

NO. 39108-2

COURT OF APPEALS

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

STATE OF WASHINGTON, RESPONDENT

v.

FLOYD TEO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming

No. 06-1-04536-1

BRIEF OF RESPONDENT

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

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B. STATEMENT OF THE CASE.

1. Procedure

On September 25, 2006, the State charged Floyd Teo, hereinafter “defendant,” with two counts of attempted first degree murder, both of which were firearm enhanced, and one count of drive-by shooting. CP 1-3, 4-5. The parties appeared for trial before the Honorable Frederick Fleming on March 20, 2008. RP 4. A CrR 3.5 hearing was held on March 26 and 27, 2008. RP 11, 79. The court found that all of defendant’s statements had been made after being he was advised of his *Miranda* rights and were voluntary. RP 101. The court found defendant’s statements admissible. RP 101.

On April 10, 2008, a jury convicted defendant of two counts of attempted first degree murder and one count of drive by shooting. CP 64, 65. The jury also found that defendant was armed with a firearm on both counts of attempted first degree murder. CP 69, 70. On April 3, 2009, the court sentenced defendant to a standard range sentence of 195.75 and 180 on each of the attempted first degree murder convictions, 36 months for the drive-by shooting conviction plus 120 months of firearm enhancements. CP 78-89; RP 837-38.

Defendant filed this timely appeal. CP 92.

2. Facts

Teresa Barker¹ testified that she is the mother of victim David Barker and Joseph Barker. RP 297. At the time of this incident, she lived with her children and ex-husband, Bruce Barker, at 2001 East 36th St. in Tacoma. RP 298, 299-300. Ms. Barker testified that on the day David was shot, he and Joseph had some friends over. RP 302. The friends were Manny Duncan, Christopher Sheets, and Marimo Yim. RP 302, 330. The boys were working on a car and playing football in the street. RP 302, 303, 330-31. A woman, Angela, who lives across the street repeatedly yelled at Duncan “We’re gonna come get you, Manny. We’re gonna get you.” RP 305-06, 331, 336.

Later that afternoon, a van full of Native American kids pulled up in front of Angela’s house and began talking to Angela. RP 307, 332. This concerned Teresa because she wasn’t sure if they were gang kids or not. RP 307, 308. Teresa testified that to her knowledge, neither her children nor their friends belonged to a gang, though she did recall Duncan wearing a blue bandana once. RP 307-08. Because of her concern, Teresa called Bruce, her ex-husband and the boys’ father, to come home. RP 310, 336-37.

¹ Because Teresa, Bruce, David, and Joseph all share the same last name, the State has referred to them by their first names in this brief to avoid confusion. No disrespect is intended.

Around 6:30 that evening, Teresa left the house to get milk for dinner. RP 311. When she returned, she saw her boys and their friends in the street and another group of young people across the street, in front of Angela's house. RP 311, 312. Teresa recognized Sandy Dillon, who was one of the boys in front of Angela's house. RP 312. Ms. Barker identified the person in Exhibit 55 as Sandy. RP 313. When she drove down the street, the boys separated and went to opposite sides of the street. RP 314. Teresa went inside her house and told Bruce that he had to go outside because she believed something bad was going to happen. RP 315, 335. After Bruce ran outside, Teresa did not see anything, but she heard gunfire. RP 316. Teresa ran outside and saw David and Yim on the ground. RP 317. David had been shot twice. RP 324. He had a through and through injury to his leg and the second bullet had gone into his stomach and shattered his hip. RP 322, 325. Police and ambulances arrived and took David and Yim to the hospital. RP 323-24.

Bruce Barker testified that at the time of this incident he was living with his ex-wife, Teresa, and their children, David and Joseph. RP 419, 421. Bruce testified that on the day his son was shot, he was working, but came home early because Teresa called saying there were problems at home. RP 421-22. He arrived home around 4:30 p.m., but didn't see anything alarming. RP 422-23. Bruce worked on his computer for some

time before Teresa came running in to tell him that she saw the boys fighting. RP 423, 424.

When Bruce went outside, he saw defendant and Duncan fist fighting in the middle of the street. RP 424, 426, 427, 524. Bruce told Duncan and defendant to “knock it off right now.” RP 427. Duncan did not want to stop immediately, but Bruce demanded respect from him. RP 429. Duncan ultimately agreed. RP 429. After Duncan and defendant stopped fighting, Bruce told Sean McClendon, defendant, Sandy Dillon and Curious that they all had to leave. RP 429-30. When they refused to go, Bruce Barker called 911 and told the police “I’ve got some gang members here, the Green Ragers, as I knew them, the NGB. I’ve asked them to leave. They’re over here fighting with my kids’ friends. And I’ve asked them to leave. They’re not leaving.” RP 431, 524.

While Bruce was on the phone, Sandy Dillon and Curious began fighting with Yim and defendant opened the door to their car, pulled out an assault rifle, and began shooting. RP 431. Bruce saw David go down. RP 431, 432, 522. He told dispatch, “One man down.” RP 432. He then saw the defendant walking away from the car and shooting Yim. RP 432. Still on the phone with dispatch, Bruce said, “Two men down. I need two ambulance and I need the police here ASAP, two ambulance and police.” RP 432. Bruce went up to the defendant and grabbed the gun out of his

arms. RP 433. Bruce grabbed his cell phone and told dispatch that he had the rifle. RP 433.

Bruce did not see anyone knocked to the ground during the fist fights. RP 523. Bruce did not hearing any threats from anyone regarding the use of force beyond fists. RP 522-23.

David Barker testified that in September 2006, he was living with his parents. RP 341. On the day he was shot, David was hanging out at his house with his brother and friend, Marimo Yim. RP 342. David remembered that his friends, Christopher Sheets and Manny Duncan also came over to his house that day. RP 344, 346, 401. David and his friends were playing football in the street when two people came up to them and said words to the effect of "There's gonna be crab meat on the ground." RP 349, 350, 357. One of the people who said that goes by the name of Curious. RP 350, 352. The term "crab" is disrespectful to Crips. RP 350. David thought the two boys were directing their comments to Duncan. RP 354.

David believed that Curious and the other person came from Columbia Street, which is known to associate with the Native Gangster Bloods (NGB). RP 351, 383. David thought the two people were wearing green and were members of the Green Rags. RP 353, 354, 383. The Green Rags is a gang affiliated with the NGBs. RP 353, 354, 383. The NGBs wear the color red and Crips wear the color blue. RP 351. Sandy

Dillon, Sean McClendon, Curious, and defendant are all members of the Green Rag Gang. RP 382-83. David denied that he or his friends were gang members, though he said that they all know or are friends with gang members. RP 346-47. David also testified that Duncan's brothers were Crips and that Duncan would be affiliated with the Crips. RP 355, 356, 357.

David testified that no one in his group had a weapon and that no one made threatening comments toward Curious or the other boy. RP 357, 358. David believed that either Curious or the other boy had a handgun in his waistband. RP 358. After Curious and the other boy walked away, David and his group resumed playing football. RP 358. A neighbor across the street began yelling things like someone was going to get Duncan, but David's group ignored her and continued playing. RP 359, 362. David remembered that a Lincoln Town Car pulled up down the street and parked near the neighbor's house. RP 362, 366-67. The Lincoln was a four door, tan car. RP 363. The people inside the Lincoln called out to Duncan to come and fight defendant. RP 367, 411. David recognized Sandy Dillon, Curious, and Sean McClendon as part of the group associated with the Lincoln. RP 367, 369-70. Duncan agreed to fight the defendant one-on-one. RP 369. When Duncan walked down toward the Lincoln, David followed because he didn't want Duncan to get jumped by a bunch of people. RP 367, 368, 413. Yim, Sheets, and Joseph also walked down towards the group by the Lincoln. RP 368.

