimony, and

therefore did not prove the absence of self defense beyond a reasonable doubt.

The State did not present sufficient evidence to prove beyond a reasonable doubt that, under the circumstances presented, and knowing what he knew about Daniel, Creede's actions were unjustified. The facts presented by the State simply do not overcome the evidence that Creede acted with the reasonable belief that he was in mortal danger, and Creede's manslaughter conviction must be reversed.

B. The trial court committed reversible error when it gave a first aggressor instruction because there is no evidence that Creede was the first aggressor.

Over defense objection, the trial court gave the following "first aggressor" instruction:

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

(CP 169 (Jury Instruction 26); 10/03/07 RP 943-46) This instruction was improper.

A defendant who initially provokes the victim to act with force cannot claim self-defense. State v. Riley, 137 Wn.2d 904, 910, 976 P.2d 624 (1999). If there is credible evidence the defendant provoked the altercation and essentially created the need to act in self-defense, a first aggressor instruction is appropriate. Riley, 137 Wn.2d at 910. A first aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992). Such an instruction must be used with caution, however, as it lessens the State's burden of proving the absence of self defense. Riley, 137 Wn.2d at 910-11.

If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of a first aggressor instruction. State v. Thompson, 47 Wn. App. 1, 7, 733 P.2d 584 (1987). For example, in State v. Wingate, the instruction was proper because the defendant was the only person to draw a gun and aim it at another person. 155 Wn.2d 817, 823, 122 P.3d 908 (2005). In Riley there was similar evidence that the defendant drew his gun first and aimed it at someone that he later shot. 137 Wn.2d at 906-07. But the evidence in this case showed that Daniel was the first to draw a weapon, not Creede.

There was also no conflicting evidence of whose behavior provoked the fight in this case. The State presented no evidence to establish that Creede's behavior, not Daniel's, precipitated a fight. Daniel told Jennifer that he might "punch Paul's teeth in" when he went to Creede and Paul's apartment. (09/24/07 RP 47) He then armed himself and drove to the apartment unannounced and uninvited, and threatened Creede verbally and with a gun. (09/25/07 RP 263; 10/01/07 RP 757; RP10/02/07 899, 901-02) He was asked to leave, but did not. (10/02/07 RP 902-03) Instead Daniel sat outside of Creede's apartment still armed with a gun. (10/02/07 RP 903) Daniel was the first aggressor, not Creede.

The State did not present any evidence to support the use of a first aggressor instruction. An instruction on an issue or theory which is unsupported by the evidence is improper. State v. Upton, 16 Wn. App. 195, 204, 556 P.2d 239 (1976). And by giving this instruction, the court improperly lessened the State's burden of disproving self defense. This error was clearly prejudicial as well. By acquitting Creede of the second degree murder charge, the jury showed that it did not believe the State's theory that Creede intended or planned to harm Daniel. The instruction inserted an inappropriate and confusing legal theory into the trial, which

deprived Creede of his right to have the jury decide the case on the facts and relevant law, and his conviction should be reversed.

C. The trial court exceeded its statutory authority to order restitution when it ordered Creede to pay travel expenses incurred by Daniel's family in attending Daniel's funeral.

The authority to order restitution is purely statutory. State v. Davison, 116 Wn. 2d 917, 919, 809 P.2d 1374 (1991); State v. Hefa, 73 Wn. App. 865, 866, 871 P.2d 1093 (1994). When a particular type of restitution is authorized by statute, the imposition of restitution is reviewed under the abuse of discretion standard. Davison, 116 Wn.2d at 91.

Under RCW 9.94A.753(3) (Former RCW 9.94A.142(1)), "restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury."

