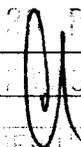


NO. 37815-9-II

COURT OF APPEALS
DIVISION II

09 MAY 2011 PM 2:11

STATE OF WASHINGTON
BY  DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KENT REGAN DILLARD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 07-1-04199-2

BRIEF OF RESPONDENT

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

1. Whether the State presented sufficient evidence to establish beyond a reasonable doubt that defendant was guilty of assault in the first degree?
2. Whether the trial court properly exercised its discretion in making evidentiary rulings?
3. Whether defendant received a fair trial when no cumulative error exists?

B. STATEMENT OF THE CASE.

1. Procedure

On August 13, 2007, the Pierce County Prosecutor's Office charged KENT REGAN DILLARD hereinafter "defendant," with one count of first degree assault with a firearm enhancement. CP 1.

Defendant filed a Knapstad motion to dismiss the case on the grounds that the force used by defendant against the victim was not unlawful as defendant was acting in defense of others. CP 7-11. Also on January 16, 2008, defendant filed motions in limine to: (1) exclude all witnesses from the courtroom; (2) exclude references to Mr. Horn as "the victim"; (3) exclude all 911 calls made; and (4) exclude defendant's statements. CP 4-6. He also stipulated to the admissibility of video surveillance from the tavern. CP 4-6.

The State filed motions in limine to: (1) exclude the criminal histories of the witnesses Justin Greenwood, Tammy Hollingsworth, William Horn, Michael Strong, Porter Thompson, and Chris Wodjenski; and (2) exclude the testimony of Sarah Dillard. CP 12-18. Defendant filed a motion to admit the criminal history of William Horn and allow the questioning of Mr. Horn's "reputation for quarrelsome or violent disposition." CP 40-42.

The State amended the charges against defendant to include the alternative means of committing the crime of first degree assault by intentionally assaulting Mr. Horn and inflicting great bodily harm in violation of RCW 9A.36.011(1)(c). CP 43-44. That same day, the parties also stipulated that defendant's statements were admissible in the State's case-in-chief. CP 45-55.

The trial court ruled on the various motions in limine. CP 56-59. The court ordered all witnesses excluded prior to their testimony, with the exception of one police officer. CP 56-59. The court ordered that police officer witnesses may refer to Mr. Horn as the victim and the parties may refer to Mr. Horn as "the victim" during opening and closing arguments, but that Mr. Horn could not be referred to as "the victim" throughout the course of the trial. CP 56-59. The court granted the State's motion to exclude the criminal histories of the witnesses Justin Greenwood, Tammy Hollingsworth, Mike Strong, Porter Thompson, and Chris Wodjenski. CP 56-59.

The court also granted the State's motion to exclude the criminal history of William Horn, except for a 1997 conviction for first degree theft and a 1997 conviction for first degree burglary which were admissible for impeachment purposes. CP 56-59. The court denied defendant's motion to admit William Horn's prior assault convictions under ER 404(a). CP 56-59. The court also granted the State's motion to exclude reference to William Horn's blood alcohol level at the time of the shooting and the State's motion to exclude testimony from Sarah Dillard regarding defendant's habit of carrying a gun and statements to her that he had "shot a guy" because the guy was "going to kill Darrell." CP 56-59.

The case proceeded to trial on March 5, 2008, in front of the Honorable Vicki L. Hogan. RP¹ (3/5/08) 3. On March 31, 2008, the jury found defendant guilty of first degree assault and answered "yes" to the special verdict form finding that defendant was armed with a firearm at the time of the shooting. CP 158-169. On May 16, 2008, the court sentenced defendant to 96 months confinement on the charge of first degree assault and 60 months confinement for the firearm enhancement for a total

¹ The Verbatim Report of Proceedings is contained in 13 volumes, only some of which are paginated consecutively. Citations to the pages of the record will be preceded by "RP([date of proceeding])." I.e., "RP(3/5/08) 1" refers to the first page of the proceedings of March 5, 2008. The record from March 25, 2008, contains a morning session, which will be referred to as "RP M(3/25/08)", and an afternoon session, which will be referred to as "RP A(3/25/08)".

confinement period of 153 months. CP 184-194. Defendant filed a timely notice of appeal. CP 197.