Duncan and defendant began fist fighting. RP 369, 411, 415, 416, 418. David described the fight as a fair fight where no one jumped in from either side. RP 370, 371, 412. It lasted only a couple of minutes and no one got really hurt. RP 371. When Duncan decided to stop fighting, he, David, Joseph, Sheets, and Yim began to leave. RP 369. However, the other group wanted Duncan to fight McClendon. RP 370. They started “banging” on Duncan, which David described as them stating their gang and encouraging Duncan to fight McClendon. RP 370, 371. It was just then, David’s friend Sarath Phai pulled up and wanted to know what was going on. RP 369, 371. McClendon took a swing at Phai, hit him with his wrist, and then pushed Phai to the ground. RP 372, 373. Then Sandy Dillon and Curious began fighting with Yim. RP 372, 373. David said that at that point he, Sheets, Joseph, and Duncan were not fighting anyone. RP 373. David said defendant walked back to the Lincoln and retrieved a gun. RP 374, 376. David pushed Duncan and then defendant shot David twice with an assault rifle from approximately ten feet away. RP 374, 375, 377, 398. David testified that defendant was walking toward him as defendant shot the gun. RP 374, 376-77. No one in David’s group had a gun or a weapon of any kind. RP 381, 382. No one in David’s group threatened to use a gun or a weapon of any kind. RP 381.

David testified that at first he did not realize he had been shot. RP 377. He went to get out of the way after pushing Duncan, but his legs wouldn’t work. RP 377, 399. When he looked down, David testified that

his leg didn't look right – like someone had cracked his leg bone. RP 378.

He said his friend put his hand on David's stomach and it felt like someone had just rammed a metal pole through his stomach. RP 378.

After he was shot, David recalled hearing additional shots being fired. RP 379, 380. He remembered his brother going up behind defendant and David's father taking the gun from defendant. RP 380.

David testified that prior to the shooting, he had seen defendant around, but didn't really know him. RP 361. David and Dillon had been friends for a time before the shooting even though David thought that Dillon was a NGB. RP 351, 352. They had stopped hanging out with each other before the shooting happened. RP355, 356.

Sarath Phai testified that on the day of this incident, he received a call from his friend Joe Barker to come over. RP 449. Phai waited approximately 30 minutes and then drove over to Joe's house. RP 449. When he arrived, he saw a fight that involved about 10 people. RP 450. Phai recognized several of the people, including defendant involved in the scuffle. RP 450, 454, 471. Curious and another person were fighting with Yim. RP 454. Phai testified that David, Joseph, Duncan, and Sheets were all fighting, but he didn't know who they were fighting because he was concentrating on Yim's fight. RP 455.

Phai testified the fight ended when the defendant shot David and Yim. RP 457. Defendant took the gun out of a Lincoln Continental, held

it about waist high, shot twice, then defendant moved over to David and shot again. RP 457, 458. Phai described the gun as a big rifle, like an SKS or an AK-47. RP 459. He saw both David and Yim lying on the ground after they were shot. RP 460. Yim had a big wound in his leg and there was blood all over his pants. RP 465. After the shooting ended, defendant and his friends left. RP 463.

Phai testified that before defendant took out the gun there had been no indication that there was going to be a shooting. RP 467. Phai did not see anyone other than defendant with a weapon. RP 467. Phai further testified that he used to be a member of the Loc'd –Out Crips (LOC), which is a Cambodian gang, but was no longer a member. RP 468. The LOCs claim the color blue. RP 468. The LOC rival gang is the Original Loco Boys (OLB) who claim the color red. RP 468-69. Phai testified that he had no knowledge of whether David, Joseph, Sheets, Yim, or Duncan, were associated with any gang. Phai thought, however, that Sheets might have been wearing blue on the day of the incident. RP 469.

Marimo Yim testified that on the day of the shooting he and his girlfriend, Ngocrine Nahn, were getting ready to go to the Puyallup Fair. RP 529, 530. They went to David's house where they were supposed to meet up with other friends before going to the fair. RP 530-31. When Yim and Nahn arrived at David's house, Duncan, Sheets, Joe, and David

were playing football. RP 532, 534. Bruce was outside the house and told them not to stay out on the street too long because the neighborhood is bad. RP 534-35.

While Yim watched the boys play football, a large older model car filled with teenagers drove by saying "What's up, Bloods?" RP 536, 537. This is disrespectful to people affiliated with the Crips gang. RP 537. The car drove by several times and each time defendant was in the car. RP 538, 546-47. Once the defendant yelled "What's up Bloods?" RP 548 Yim, David, and the others just ignored the teenagers in the car. RP 538. Finally, Duncan says "You guys got a problem?" to which someone from the car responded: "What's up, Blood? You's a Crab." RP 538-39.

Eventually, Duncan and the defendant get into a fight. RP 539, 548. Bruce told the boys in the car to leave and that he was going to call the police. RP 539. When Yim goes down to the fight, two kids attack and punch him. RP 540, 549, 560. Yim remembers defendant getting a gun from the car and shooting. RP 540, 551. Yim saw David pushing Duncan out of the way and then David getting shot. RP 540, 550. After David was shot, Yim was shot in the leg. RP 540, 552. Yim stood up again and took a step before being shot in the arm and then again in his buttocks. RP 540-41, 552, 553.

Yim testified that no one in his group had a weapon that day. RP 558-59. Yim has never been in a gang and, to his knowledge, neither has David, Joseph, Duncan, or Sheets. RP 557, 558.

Christopher Sheets testified that he was playing football with David, Joe, and Yim on the day of the shooting. RP 592. Two kids came up with defendant and started taking trash to Duncan, trying to get Duncan to fight. RP 593, 594. Duncan told them "If you really want to fight me, why don't you come back without a gun." RP 594. About fifteen minutes later they came back in a gold Lincoln Town Car. RP 594, 595. Someone in the car yelled that they were going to leave our meat all over the streets. RP 595. The car left, but came back later. RP 595.

Defendant kept trying to call Duncan out, and eventually Duncan went down there to fight. RP 596. Sheets and the others followed to make sure it stayed a one-on-one fight. RP 596. Around this time Phai pulled up in his car. RP 596. Sheets saw the driver of the Lincoln pushed Phai down and then two other boys from the Lincoln jumped on Yim. RP 597. Sheets went over to Yim and pulled one of the guys off of him. RP 597. Sheets saw defendant go back to the car and get the gun. RP 597. Sheets yelled "He's got a gun, everybody run." RP 597. Sheets believed the gun was an SKS assault rifle. RP 598. Sheets saw Joe tackle defendant and Bruce grab the gun from defendant's hands. Sheets hit the

defendant a couple of times before running over to Yim to try to stop his bleeding. RP 602.

Tacoma Police Detective Gene Miller testified that he interviewed Sandy Dillon several hours after the shooting on September 22, 2006. RP662-63. Detective Miller described Dillon as approximately 5'4" tall, weighing between 115-120 pounds, and wearing a red t-shirt with khaki pants. RP 665,666. During his interview with Dillon Detective Miller had photographs taken to document Dillon's physical condition after the fight. RP666, 667 Exhibits 54, 55, 56, 57, 58. The photographs show a slight swelling over Dillon's eye and a scuff mark on his pants, which was consistent with being in a scuffle. RP 669.