A causal connection must exist between the defendant's criminal conduct and the victim's damages. State v. Landrum, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992); State v. Clapp, 67 Wn. App. 263, 276, 834 P.2d 1101 (1992). A sufficient causal connection exists if, but for the criminal acts of the defendant, the

victim would not have suffered the damages for which restitution is sought. Landrum, 66 Wn. App. at 799 (citing State v. Blair, 56 Wn. App. 209, 214-16, 783 P.2d 102 (1989); State v. Barrett, 54 Wn. App. 178, 179, 773 P.2d 420 (1989)). Restitution is not appropriate where the victim has not suffered any injury to person or property as a direct result of the defendant's criminal conduct. State v. Martinez, 78 Wn. App. 870, 882, 899 P.2d 1302 (1995).

At the State's request and over Creede's objection, the trial court ordered Creede to pay \$1665.50 in expenses incurred by Daniel's family members when they traveled to Daniel's funeral. (CP 209-14, 224-26, 227-28; 11/08/07 RP 10, 19-20; 01/04/08 RP 14-17, 20-21) The trial court found that travel expenses to a funeral were authorized under RCW 9.94A.753(3) because they were reasonably related to burial expenses and therefore reasonably related to the criminal act. (01/04/08 RP 20-21)

The trial court was incorrect. Travel expenses are not authorized by RCW 9.94A.753(3) because they do not satisfy the statutory causal connection requirement. The event that triggered the travel expenses was not Creede's actions, but rather the decision to attend the funeral, made by Daniel's family members.

Several cases interpreting other restitution statutes have reached the same conclusion—that similar travel expenses are not statutorily authorized. In State v. Halsen, the court held that RCW 9A.40.080, a more specific statute dealing with restitution for costs associated with custodial interference, was the proper statute under which to order restitution in the case. 111 Wn.2d 121, 122-23, 757 P.2d 531 (1988). The court then analyzed the restitution order under the more general Former RCW 9.94A.140(1), beginning with the statement that "although not necessary to the disposition of this case, we address briefly the published opinion of the Court of Appeals, which was based on [Former] RCW 9.94A.140(1)." 111 Wn.2d at 123. The court then interpreted Former RCW 9.94A.140(1), and concluded that the "treatment for injury to persons" language could not fairly be read to include travel expenses to recover a child. 111 Wn.2d at 123.

In State v. Morse, the court interpreted the juvenile restitution statute, RCW 13.40.190, and the language of RCW 13.40.020(17), which defines restitution. 45 Wn. App. 197, 199, 723 P.2d 1209 (1986). The court focused on the language "actual expenses incurred for medical treatment for physical injury to persons, and lost wages resulting from physical injury", and held

that the "plain and common meaning of the words of the statute precludes restitution for travel and telephone expense". 45 Wn. App. at 199 (emphasis omitted).

These cases do not directly consider the causal relationship requirement, or the "injury to or loss of property" language of RCW 9.94A.753(3) or Former RCW 9.94A.142(1), but they are instructive.

Moreover, RCW 9.94A.753(9) states that the restitution statute does not limit civil remedies available to "the victim, survivors of the victim, or defendant." Restitution is therefore not a replacement for a civil suit.

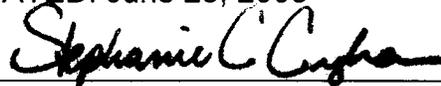
Because Creede did not directly cause the travel expenditures, the trial court exceeded its statutory authority when it ordered him to pay these expenses. That portion of the Judgment and Sentence, and the court's revised Order Setting Restitution and Disbursement (CP 227-28) should be reversed and stricken.

V. CONCLUSION

The State failed to meet its burden of disproving Creede's claim that he acted in self defense, and this requires reversal and dismissal of his conviction. The trial court also erred when it gave the State's requested first aggressor instruction because there was

no evidence to support the State's theory that Creede was the first aggressor, which requires reversal and a new trial. Finally, the trial court exceeded its statutory authority when it included travel expenses in the revised Order Setting Restitution, and that portion of the restitution order should be stricken.

DATED: June 26, 2008



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CERTIFICATE OF MAILING

I certify that on 06/26/2008, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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