2. Facts

Ma and Pa's Roundup Tavern is a neighborhood bar where clientele consists mostly of regulars. RP (3/19/08) 138. Justin Greenwood is the bartender at the tavern and is the fiancée of Tammy Hollingsworth, the owner's daughter. RP (3/19/08) 138. Mikie and Laci also bartend at the tavern. RP (3/19/08) 142. They were present but not working the night of the incident. RP (3/19/08) 142. Mike Strong is the tavern's karaoke DJ. RP (3/19/08) 190. Darrell Albery and defendant had never been to the tavern before the night of the incident. RP (03/19/08) 139. William Horn is a "regular" at the tavern. RP (3/19/08) 190

Justin Greenwood was working the night of August 10, 2008, when defendant and Mr. Darrell Albery came in around 9 p.m. after fishing. RP (03/19/08) 139-40. Mr. Albery knew Mr. Greenwood as their children attended daycare together. RP (3/19/08) 141. At some point Mr. Greenwood saw Mr. Albery go to use the bathroom. RP (3/19/08) 141. Once inside the bathroom, Mr. Albery got into a physical altercation with a man who was blocking the door to the toilet that Mr. Albery needed to use. RP (3/19/08) 141-42. The door of the stall opened to reveal two intoxicated off duty employees of the tavern, Mikie and Laci, inside. RP

(3/19/08) 142. Laci began cussing and trying to slap Mr. Albery so Mr. Greenwood separated them. RP (3/19/08) 142.

Outside of the bathroom, Laci began yelling about Mr. Albery grabbing her neck; Mikie, in turn, ran after Mr. Albery. RP (3/19/08) 145. Eventually, Mr. Greenwood asked Laci and Mikie to leave. RP (3/19/08) 146. He told Mr. Albery to leave as well, but indicated that he would be welcome back at another time. RP (3/19/08) 146. At 12:55 p.m., Mr. Albery and defendant paid their tab with Mr. Albery's credit card and walked out the door. RP (3/19/08) 147; RP M(3/25/08) 43. The credit card tab showed the two of them had purchased about ten beers. RP M(3/25/08) 43.

Mr. Albery and defendant went to defendant's car and drove to the Clear Lake parking lot where they drank a few more beers. RP M(3/25/08) 44. An hour or so later around closing time, Mr. Albery and defendant returned to the bar. RP (3/19/08) 148. Defendant gave Mr. Albery a fishing knife to arm himself with and defendant took out his gun for himself. RP M(3/25/08) 60. They did not appear intoxicated to Mr. Greenwood. RP (3/19/08) 151. Mr. Greenwood told them it was closing time and asked Mr. Albery to throw away a beer can he had walked in with. RP (3/19/08) 150. Mr. Greenwood testified that defendant and Mr. Albery appeared awkward, paranoid, and quieter than the first time they were in the bar; this made him uncomfortable. RP (3/19/08) 153. He

described them as looking around observing the whole bar in an intimidating manner. RP (3/19/08) 154.

Defendant and Mr. Albery proceeded to the door; they were followed by William Horn. RP (3/19/08) 150. Mr. Horn is a regular who occasionally helps the bartenders get everyone out of the bar at closing time. RP (3/19/08) 190. He had been present at the tavern during the earlier altercation, but had not been involved in any way. RP (3/19/08) 211-212. Mr. Horn noticed Mr. Albery was upset and he tried to talk to defendant in an effort to get Mr. Albery out of the bar. RP (3/19/08) 217. Defendant ignored Mr. Horn. RP (3/19/08) 217.