On October 8, 2006, defendant turned himself in to the Puyallup Tribal Police. Exhibits 66a, 67. Defendant told officers he was an Eastside Green Ragger and that he had been involved in the shooting on September 22, 2006. *Id.* Defendant told the police that he was visiting friends with Dillon, who is also a Green Ragger, when some Crips started saying insults to them. *Id.* Defendant told the police that he agreed to fight Duncan. *Id.* The fight was to be a fist fight. *Id.* Defendant said that there were 12 Crips and only four Green Ragers, including himself, Dillon, McClendon, and another small guy. *Id.* Defendant said during the fight he sees four Crips jumping on Dillon, who is quite small. Two Crips

were stomping on Dillon. *Id.* Another two were punching him. *Id.* Because he was afraid of the damage they were doing to Dillon, defendant went back to the Lincoln Town Car and got his AK 47. *Id.* Defendant said he fired the gun towards the Crips who were jumping on Dillon. *Id.* Defendant told police he hit one in the chest and one in the leg. *Id.* Defendant fled in the Town Car and had been hiding from police ever since. *Id.*

C. ARGUMENT.

1. THE COURT PROPERLY GAVE THE FIRST AGGRESSOR INSTRUCTION WHERE DEFENDANT AND OTHER MEMBERS OF HIS GANG WERE ENGAGED IN A FIST FIGHT WITH THE VICTIMS WHEN DEFENDANT WENT TO HIS THE CAR, RETRIEVED A GUN, AND SHOT DAVID BARKER AND MARIMO YIM, SERIOUSLY WOUNDING THEM BOTH.

Jury instructions are appropriate where they “permit each party to argue his theory of the case and properly inform the jury of the applicable law.” *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The standard for review applied to a challenge to a trial court’s instructions depends on whether the trial court’s decision is based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court’s decision is reviewable only for abuse of discretion if based on a factual dispute. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541,

544, 947 P.2d 700 (1997). The trial court's decision based upon a ruling of law is reviewed de novo. *Id.*

Generally, self-defense cannot be invoked by a defendant who is the first aggressor and whose acts result in an altercation unless he or she first withdraws. *State v. Riley*, 137 Wn.2d at 909. A first aggressor instruction is appropriate when there is some credible evidence from which a jury can reasonably determine that the defendant engaged in conduct that precipitated the fight and "provoked the need to act in self-defense." *Id.* The trial court may give an aggressor instruction despite conflicting evidence about whether the defendant's conduct precipitated the fight. *Id.* at 910 (*citing State v. Davis*, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)). To determine whether there is sufficient evidence to support giving the instruction, a court views the evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction. *Riley*, 137 Wn.2d at 910, *citing State v. Thompson*, 47 Wn. App. 1, 7, 733 P.2d 584 (1987).

In *Riley*, Johnny Lee Riley shot Gustavo Jaramillo after a verbal confrontation. 137 Wn.2d 904, 906. On the day of the shooting, Riley approached Jaramillo and his friend, Calloway, about purchasing a vehicle. *Riley*, at 906. Riley testified that he was joking with Jaramillo

about being a gang member when Jaramillo threatened to shoot Riley. *Id.* at 906. In response to Jaramillo's threat, Riley testified that he pulled a gun on Jaramillo. *Id.* Riley demanded Jaramillo's gun to prevent Jaramillo from shooting Riley in the back as he left. *Id.* Jaramillo denied having a gun on him and told Riley that his gun was in some bushes across the street. Riley testified that he shot Jaramillo when Jaramillo reached for a gun. *Id.* at 907. Other witnesses testified that Riley approached Jaramillo with the gun and then shot Jaramillo when Jaramillo turned his head to look at Riley. *Id.* at 907.

At trial, the court gave instructions on self-defense and first aggressor; Riley objected to the first aggressor instruction. *Id.* at 907. After his conviction, Riley appealed arguing, among other issues, that the giving of the first aggressor instruction was error. *Id.* at 907-08. The Supreme Court affirmed the trial court's finding that the first aggressor instruction was proper because there was evidence that Riley drew his gun first and aimed it at Jaramillo. *Id.* at 909. The court held that words alone do not give rise to a reasonable apprehension of great bodily harm. *Id.* at 912. In a footnote, the court noted that the giving of the first aggressor instruction did not prevent Riley from arguing his theory of the case, which was self-defense, because the jury was also properly instructed on self-defense. *Id.* at 908 n. 1.

Similarly, in *State v. Wingate*, 155 Wn.2d 817, 818, 122 P.3d 908 (2005), the defendant was the first to draw a gun and the court properly

gave a first aggressor instruction. In *Wingate*, Stephen Park and several of his friends went to James Koo's house to confront Koo about dating Park's ex-girlfriend. *Wingate*, 155 Wn.2d 817, 818. When Park and his friends arrived, many of Koo's friends, including Joshua Wingate, had gathered at Koo's house because they heard Park was coming over to confront Koo. *Wingate*, at 818-19. At trial, the defense and the State presented two very different versions of events after Park's arrived at Koo's house.

Wingate, who had brought a handgun with him, testified that Park took a sawed off shot gun from his trunk, pumped it, and placed it back in the trunk. *Wingate*, at 819. Park then crossed the street to confront Koo. Wingate testified that while Park was trying to confront Koo, Wingate observed Feist, Scott, and Poydras standing by the open trunk. *Id.* Wingate approached the three men and pulled out his gun to scare them away from the trunk so Wingate could retrieve the shotgun. *Id.* When Koo went inside his house, Park noticed Wingate pointing a gun at his friends. *Id.* Wingate testified that while Park confronted Wingate, Feist pulled gun from his waistband. *Id.* Feist put the handgun in the trunk when Wingate threatened to shoot him. *Id.* Wingate and Park exchanged words and Park asked whether Wingate was going to shoot him. *Id.* Wingate testified that he believed Park was reaching for a gun and, feeling that he was out numbered four to one, Wingate shot Park in the leg. *Id.* at 819-20.

In contrast, the State presented evidence that Park did not touch a shotgun that day. *Wingate*, at 820. Park testified that when he tried to confront Koo, Koo went into his house. *Id.* After Koo went into his house, Park noticed that Wingate was pointing a gun at his friends. *Id.* Park went over and stood between Wingate and Park's three friends, raised his hands and asked if Wingate was going to shoot him. Wingate shot Parks in the leg and then said "Who else wants some?" *Id.* at 820. The trial court gave a first aggressor instruction over Wingate's objection. *Id.* at 820. The Court of Appeals held that the first aggressor instruction was improper and reversed. The Supreme Court reversed the Court of Appeals and affirmed the trial court's ruling giving the first aggressor instruction because, like *Riley*, there was evidence that Wingate was the first to draw a gun in this conflict. *Id.* at 823.

In the present case, like in *Riley* and *Wingate*, the trial court properly gave the first aggressor instruction. There was ample evidence adduced at trial that defendant and his gang, the Green Ragers, initiated the fight on September 22, 2006. RP 350, 352, 354, 358, 367, 369-70, 382-83; see Exhibit 67². Defendant and his gang members came to David Barker's neighborhood looking for a fight. RP 350, 351, 362, 366-67,

² Exhibit 67 is a transcript of the taped statement defendant gave to police after this incident. The taped statement was admitted into evidence as exhibit 66A, the transcript was provided to the jury to read as the taped statement was played. The State refers to exhibit 67 for the convenience of the court.

382, 383, 411. The Green Ragers are affiliated with the bloods, who claim the color red. RP 351, 468-69; Exhibit 67. While David and his friends denied they were currently part of a gang, the insults the Green Ragers used were directed at Crips, who claim the color blue.³ RP 346-47, 351. The Green Ragers made comments like “there’s gonna be crab meat on the ground” or “What’s up, Blood?” which are challenging and derogatory statements designed to instigate a fight. RP 350, 536, 537, 538, 546-47, 548. Additionally, witnesses testified that the Green Ragers directly stated they wanted defendant to fight Duncan. RP 367, 411, 593, 594, 596.

Duncan eventually agreed to fight defendant in a one-on-one fist fight. RP 369. The witnesses testified that initially the fight, instigated by defendant and the Green Ragers, was fair. RP 370, 371, 412, 593, 594, 595. However, the initial fight expanded when one of defendant’s gang members, McClendon, pushed Phai over and two other Green Ragers jumped on Yim. RP 372, 373, 431, 454, 540, 549, 560, 597. There were approximately ten people total involved in the fight. RP 450, 454, 455, 471. It was then that defendant returned to the car, armed himself with a semi-automatic rifle, and shot at Duncan. RP 374, 376, 457, 457, 458, 459, 540, 551, 597, 598. David Barker pushed Duncan out of the way and

³ Phai testified that he used to be a member of the Loc’d out Crips. RP 468. David, testified that Manny Duncan’s brothers were members of a Crips gang and that Duncan associates with Crips. RP 355-57.

David was hit by the bullets that defendant had intended for Duncan. RP 374, 375, 377, 398, 540, 550. Defendant then turned the gun on Yim, shooting him three times. RP 379, 380, 432, 540-41, 552, 553.

Defendant claimed that he was acting in defense of his friend, Sandy Dillon, but evidence adduced at trial showed that Dillon had minimal injuries. Tacoma Police Detective Gene Miller responded to the scene of the shooting where he interviewed several witnesses. RP 559-60, 661-62. At approximately midnight on the date of the incident, Detective Miller met with Sandy Dillon for an interview at the Tacoma Police Station. RP 662-63. Dillon had turned himself in and was transported to the station for the interview. RP 663. Detective Miller described Dillon as approximately 5'4" tall, weighing between 115-120 pounds, and wearing a red t-shirt with khaki pants. RP 665, 666. Detective Miller noted that Dillon's only visible injury was a slight swelling over one of his eyes. RP 666. Photographs were taken of Dillon, documenting his physical condition at the time of the interview, which was held five hours after the shooting. RP 666, 667; Exhibits 54, 55, 56, 57, 58. These photographs show the slight swelling over Dillon's eye and a scuff mark on his pants, which is consistent with him being in a scuffle. RP 669. There is no physical evidence that would indicate that Dillon was being beaten and kicked during this fist fight.

When the evidence is viewed in the light most favorable to the State, as this court must do, it is clear that the first aggressor instruction

was appropriate because defendant was the first to draw a gun during a fist fight and then shot two unarmed boys, David Barker and Marimo Yim. See *Wingate*, 155 Wn.2d 817, 823, citing *State v. Fernandez-Mendoza*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Relying on *Riley*, defendant argues that gang insults are insufficient to justify an aggressor instruction. BOA at 10. While defendant's argument is correct statement of the law, it ignore the fact that defendant followed his gang insults with a fist fight that escalated to the point where defendant shot David Barker and Marimo Yim with a semi-automatic weapon.

Here the facts support the court's decision to give the first aggressor instruction because defendant introduced a gun into a fist fight that was initiated by defendant and his gang. Contrary to defendant's argument, when defendant uses gang insults to pick a fist fight, he cannot conclude the fight using a semi-automatic rifle.

Defendant relies upon *State v. Wasson*, 54 Wn. App. 156, 772 P.2d 1039 (1989) to support his argument that because defendant was not specifically engaged in a fight with David Barker or Marimo Yim, that shooting those individuals was the first aggressive act towards them. Defendant's argument is misguided and his reliance on *Wasson* is misplaced.

First, defendant's argument is misguided because it ignores that this was a gang fight between the Green Ragers and David Barker and

his friends. Defendant's argument is premised on a fist fight between two individuals, defendant and Duncan. It ignores that defendant was not the only person in his gang throwing out insults to instigate the fight. It ignores that Duncan was with several friends, David, Joe, Yim, and Phai when the defendant and his gang member started the fight. It is reasonable to expect that the fight between defendant and Duncan would expand to the other gang members especially when those gang members helped instigate the fight in the first place. The fight between defendant and Duncan escalated into a gang fight when defendant's gang members McClendon, Curious, and Dillon, began fighting with Phai and Yim. Defendant left this fist fight to get his gun, which he brought with him in the car, and shot David Barker and Marimo Yim.

In *Wasson*, Rodger Wasson was convicted of assaulting Thomas Reed. The court of appeals reversed finding that the giving of a first aggressor instruction was improper. *Wasson*, 54 Wn. App. 156, 161. Wasson and his cousin, Billy Bartlett, got into a fight in which Bartlett broke the window of Wasson's vehicle while Wasson was revving the engine. *Wasson*, at 157. Rodger Reed hearing the commotion, told Wasson and Bartlett to quiet down. *Id.* Wasson and Bartlett had resolved their differences when Reed approached for a second time. *Id.* A fight ensued between Reed and Bartlett in which Reed struck Bartlett several times in the face and body, knocking him to the ground. *Id.* When Reed

turned and took several steps toward Wasson, Wasson shot him in the chest. *Id.*

Wasson asked for and received self-defense instructions. *Id.* at 158. The court also gave a first aggressor instruction. *Id.* The court of appeals reversed because there was no showing that Wasson was an aggressor toward Reed. *Id.* The evidence showed that Wasson provoked a fight between him and Bartlett, but that Reed, who was visiting tenants in a nearby apartment complex, interjected himself into the fight. There was no evidence that Wasson and Bartlett knew that Reed was even in the area when their fight over Wasson's girlfriend, began. *Id.* at 157-58.

The present case is clearly distinguishable from *Wasson*. Here there was evidence that defendant and his gang members were taunting David Barker and his friends to initiate a fight. Thus, under *Wasson*, defendant and the rest of the Green Ragers, engaged in an intentional act – throwing out gang insults and challenging Duncan to a fist-fight- that was likely to provoke a belligerent response. This is not a situation, like *Wasson*, where the fight was solely between two individuals when an unknown third party enters the fray. The Green Ragers' initial goal may have been to fight Duncan, but it was reasonable to expect that the fight would escalate into a brawl that included all of the Green Ragers against Duncan, David Barker, and his friends.

Defendant argues that if his fight with Duncan constitutes an act of aggression, the first aggressor instruction was still erroneous because he

did not shoot Duncan. Even if David Barker was an unintended victim, defendant's argument fails because it ignores the law of transferred intent. *See, e.g., State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). David Barker testified that defendant shot at Duncan, but hit him when David pushed Duncan out of the way. RP 401-02. Defendant's intent to shoot Duncan transfers to David Barker.

Finally, defendant argues that he did not bring a gun to a fist fight – he left it in the car. BOA at 14. This argument fails because it is clear that defendant did bring his gun to the fight. The fight took place in the street near David Barker's home. Defendant and the other Green Ragers arrived by car. RP 367, 369-70, 411. The State's witnesses testified that defendant retrieved his gun from the vehicle and shot David Barker and Yim. RP 374, 376. To argue that he did not bring his gun to the fight ignores the facts of the case.

This court should hold that the court properly gave the first aggressor instruction. Defendant's claim to the contrary is without merit.

2. THE PROSECUTOR'S CLOSING ARGUMENT
WAS PROPER AND DEFENDANT CANNOT
SHOW THE PROSECUTOR'S ARGUMENT WAS
FLAGARANT AND ILL-INTENTIONED.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remark or conduct was improper and that it prejudiced the defendant. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d

747 (1994). Improper comments are not deemed prejudicial unless “there is a *substantial likelihood* the misconduct affected the jury’s verdict.”