As defendant and Mr. Albery went to the door, Mr. Greenwood heard Mr. Horn say “come on guys, he told you it’s time to go, let’s go.” RP (3/19/08) 152. After defendant and Mr. Albery stepped outside, Mr. Albery pulled a knife out and started swinging it at Mr. Horn’s face. RP (3/19/08) 217. Mr. Horn told him to stop and asked him what he was doing. RP (3/19/08) 217. Out of fear, Mr. Horn finally said, “drop the knife or I am going to nunchuk your ass.” RP (3/19/08) 217.

Mr. Horn walked over to his van to see if he had his nunchucks. RP (3/19/08) 218-29. He noticed his baseball bat sitting in the back, but realized Mr. Albery and defendant were far enough away so as not to harm him; Mr. Horn closed the door, leaving the bat in the van. RP (3/19/08) 219. He never found his nunchucks in the van. RP (3/19/08) 219.

Mike Strong, the tavern's karaoke DJ, had overheard defendant, Mr. Horn and Mr. Albery begin to argue and he walked over to them to stop it. RP (3/19/08) 190. Mr. Strong watched Mr. Albery and defendant go out of the door, then step to the side. RP (3/19/08) 192. Mr. Strong stood in the doorway and noticed a ten inch long fillet knife Mr. Albery was holding by his side. RP (3/19/08) 193. As he questioned Mr. Albery about bringing a knife into the bar, Mr. Strong noticed defendant standing three feet away with a small black automatic gun in his hand. RP (3/19/08) 193.

Chris Wodjenski, another regular at the tavern, testified that he was sitting at the bar and noticed Mr. Albery pull a large fishing knife out of his right pocket. RP A(3/25/08) 52-53. Mr. Wodjenski said Mr. Albery held the knife out to show everyone it was there. RP A(3/25/08) 55. He observed Mr. Albery get loud and confrontational with Mr. Horn. RP A(3/25/08) 53.

Mr. Strong testified at trial that Mr. Horn had not done anything physically or verbally threatening towards defendant or Mr. Albery prior to them getting the weapons. RP (3/19/08) 196. Mr. Strong ran back inside and yelled across the bar at Mr. Greenwood to call 911 because someone had a gun. RP (3/19/08) 154.

Mr. Albery began to walk around the outside of the tavern with the knife being belligerent. RP (3/19/08) 224. Mr. Horn followed him to make sure he did not hurt anyone; Mr. Horn told Mr. Albery to leave the

knife alone and just go home. RP (3/19/08) 224. Mr. Horn told Mr. Albery the cops were going to be there and then heard a boom. RP (3/19/08) 225. Mr. Horn felt the bullet hit him and turned to see defendant standing with his weapon pointed at his back. RP (3/19/08) 225. Mr. Albery ran away and Mr. Horn walked to the back door of the tavern bleeding. RP (3/19/08) 224. He threw away a marijuana pipe and a bag of weed so he would not have it when the police came. RP (3/19/08) 228-29. Mr. Horn testified at trial that defendant was the person who shot him. RP (3/19/08) 215; RP (3/19/08) 223.

While this was going on, Mr. Greenwood was attempting to call 911 but got busy signals; he heard a pop coming from the side of the building that sounded like a small caliber gunshot. RP (3/19/08) 155. Mr. Wodjenski also heard the gunshot and never heard any threats or warnings prior to it. RP A(3/25/08) 59. Everyone in the bar panicked and hid while Ms. Hollingsworth grabbed the keys to lock the doors. RP (3/19/08) 155. As she headed to the back, Mr. Horn approached her saying "he shot me" in a calm, shocked voice. RP (3/19/08) 155. Ms. Hollingsworth also saw Mr. Albery run by. RP (3/19/08) 173.