State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original].

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App 284, 293-94, 902 P.2d 673 (1995). Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.*

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a *substantial likelihood* the defendant did not receive a fair trial. *State v. Russell*, 125 Wn.2d 24, 85; *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial irregularity warrants a new trial, the court considers: 1) the seriousness of the irregularity; 2) whether

the statement was cumulative of evidence properly admitted; and 3) whether the irregularity could have been cured by an instruction. *State v. Crane*, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. *See State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986).

A curative instruction will often cure any prejudice that has resulted from an alleged impropriety. *See State v. McNallie*, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), *aff'd*, 120 Wn.2d 925, 846 P.2d 1358 (1993). It is not misconduct for a prosecutor to make arguments regarding a witnesses' veracity that are based on inferences from the evidence. *See State v. Rivers*, 96 Wn. App. 672, 674-675, 981 P.2d 16 (1999).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). However, a prosecutor may not make statements unsupported by the evidence and prejudicial to the defendant. *State v. Jones*, 71 Wn. App. 798, 808, 863 P.2d 85 (1993). As an advocate, the prosecuting attorney is entitled to make a fair response to the argument of defense counsel. *State v. Brown*, 132 Wn.2d 529, 567; *quoting State v. Russell*, 125 Wn.2d 24, 87.

In the present case, defendant misstates the prosecutor's argument by taking a phrase out of context and then arguing that the prosecutor's statement was flagrant and incurable misconduct. BOA at 15. Defendant's argument fails because the statement was neither flagrant nor

ill-intentioned and defendant cannot show a substantial likelihood that the prosecutor's remark affected the outcome of the trial.

Defendant argues in his brief that "[t]he prosecutor committed incurable misconduct when he argued that to accept Teo's defense, the jury would have to find "two people deserved to die." BOA at 15. Defendant's argument is unsupported by the record. What the prosecutor actually stated at the very beginning of his argument was:

I am going to try to be as succinct as I can be in my closing remarks. The State's position is there are two issues for you to decide in this case: One, was the shooting itself, considering the defendant admitted he was the one who did it, legally justified and therefore excusable?

The second issue is: What was his intent when he shot?

Those are the two issues that the State believes this case provides to you. And I don't want – the State doesn't want you to lose sight of the overall picture of what occurred here in your discussions of the minutiae of the details of what was heard here in testimony and the various issues that you will talk about back in the deliberation room. In essence, this case does involve a fist fight, a group of kids – initially, a single person versus another person – but, groups together on opposite sides, clearly, engaging in fist fights. And so the question is, during any part of that fist fight, fist fights in general in this case, do you find that someone had to be shot and killed in order to either stop – well, actually, to stop or prevent someone from suffering great physical injury? That's the question. And that's the big picture of this case.

I ask you to use your common sense in determining, of course, the defense view from the defendant's statements that were admitted in court, whether Sandy Dillon – who

would be the subject matter of the self-defense – was in the process of being beaten so severely that two people deserved to die in order to stop that beating.

RP 753-54. When the phrase “two people deserved to die” is placed in the context of the prosecutor’s entire statement it is clear he is properly arguing to the jury that when they evaluate defendant’s claim of defense of others, they must determine whether from the defendant’s view, lethal force was necessary in order to stop the beating of Sandy Dillon. There was no objection to the prosecutor’s argument at trial and therefore, the issue is waived unless this court finds that the statement was so flagrant and ill-intentioned that no curative instruction could have obviated the resulting prejudice. Trial counsel’s failure to object strongly suggests that the comments did not appear critically prejudicial to the defendant in the context of trial. *See State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)(noting lack of objection strongly suggests comment did not seem critically prejudicial in context of trial).

- a. The prosecutor properly argued the law of defense of others in the context of an attempted murder trial.

The prosecutor’s statement of the law during closing argument was proper. Defendant does not challenge any of the court’s instructions; in fact, he concedes that the jury was properly instructed on the law of defense of others. *See BOA* at 18. Jurors are presumed to follow the court’s instructions. We presume that juries follow all instructions that the

trial court gives them. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

The jury was instructed that “A person commits the crime of attempted murder in the first degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.”

CP 29-63 (Jury Ins. No. 7).

The jury was further instructed that:

A person commits the crime of murder in the first degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.

CP 29-63 (Jury Ins. No. 8).

The jury was instructed that it was a defense to the charge of attempted murder that the force used was lawful.⁴ The jury was further instructed that the defendant is entitled to act on appearances in defending another so long as he has a good faith belief that the other person is in actual danger, though actual danger is not necessary. CP 29-63 (Jury Ins. No. 21).

⁴ 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 in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.

The person using the force may employ such force and means as reasonably prudent person 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 providing 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 29-63 (Jury Ins. No. 19)

During his closing argument, the prosecutor emphasized the importance of several jury instructions, including Jury Instruction No. 19, which is the instruction on defense of others. CP 29-63; RP 764. The prosecutor stated:

A person can defend themselves, a person can act in defense of another person. There are qualifiers to that, however, and those apply in this case. The use of force is lawful only when used by someone who is preventing an offense against themselves or another, and when the force is not more than is necessary.

RP 764. The prosecutor emphasized that the defendant was entitled to act on appearances when he decided to use lethal force in a fist fight. RP 764. He also argued that the jury must evaluate the evidence from the defendant's perspective. RP 765. The prosecutor emphasized that:

even if it's afterwards discovered that the extent of the danger wasn't there, you still will have to consider the defendant's perspective. Did he think the person was in that kind of danger? Did he reasonably think, truthfully, that Sandy Dillon was about to be killed, in essence, or suffer some huge amount of great personal injury.

RP 766.

With respect to using no more force than necessary, the prosecutor argued:

If you find that shooting these two men with an AK-47 type weapon, from short range, and nearly killing them both, was excessive, considering this was a fist fight, then self-defense is defeated. And that is, in part, the case here.

RP 764.

The record clearly shows that the prosecutor accurately argued the law of defense of another within the context of the facts of this case.

Here, defendant chose to use lethal force in a fist fight. The prosecutor's argument asked the jurors to use their common sense in evaluating defendant's argument that he believed Dillon was being so severely beaten that defendant had to use lethal force (force that could result in the death of two people) to stop the beating. While the prosecutor could have worded his argument better, his argument does not misstate the law. Defendant's argument to the contrary relies upon taking a single phrase out of context and imputing a contrary meaning to that phrase. Defendant cannot show misconduct let alone flagrant and ill-intentioned misconduct.

Assuming, *arguendo*, the court finds the prosecutor's phraseology improper, a curative instruction would have certainly cured any error. The challenged phrase was only mentioned once during the prosecutor's argument. The prosecutor emphasized the lawful use of force instructions, pointing them out by number and reviewing the law as it related to the facts of this case. Because the error, if any, could have been cured by a curative instruction or was cured by the court's instructions to the jury, defendant's claim that the prosecutor misstated well-established case law is without merit and must be dismissed.

- b. The prosecutor's argument was based upon the facts of this case and the law and was not designed to induce sympathy for the victims.

The prosecutor has a duty to “seek a verdict free of prejudice and based on reason.” *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1984). It is improper to present an argument that is not based on the evidence or one that appeals to the jury’s passion and prejudice. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993). “A prosecutor’s comments must be viewed in context and only by so doing can it be determined whether the prosecutor’s conduct affected the fairness of the trial.” *United States v. Young*, 470 U.S. 1, 9-10, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985).

Defendant argues that the prosecutor improperly invited the jury to find defendant guilty because David Barker and Marimo Yim did not deserve to die. BOA at 19. However, again defendant mischaracterizes the prosecutor’s statement. The prosecutor’s argument really asked the jury to determine whether the defendant reasonably believed that Dillon was being beaten so severely that the use of lethal force against David Barker and Marimo Yim during in a fist fight was reasonable. RP 753-54. This is an accurate and appropriate argument in light of the facts of this case and the defense to the charges. The prosecutor’s argument was not designed to inflame the jury’s passions; to the contrary the prosecutor repeatedly told the jury that their decision must be based upon the facts of

this case and the law as given to them by the court. RP 765, 769, 782, 798, 811, 813.

Defendant argues that the prosecutor improperly made the culpability of the victims an issue. BOA at 19. However, in a defense of other case, the actions of the victim are at issue and must be viewed from defendant's perspective at the time of the incident. See *State v. Penn*, 89 Wn.2d 63, 568 P.2d 797 (1977); *State v. Fischer*, 23 Wn. App. 756, 598 P.2d 742 (1979). Here defendant told police that he shot at four Crips who were jumping on his friend, Dillon. Exhibit 67. Defendant said that Dillon was on the ground and overmatched by four Crips, who were stomping and punching Dillon. *Id.* Defendant told police that, because he was afraid of the damage the four Crips had done and could do to Dillon, he got his gun and shot at the Crips who were jumping on Dillon. *Id.* Thus, defendant's entire defense was based upon his perception that David Barker and Marimo Yim were beating Dillon so severely that defendant needed to use lethal force to stop the beating. *Id.* The prosecutor properly argued that the jury should use their common sense to evaluate defendant's statement that he needed to use lethal force to protect Dillon from being beaten by David Barker and Marimo Yim. See RP 753-54.

Defendant's claim that state's argument was designed to create sympathy for the victims is without merit and must fail.

- c. The prosecutor properly argued that the State had to disprove defendant's "defense of others" defense beyond a reasonable doubt and did not provide the jury with a false choice.

The State has the burden to prove every element of the crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The defendant has no obligation to present evidence, and it is improper for the State to comment on his failure to do so. *State v. Cleveland*, 58 Wn. App. 634, 647-8, 794 P.2d 546 (1990). When the defendant asserts that he acted in defense of another, the State bears the burden of disproving defense of another beyond a reasonable doubt. *See State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984).

Here, the prosecutor expressly argued in closing that the State must disprove self-defense or defense of another beyond a reasonable doubt. RP 765. The State did not shift the burden of proof during argument and defendant concedes in his brief that the jury instructions accurately state the law on self-defense. *See* BOA at 18. Because these instructions are unchallenged and defendant concedes the jury was properly instructed on self-defense, defendant's claim must fail. BOA at 18.

Defendant relies on *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), *State v. Casteneda-Perez*, 61 Wn. App. 354, 810 P.2d

74 (1991), and *State v. Wheless*, 103 Wn. App. 749, 14 P.3d 184 (2000) to argue that the State's closing argument shifted the burden to the defendant to prove the victims deserved to die in order to acquit. BOA at 19. To make this argument, defendant analogizes the State's closing argument to the improper argument of presenting the jury with a false choice of finding the State's witnesses have lied in order to acquit. Defendant's argument fails because the State did not shift the burden to the defendant and did not present a false choice.

In the present case, as noted above the State's began its closing argument by outlining the two main issues for the jury to decide. The first issue was "was the shooting itself, considering the defendant admitted he was the one who did it, legally justified and therefore excusable." RP 753. The second issue was "what was the defendant's intent when he shot" David Barker and Marimo Yim. *Id.* The State went on argue "[a]nd so the question is, during any part of that fist fight...do you find that someone had to be shot and killed in order to either stop...or prevent someone from suffering great physical injury?" RP 754. The prosecutor then states:

I ask you to use your common sense in determining, of course, the defense view from the defendant's statements that were admitted into court, whether Sandy Dillon – who would be the subject matter of the self-defense – was in the

process of being beaten so severely that two people deserved to die in order to stop that beating.

RP 754.

It is clear from the prosecutor's argument that he is asking the jury to determine whether defendant's use of lethal force was reasonable to stop the beating of Dillon. The prosecutor then reinforces the State's burden with respect to self-defense:

The State has the burden of disproving self-defense beyond a reasonable doubt. So, understand that. It is the State's burden, not the defendant's, to disprove self-defense...

RP 765. Defense counsel also pointed out that the State has the burden to prove the absence of self-defense. RP 787. Because the State's argument did not shift the burden of proof to the defendant, the State specifically told the jury it bore the burden of disproving self-defense, the court's instructions properly instructed the jury that the State bore the burden to disprove self-defense beyond a reasonable doubt, and the defense in his closing argued the State had the burden to disprove self-defense beyond a reasonable doubt, there was no error.

Defendant's reliance on *Fleming*, *Casteneda-Perez*, and *Wheless* is misplaced. In *State v. Fleming*, 83 Wn. App. 209, 213, the defendants were convicted of second degree rape after the prosecutor argued in closing that in order to acquit defendant of the crime they would have to

find that either the victim lied or fantasized about what happened to her. In addition to misstating the bases upon which a jury can acquit, the prosecutor later implied during her argument that defendants had some burden to disprove the charges by presenting evidence. On appeal, the court found the errors' cumulative effect required reversal particularly in light of the weakness of the State's case. *Fleming*, at 215-16.

Similarly, in *State v. Casteneda-Perez*, during cross examination, the prosecutor repeatedly asked defense witnesses whether the State's witnesses were lying or mistaken. 61 Wn. App. 354, 357-59. Initially, defense counsel did not object in such a way to preserve the error. *Id.* at 364. However, after the fourth such question, the objection preserved the error. *Id.* Despite the fact that the prosecutor asked more than nine questions that required the witness to say the State's witnesses were lying or mistaken, the court found that "the objectionable testimony that was admitted after a valid objection was made was not sufficiently damaging that we can say there is a reasonable probability it affected the outcome of the trial." *Id.*

Finally, defendant relies upon *State v. Wheless*, 103 Wn. App. 749, to support his claim that the State's argument presented the jury with a false choice that they must find the victims deserved to die in order to acquit. BOA at 21. Defendant asserts that the *Wheless* court reversed in

part because the prosecutor argued in closing that the defense theory required the jury to find that “every officer in that chain is lying” and that that one officer was “confused or mistaken.” BOA at 21. However, a review of the *Wheless* case reveals that the court reversed based upon an improper search of Wheless’ vehicle not prosecutorial misconduct. *Wheless*, at 758. Wheless did raise the issue of prosecutorial misconduct in his Statement of Additional Grounds, but the court merely stated that while the prosecutor’s statements were likely improper “it was not ‘so flagrant and ill-intentioned that it evinces and enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.’” *Id.* at 758.

The present case is clearly distinguishable from *Fleming* and *Castaneda-Perez* and *Wheless* is inapposite. Both *Fleming* and *Castaneda-Perez* deal with repeated statements that the jury must find that the State’s witnesses were lying in order to acquit and in *Fleming* that the defendant had some burden to disprove the charges by presenting evidence. The prosecutor in the present case did neither. The defendant’s case theory was that he used lethal force in a fist fight because he believed that Dillon was going to suffer serious injury. The prosecutor properly argued that the jury needed to use their common sense to determine whether defendant reasonably believed that lethal force was necessary to stop the

beating. The prosecutor did not present the jury with a false choice; instead, he correctly and properly argued the law of defense of others during his closing argument.

3. THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S STATEMENT THAT HE STOLE THE GUN AS PART OF THE RES GESTAE OF THE CASE.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. Even when an objection is made at trial, a party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. *Guloy*, 104 Wn.2d at 422; *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). The trial court's decision to admit or exclude evidence will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Evidentiary errors that are not of constitutional magnitude are reversible only when the error was prejudicial. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). A nonconstitutional evidentiary error is prejudicial only if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599; *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Under the *res gestae* exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or provide the immediate context for events close in both time and place to the charged crime. *State v. Lillard*, 122 Wn. App. 422, 93 P.3d 969 (2004).

In *State v. Hughes*, 118 Wn. App. 713, 717, 77 P.3d 681 (2003) Verne Hughes was convicted of second degree murder. In April 1999, Hughes was assisting a friend locate his stolen motorcycle. *Hughes*, 118 Wn. App. 713, 718. They went to two different residences armed with a bat and a gun to question individuals about the stolen motorcycle. *Id.* at 718. Ultimately, they went to Ronald McComb's trailer where Hughes' friend started beating McComb with a baseball bat. *Id.* When McComb tried to run, Hughes stopped him. *Id.* Hughes left for a while and when he returned McComb was dead. *Id.* at 719.

On appeal, Hughes alleged the trial court erred in admitting evidence of the uncharged burglary and weapons possession under the *res gestae* exception. The Appellate Court held that the trial court properly admitted that evidence because it was part of the same transaction.

In the present case, the trial court properly admitted the defendant's admission that he had stolen the gun prior to the shooting because it provided the jury with a complete picture of how defendant was able to bring this firearm to the fight. The trial court carefully weighed the probative value and prejudice before making its ruling that the evidence was admissible.

During trial, the State offered a tape of defendant's statement to police into evidence. RP 632; Exhibit 66A. In that taped statement, defendant admits that he shot David Barker and Marimo Yim during the fight. *See* Exhibit 67. When asked how he came to possess the gun, defendant replied that he had stolen it from a car about a couple of months ago. RP 67.

Defendant argues that the court abused its discretion because the theft of the gun was too attenuated in time, lacks relevance to the charges, and is too prejudicial. However, because defendant's interview with police occurred on October 8, 2006, sixteen days after the shooting, defendant would have stolen the firearm at most a month and a half before

the shooting. RP 623, 629, 930. The theft of the gun is clearly relevant because it relates to the weapon defendant used during incident and explains how defendant came to be in possession of a semi-automatic rifle. While prejudicial, it is not so prejudicial that it outweighs the evidence's probative value.

The court admitted the evidence because it explained how defendant happened to have the weapon used in this crime. The court stated "it seems to me that it's just part of the circumstances...It's prejudicial, but it is not highly prejudicial, and especially in view of the other facts that the finder of the fact may agree on beyond a reasonable doubt." RP 646.

Additionally, the Court noted that the State has the burden to prove premeditation. RP 642, 644. The fact that defendant stole the gun a month or so before the shooting was relevant for the jury's determination of whether defendant premeditated the attempted murders. The court stated:

I think I'm looking at it most favorably in favor of the defense. And, here, the evidence is to complete the picture for the circumstances of this, that Mr. Teo, two months ago, stole this weapon. How does that relate to premeditation here, under the circumstances of this alleged crime? So, as

far as premeditation is concerned, and that fact alone, I don't see how it is that prejudicial. And, consequently, it just completes the picture.

RP 642.

Defendant relies on *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981), and *State v. Perrett*, 86 Wn. App. 312, 936 P.2d 426 (1997), to support his argument that defendant's statement he stole the gun was improperly admitted as *res gestae*. Defendant's reliance on these cases is misplaced.

The facts of *Tharp* are clearly distinguishable from the present case. Jo Elliott Tharp was convicted of second degree murder for the death of William Bond. *Tharp*, 96 Wn.2d 591, 961. The evidence showed that Tharp had committed a series of crimes, one of which was the theft of Bond's son's vehicle, prior to murdering Bond. *Tharp*, at 961. During trial, the court allowed the evidence of Tharp's prior conviction for auto theft and the fact that Tharp was on furlough status from prison at the time of the murder to establish motive. *Id.* at 596-97. The Supreme Court found that the evidence that defendant committed a prior auto theft and his furlough status gave him a strong motive to murder Bond unpersuasive. Most important to the court was the fact that the trial court did not engage in a balancing test regarding the probative value of the evidence versus the potential prejudice. In contrast, here the court carefully weighed the

probative value against its possible prejudice. RP 642-46. The court properly admitted defendant's statement that he stole the gun because it related to the very gun used in the charged crime. How defendant came to possess that gun is directly relevant to defendant's knowledge that the gun was in the vehicle and that he had access to it during the fist-fight.

Defendant's reliance on *Perrett* is similarly misplaced. In *Perrett*, Charles Perrett was convicted of second degree assault with a deadly weapon for pointing a shotgun at his tenant's stomach during an argument. 86 Wn. App. 312, 315. When police arrived the officer asked Perret for the shotgun used in the assault. *Id.* Perrett replied "No, the last time the Sherriff's took a weapon I didn't see it for a long time." During trial the court allowed this evidence in to establish Perrett's demeanor when he was arrested. *Id.* at 319. The court of appeals held that the trial court abused its discretion when it admitted Perrett's statement because demeanor on arrest was not relevant to the charges and was unfairly prejudicial as "it raised the inference the Perrett had committed a prior crime involving a gun, thereby making it more likely he had done so again." Despite finding error, the *Perrett* court did not reverse on this error alone. *Id.* at 323. Instead the court reversed based upon cumulative error where, in addition to admitting Perrett's statement, the court also

excluded ER 609 evidence on one of the State's witnesses and allowed a Deputy to comment on Perrett's post-arrest silence. *Id.*

Perrett is distinguishable from the present case. Here, defendant's statement that he stole the gun a couple of month ago explained how he came to be in possession of the gun on the night of the incident. In contrast, Perrett's statement that the last time law enforcement seized his weapons he didn't get them back for a long time implied that he had used his weapons in prior crime, which was improper propensity evidence.

Defendant also argues that the court's admission of this evidence allowed the jury to convict defendant based upon propensity. BOA at 30. To support his argument, defendant relies upon *State v. Trickler*, 106 Wn. App. 727, 25 P.3d 445 (2001). In *Trickler*, as part of the *res gestae* of the charged offense, the trial court admitted evidence of possession of stolen property other than the property for which the defendant was charged. *Trickler*, 106 Wn. App. at 733. The trial court did not do the required balancing on the record. *Trickler*, 106 Wn. App. at 733. On appeal, the court balanced the prejudicial effect of the evidence with its probative value, concluded that its prejudicial effect outweighed its probative value, and therefore reversed the conviction. *Trickler*, 106 Wn. App. at 733-34. Unlike the *Trickler* court, as argued above, the trial court here properly balanced the probative value and prejudicial effect of the challenged

evidence on the record, and ruled in favor of admission. Such a balancing will not be overturned absent an abuse of discretion by the trial court, which is not present here. Additionally, as argued below defense counsel used the challenged evidence in his closing to buttress the credibility of defendant's statement to police. (Defendant's statement to police was the sole evidence presented at trial to support his "defense of other's" defense to the charges).

Defendant also argues that the trial court erred in failing to give a limiting instruction to the jury regarding the use of the challenged evidence. BOA at 32. However, trial counsel never requested a limiting instruction so there can be no error. *See State v. Hess*, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975), holding that the court's failure to give a cautionary instruction regarding the limited use of evidence was not error when no such instruction was requested.