Ms. Hollingsworth thought Mr. Horn was joking until she was blood on the stairs coming from his wound. RP (3/19/08) 174. She brought him inside and laid Mr. Horn on the dance floor as Mr. Greenwood grabbed the first aid kit. RP (3/19/08) 174. Mr. Horn was bleeding from his side. RP (3/19/08) 201. Mr. Strong had run back

outside and saw defendant and Mr. Alberty pacing. RP (3/19/08) 202. He watched as they got into a vehicle pulling a boat and drove away. RP (3/19/08) 202.

The police arrived at the tavern around 2 a.m., secured the area and began taking statements as the paramedics worked on Mr. Horn. RP A(3/25/08) 70-71. Deputy Lukas Baker testified that he and other officers thoroughly checked the area around the tavern, including the roof, for nunchucks and other weapons and never found any. RP A(3/25/08) 84-85. Mr. Horn was transported to a hospital where he underwent emergency surgery from a gunshot wound to the abdomen. RP A(3/25/08) 91. While most of the multiple holes in Mr. Horn's internal organs could be repaired, a part of his small intestine had to be removed. RP A(3/25/08) 92. The wounds were life threatening had Mr. Horn not received prompt medical attention that night. RP A(3/25/08) 94.

Using the credit card receipt from the bar, the police were able to obtain Mr. Alberty's address. RP A(3/25/08) 78. Around 5a.m., the officers went to Mr. Alberty's house and had 911 operators call the house and ask the people inside to step out. RP (3/26/08) 291. The officers apprehended the male, Mr. Alberty, and then noticed defendant walking towards them. RP A(3/25/08) 81-82. Defendant matched the description of one of the suspects that night. RP (3/26/08) 293.

Defendant then told the officers "I want to turn myself in. The gun I used to shoot that son of a bitch is on my front porch. He deserved to be

shot.” RP (3/26/08) 296. As defendant described what had happened to the officers, he also stated that he hit Mr. Horn center chest and Mr. Horn was going to need a chest tube because of it. RP (03/26/08) 367. When referring to the person he had shot, the officers wrote in their reports that defendant used the words “mother fucker, asshole” and “son of a bitch” numerous times. RP (03/26/08) 369. Defendant was arrested and taken to jail. RP (03/26/08) 308. The officers recovered the gun from defendant’s front porch. RP (3/26/08) 299.

Deputy James Wilson transported defendant to jail. RP (03/26/08) 308. During the ride, defendant asked Deputy Wilson if he had ever shot anyone. RP (03/26/08) 311. Deputy Wilson replied yes and defendant said that it doesn’t feel very good to shoot somebody, does it. RP (03/26/08) 311. Defendant also told Deputy Wilson that he did not want to shoot the guy but the bastard deserved it. RP (03/26/08) 312. Deputy Wilson wrote in a report that defendant also said “point of impact was point of aim, pretty good?” RP (03/26/08) 314.

Mr. Albery testified at trial that he was frightened of Mr. Horn, who was unarmed, and he just wanted to get out of the situation which was why he pulled the knife out and turned and walked away. RP M(3/25/08) 74. He testified that he heard defendant screaming something and turned around to see Mr. Horn running at him with a pair of nunchucks. RP M(3/25/08) 76. Mr. Albery testified that Mr. Horn never hit him or swung at him with the nunchucks. RP M(3/25/08) 119-20. Mr.

Albery testified that Mr. Horn yelled "I am going to kill you," but acknowledged that he never told the police or any investigators this information. RP M(3/25/08) 136-37. Mr. Albery yelled at defendant to "take the shot" right before defendant shot Mr. Horn. RP M(3/25/08) 83.

Defendant chose to testify at trial. RP (03/26/08) 398. He stated that he and Mr. Albery left the tavern the first time because they were told it was time to leave. RP (03/26/08) 412. They went back because Mr. Albery wanted to ensure he had paid his bill. RP (03/26/08) 414. Defendant gave Mr. Albery a knife before they went in so that he would be able to defend himself as they did not know what kind of situation they were walking into. RP (03/26/08) 418. Defendant took his gun into the bar. RP (03/26/08) 419. He also admitted that when originally interviewed by Detective Deborah Heishman, he had lied and said he did not bring the gun inside but retrieved it from his car later. RP (03/26/08) 419.

Defendant testified that when he and Mr. Albery returned to the bar, Laci was being loud and obnoxious trying to incite a riot by claiming Mr. Albery had attacked her during the bathroom incident. RP (03/26/08) 422. Defendant left the bar in an effort to get out of the situation and did not know where Mr. Albery was. RP (03/26/08) 424. He walked around the bar and saw Mr. Albery who appeared to be getting yelled at by Mr. Horn. RP (03/26/08) 432. Defendant saw Mr. Albery reach in his pocket and pull out the knife causing Mr. Horn to back down. RP (03/26/08) 433.

Mr. Albery put the knife away and began to run down the alleyway. RP (03/26/08) 434.

Defendant testified that he saw Mr. Horn go to his vehicle, pull out an object and proceed to run after Mr. Albery. RP (03/26/08) 434.

Defendant believed the object to be nunchucks and saw Mr. Horn raise them up above Mr. Albery. RP (03/26/08) 435, 438. Defendant yelled at Mr. Albery, but Mr. Albery did not hear him. RP (03/26/08) 438-39.

Defendant drew his gun and shot Mr. Horn because he believed Mr. Albery would have been struck by the nunchucks if he did not shoot Mr. Horn. RP (03/26/08) 439.

Defendant and Mr. Albery left the bar because they were scared and did not know if anyone else would come after them. RP (03/27/08) 455. They drove to Mr. Albery's house and put the car behind his barn in case someone was following them. RP (03/27/08) 457. Defendant and Mr. Albery drove to Clear Lake and sat for a while to debrief before returning home around 5a.m. RP (03/27/08) 458, 461. On their way home, they drove by the tavern and saw all the police, but chose not to stop. RP (03/27/08) 588-90. When the police arrived at Mr. Albery's house, defendant came outside and was arrested. RP (03/27/08) 463.

On March 18, 2008, the parties stipulated to the testimony of Dr. Michael Mulcahy. CP 60-63. On March 26, 2008, the parties stipulated to the admissibility of defense exhibit 48, a video compilation prepared by

defense counsel of the surveillance at the tavern during the time of the shooting. CP 105-107.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED ASSAULT IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted

most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

If the defendant produces some evidence demonstrating self-defense, they may be entitled to a jury instruction on self-defense. *State v.*

Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). After the defendant produces such evidence the burden shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984).

Evidence of self-defense is evaluated from the standpoint of a reasonably prudent person in the defendant's situation. *Janes*, 121 Wn.2d at 238. This standard relies on both subjective and objective elements. The subjective portion requires the jury to stand in the shoes of the defendant so that they might consider all the facts and circumstances known to him or her. Conversely, the objective portion requires the jury to use the information to determine what a reasonably prudent person in a similar situation would have done. *Janes*, 121 Wn.2d at 238.

Essentially, evidence will support a self-defense claim if the defendant shows "(1) reasonable apprehension of a design to commit a felony or to do some great personal injury, and (2) imminent danger of that design being accomplished." *State v. Janes*, 64 Wn. App. 134, 139-40, 822 P.2d 1238 (1992). As such, the degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. *State v. Bailey*, 22 Wn. App. 646, 650, 591 P.2d 1212 (1979).

In the present case, the State charged defendant with first degree assault. CP 1, 43-44. To prove first degree assault, the State had to convince a jury of the following elements beyond a reasonable doubt:

(1) That on or about the 11th day of August, 2007, the defendant intentionally assaulted William Horn;

(2) That the defendant acted with intent to inflict great bodily harm;

(3) That the assault

(a) was committed with a firearm or with a deadly weapon or by a force or means likely to produce great bodily harm or death; or

(b) resulted in the infliction of great bodily harm; and

(4) That the acts occurred in the State of Washington.

CP 131-157, Instruction No. 12.

At trial, defendant admitted that by shooting Mr. Albery in the back the elements of first degree assault were met. RP (03/26/08) 438. The only issue before the jury was whether defendant was acting in lawful self-defense. The court's instructions to the jury stated that under Washington law:

It is a defense to a charge of Assault in the First Degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by someone lawfully aiding a

person who he reasonably believes is about to be injured, or in preventing or attempting to prevent an offense against a person, and when the force used is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 131-157, Instruction No. 14.

Defendant does not challenge the instructions. The law is properly laid out to the jury. Any time there are two versions of an event, courts rely on juries to make credibility determinations and resolve factual issues. Determinations regarding the credibility of witnesses made by the trier of fact should not be overturned. See *State v. Cord*, 103 Wn.2d 361, 693 P.2d 81 (1985). The jury, after hearing the testimony of Mr. Albery and defendant, determined there was sufficient evidence and found defendant was guilty of first degree assault. This credibility determination by the jury should not be altered and the verdict should be upheld.

2. THE COURT PROPERLY EXERCISED ITS DISCRETION IN MAKING EVIDENTIARY RULINGS.

- a. Defendant has failed to show that the use of the term victim constituted improperly opinion testimony or that the trial court abused its discretion in allowing the use of the term at trial.

To determine “whether testimony constitutes an impermissible opinion on the defendant’s guilt” the court looks to the circumstances of each case. *State v. Olmedo*, 112 Wn. App. 525, 531, 49 P.3d 960 (2002) (citing *State v. Cruz*, 77 Wn. App. 811, 814-815, 894 P.2d 573 (1995)). In doing this, courts should consider factors that “include the type of witness, the nature of the charges, the type of defense and the other evidence.” *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

Generally, testimony given by lay and expert witness may not directly or by inference refer to defendant’s guilt. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). But, “an opinion is not improper merely because it involves ultimate factual issues.” *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002) (citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993) (citing ER 704).

In deciding whether to admit evidence, including testimony, “trial courts are afforded broad discretion.” *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002) (citing *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001); *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). “A trial court’s decision to admit or deny evidence will be upheld unless the appellant can show an abuse of discretion.” *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002) (citing *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001))

Defendant contends that allowing Mr. Horn to be referred to as the victim is prejudicial because it invades the province of the jury and is impermissible opinion testimony regarding defendant’s guilt. The record shows that prior to opening statements, defense counsel moved to exclude the use of the term “victim” to refer to Mr. Horn, but did not provide the court with any case authority to support his request. RP (03/05/08) 45. In its ruling on the motions in limine, the trial court ordered:

that the defendant’s motion to preclude the State from referring to William Horn as “the victim” [be] granted in part and denied in part. The Court allow[ed] police officer witnesses to use the terms suspect, victim, complaining witness, and witness as they normally use those terms during the course of their investigation. The Court [did] not allow the State to refer to Mr. Horn as “the victim” during the course of the trial, but the State [could] use that term during opening statement when outlining its case and the expected evidence and during closing argument.

CP 56-59.

The State submits that using the term “victim” under the facts presented here is not the same as expressing an opinion that the defendant was guilty of a crime. Under the common dictionary definition of the term “victim” means “someone put to death [or harmed] ...by another;” the entry states further that “victim applies to anyone who suffers either as a result of ruthless design or incidentally or accidentally.” *Webster's Third New International Dictionary* 2550 (1993). The court correctly reasoned that the term victim is a title for which the investigators and people relaying information use to describe the situation and is easier for juries to understand when being presented with the facts of the case. RP (03/05/08) 48. Whether or not Mr. Horn was injured by accident, in self-defense, or was injured unlawfully, he was a victim. The trial court acted well within its discretion it holding that the manner in which the term was being used did not constitute improper opinion testimony. Defendant has failed to demonstrate an abuse of discretion.

Furthermore, the court retains the right to give a limiting instruction regarding such inferences if it believes the jury might be unduly influenced by such usage of the term. Therefore, the court’s order granting in part and denying in part reference to Mr. Horn as the victim was proper and reasonable given the common usage of the term and its purpose to identify the individuals in the case.

- b. The trial court properly granted the state's motion to exclude reference to Mr. Horn's two convictions of third degree assault.

In its motions in limine, the State moved to exclude reference to Mr. Horn's two convictions of third degree assault from 1996 pursuant to ER 609. CP 12-18. Defendant objected and moved to admit these crimes under ER 609(a) and ER 404(a)(2). CP 40-42. The trial court properly granted the State's motion to exclude. CP 56-59.

- i. **The trial court properly excluded Mr. Horn's two previous third degree assault convictions under ER 609(a).**

ER 609(a) allows evidence of prior convictions of a witness, including a criminal defendant, to be admissible for the purpose of attacking the credibility of a witness so long as the probative value of the conviction outweighs its prejudice to the witness. *State v. Bankston*, 99 Wn. App. 266, 992 P.2d 1041 (2000). A trial court's discretionary decision regarding the admissibility of prior convictions for impeachment purpose under ER 609 will not be overturned absent a showing of clear abuse. *State v. Anderson*, (1982) 31 Wn. App. 352, 641 P.2d 728.

The trial court properly granted the State's motion to exclude Mr. Horn's two prior assault convictions under ER 609(a). Because Mr. Horn's assault convictions were not crimes of dishonesty, the court must weigh the probative value with the potential prejudice to the witness. Mr.

Horn's credibility was central to the case as he was one of three people who witnessed the shooting. The admissibility of these convictions would substantially prejudice Mr. Horn's credibility with the jury while failing to add little if any probative value. Therefore, the convictions were properly excluded under ER 609.

ii. The trial court properly excluded Mr. Horn's two prior third degree assault convictions under ER 404(a).

ER 404(a)(2) states evidence of a person's character or a trait of character is generally inadmissible, but may be offered by defendant to rebut a pertinent trait of character of the victim of a crime. In his motion to the court, defense counsel wrote nothing regarding the admissibility of Mr. Horn's convictions under ER 404(a). CP 40-42. His argument regarding ER 404(a)(2) regarded why defense counsel should be allowed to question witnesses about Mr. Horn's "reputation for quarrelsome or violent disposition." CP 40-42. Thus, the trial court properly denied the motion when it concluded:

The defense did not establish any factual basis for its argument that the facts underlying those convictions would be admissible character evidence contemplated by ER 404(a). The convictions themselves are not admissible under the rule as a "pertinent trait" of character.

CP 56-59.

As such, Mr. Horn's two prior convictions for third degree assault were properly excluded as they failed to meet the standards for admissibility under ER 609 and ER 404.

- c. The trial court properly granted the State's motion that prevented defendant from questioning witnesses about Mr. Horn's prior incidences of fighting at the tavern and his use of nunchucks.

Defense counsel sought to be allowed to question witnesses about Mr. Horn's "reputation for quarrelsome or violent disposition" pursuant to ER 404(a)(2). Again, ER 404(a)(2) states that evidence of a person's character or a trait of character is generally inadmissible, but may be offered by defendant to rebut a pertinent trait of character of the victim of a crime.

In his motion, defense counsel wrote:

to allow defense counsel to question witnesses regarding the reputation of Mr. Horn, who is well known by the people in his community to a) carry and often brandish nunchucks, and b) start fights or quarrels in public places.

CP 40-42.

Defense counsel offered proof of this character evidence through:

At least two, I believe of the people who were interviewed by the detective at the Roundup, indicate that they knew that William Horn regularly carried nunchakus (sic).... Furthermore, Clyde Harris, who has been on our witness list for sometime, who is the best friend of William Horn's father and practically raised him, he describes him as Uncle

Clyde, can tell the Court, and can tell the jury of a number of occasions where he has seen Mr. Horn brandishing the nunchakus(sic), training with the nunchakus(sic). Mr. Horn has indicated he had taken classes on how to use the nunchakus. He has also taken, he has indicated that he at times has shown them off to the kids, hanging outside, waving them around. Mr. Harris can also testify that at one point Mr. Horn went all the way back up to the Roundup to get into an argument with some college kids who were new to the area, and took the nunchakus to their car. And that afterwards, Uncle Clyde, who went and essentially bailed him out of the fire, because he was about to get pretty trashed by some college kids, brought him away and said, you know what, you need to cut this out. You are going to mouth off to the wrong person, and attack the wrong person, and quite frankly, you are going to get shot.

RP (03/05/08) 64-65.

Defense counsel's offer of proof provides no evidence that people could testify to Mr. Horn's reputation within the community. Rather, defense counsel describes how Mr. Harris could testify to specific instances of conduct. ER 608(b) states that specific instances of the conduct of a witness may not be proved by extrinsic evidence. Defense counsel described how Mr. Harris would testify that he had seen Mr. Horn carry nunchucks on prior occasions, show the nunchucks to little kids, and got into an argument with college kids. This does not mean that Mr. Horn has a reputation within the community for brandishing nunchucks and starting fights with them. These incidents are not evidence of his reputation within the community and cannot be brought in under such a

guise. Therefore, the court properly granted the State's motion to prevent defendant from questioning Mr. Horn about these subjects at trial.

Further, motions in limine are advisory and tentative. *State v. Wilson*, 29 Wn. App. 895, 899, 626 P.2d 998 (1981). In its ruling, the trial court said "I am going to deny the motion *at this time*" indicating the court's willingness to revisit the issue later on if defendant wanted to raise it again. RP (03/05/08) 66 (emphasis added). Therefore, the trial court's motion to exclude asking such questions of witnesses was proper with regard to its admissibility under ER 404(a)(2) at that time. Defendant could have re raised the issue during trial and chose not to do so.

Defendant incorrectly relies on the case of *State v. Adamo*, 120 Wn. 268, 207 P. 7 (1922), to support his argument. In *Adamo*, the court held that a defendant who alleges self defense when charged with murder may introduce testimony from third persons that shows the deceased had a reputation for quarrelsome conduct. *Adamo*, 120 Wn. at 269. The defendant in *Adamo* sought to prove this through a witness who would testify the decedent had threatened him four years earlier and the court held it was not error to exclude such testimony because it was too remote in time. *Adamo*, 120 Wn. at 270.

Although defendant correctly points out that one of the distinguishing facts of this case is that defendant is charged with first

degree assault rather than murder as in *Adamo*, defendant neglects to point out another vital difference. In the present case, the victim/alleged instigator, Mr. Horn, is still alive whereas in *Adamo* he was dead. As such, in the present case, the jury would be able to judge on their own the character of Mr. Horn when he testifies where they could not do so to the decedent in *Adamo*. Therefore, the reputation evidence was much more probative of what actually occurred during the murder in *Adamo* than it is in the present case where it is substantially prejudicial to Mr. Horn.

3. DEFENDANT RECEIVED A FAIR TRIAL AS NO CUMULATIVE ERROR EXISTS.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal...”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

In this case, for the reasons set forth in the preceding sections, defendant has failed to establish any error, much less an accumulation of it. No cumulative error occurred. Even if errors exist, the evidence against defendant is overwhelming and the errors are harmless.

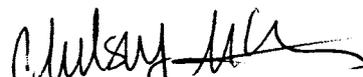
D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: MAY 19, 2009.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

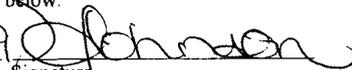

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 16411


Chelsey McLean
Rule 9

COMM. REC. 05/19/09 PM 2:11
STATE OF WASHINGTON
BY _____ DEPUTY
SPECIAL DELIVERY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/19/09 
Date Signature