In the present case, the court properly admitted defendant's statement as res gestae of the charged crime. The court balanced the probative value of the challenged evidence against its possible prejudice and found that the probative value outweighed any prejudice. Defendant's arguments to the contrary are without merit.

Alternatively, as the court noted, the evidence went to whether defendant premeditated the crime, which the State had the burden to prove

for the charges of attempted first degree murder. The evidence was properly admitted for this purpose as well.

4. DEFENDANT CANNOT SHOW INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE CANNOT ESTABLISH EITHER PRONG OF THE **STRICKLAND** TEST.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L. Ed. 2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d

1251 (1995). First, a defendant must establish that defense counsel's representation fell below an objective standard of reasonableness. Second, a defendant must show that defense counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687; *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the "heavy burden of showing that his attorney 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting *Strickland v. Washington*, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney's conduct failed to meet an objective standard of reasonableness. *State v. Huddleston*, 80 Wn. App. 916, 912 P.2d 1068 (1996). There is a strong presumption that counsel's representation was reasonable and, taking into consideration the entire record, that counsel made all significant decisions in the exercise of reasonable professional judgment. *State v. McFarland*, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. *State v. Hendrickson*, 129 Wn.2d at 77-78. The decision of when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection was meritorious, but also that the verdict would have been different if the motion or objection had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. *McFarland*, 127 Wn.2d at 337; *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the

errors, the fact finder would have had a reasonable doubt respecting guilt.”).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

In the present case, defendant asserts that his trial counsel was ineffective for failing to request a limiting instruction on the *res gestae* evidence admitted by the court. BOA at 32. However, it is clear that defense counsel’s decision not to limit the use of the *res gestae* evidence was tactical because defense counsel used the fact that defendant admitted to police that he had stolen the gun to argue that this admission showed that the rest of defendant’s statement was credible. RP 794-95

In the State’s initial closing, the State argued that much of defendant’s statement to police was self-serving and not credible. RP 776-81. The prosecutor argued that defendant’s statement that four Crips were stomping on Sandy Dillon was inconsistent with the photographs taken of Dillon on the night of the incident showing that Dillon had virtually no injuries – slight swelling above the eye and some bruising under the eye.

RP 778. Further the prosecutor argued that defendant's statement that the Crips said "Let's blast on 'em." during the fight was not credible because there was absolutely no evidence that David Barker or any of his friends had weapons during this fight. RP 780. Finally, the State argued the version of events defendant relayed in his statement, which was made more than two weeks after the incident, was designed to provide defendant with a legal justification for shooting David Barker and Marismo Yim. RP 780-81.

In response, defense counsel used the fact that defendant admitted stealing the firearm to undermine the State's closing argument and bolster the credibility of defendant's statement. Defense counsel argued:

Mr. Greer seems to think that my client, Mr. Teo, is a legal genius, you know, that he sat down and that he crafted a statement that met the requirements of self-defense in the law, and that when he was asked by the officer later on why he did something or other, that he threw something in at the last minute that might make him look good. Well, I'll tell you, ladies and gentlemen, anybody who would sit, in talking to police officers, when he is wanted for attempted murder, would volunteer that he had stolen the gun, is not a legal genius. It just ain't the case.

RP 794-95. Later defense counsel argued that:

...And, if [Mr. Teo] was lying, why wouldn't he have lied about other things? Why wouldn't he have said, "Oh, that was Sean's gun. It wasn't mine, but I knew it was there. And when I saw him getting beat up, I went for it." But, he didn't say that. He said, "It was my gun. I knew it was

there. I knew it was loaded. I grabbed it to save my friend.
And I stole it.”

RP 796. Thus, it is clear that defense counsel made a tactical decision to use defendant’s admission that he had stolen the firearm to buttress the credibility of defendant’s statement that he acted in defense of Sandy Dillon. Because a legitimate trial tactic cannot be considered deficient performance, trial counsel was effective.

Defendant has also failed to satisfy the second prong: prejudice. The evidence that defendant committed the crimes with which he was charged was overwhelming. Other than defendant’s statement, there was evidence that David Barker’s group had any more than five people in it. RP 344, 346, 369, 371, 401, 450, 592. No witness testified that Dillon was in serious peril during the fight. RP 372, 373. To the contrary, they testified that Dillon and Curious had ganged up on Yim. RP 372, 373, 454, 540, 549, 560, 597. Sheets, Yim, and David all testified that the fight was initiated by defendant and his gang members calling out gang insults in an attempt to get Duncan to fight. RP 367, 411, 538-39, 548, 593, 594, 595, 596. Sheets, Yim, David, and Phai testified that Duncan and the defendant engaged in a fist fight that escalated to a gang fight involving all four of the Green Ragers and everyone in David’s group fighting. RP 369, 370, 371, 372, 373, 411, 412, 415, 416, 418, 455, 597. Sheets, Yim,

David, Phai, and Bruce all testified that defendant walked to the car, got his gun, and fired shots that struck David and Yim, injuring them both severely. RP 374, 376, 431, 457, 458, 460, 465, 540, 551, 552, 597, 602. Photographs of Dillon taken several hours after the incident showed that he sustained minimal injuries. RP 666, 667; Exhibits 54-58.

The evidence from the State's witnesses is in stark contrast to defendant's statement to police made 16 days after the incident. *See* Exhibit 67 (transcript of taped interview). In his statement defendant asserts: 1) that there were 12 Crips, not the 5 boys to which David, Sheets, Phai, and Yim testified; 2) that four of the Crips were jumping on Dillon, by kicking and hitting Dillon repeatedly; 3) that he was afraid for Dillon because of the injuries Dillon could receive; and 4) that he heard one of the Crips say "Let's blast 'em." *See* Exhibit 67. Because defendant's statement to police was the only evidence to support his case theory that he acted in defense of another, it was critical that the jury perceive that statement as credible. Thus, trial counsel tactical decision to bolster the credibility of defendant's statement was a legitimate trial tactic. Trial counsel was not deficient. This trial strategy, although failed, does not amount to deficient performance. *See State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

Additionally, defendant cannot show he was prejudiced by his attorney's choice not to request a limiting instruction. Defendant has

failed to show that the trial's outcome would have been different had a limiting instruction been offered. Here, the evidence of defendant's guilt was overwhelming. If trial counsel had requested a limiting instruction the result would have been to emphasize to the jury that defendant had stolen the gun without any benefit to defendant's case. Instead, trial counsel used the *res gestae* evidence to bolster's the credibility of defendant's exculpatory statement, which was the only evidence that supported his claim of defense of others.

5. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE DOCTRINE OF CUMULATIVE
ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)(internal quotation omitted). "[A] defendant is entitled to a fair trial but not a

perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973)(internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometime 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). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First,

there are constitutional and non-constitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. *Id.* Conversely, non-constitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990)(“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error) and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for

truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. He has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

6. THIS COURT SHOULD REMAND TO THE TRIAL COURT FOR THE ENTRY OF WRITING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In a criminal trial, Criminal Rule (CrR) 3.5(c) requires the trial court to enter written findings of fact and conclusions of law. CrR 3.5(c) states:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

The failure to file written findings is harmless error if the trial court's oral opinion and the record of the hearing are so comprehensive and clear that written findings would be a mere formality. *State v. Smith*, 76 Wn. App. 9, 16, 882 P.2d 190 (1994), *review denied*, 126 Wn.2d 1003, 891 P.2d 37 (1995). A trial court's failure to enter written findings and conclusions typically requires remand for entry of findings and conclusions, not reversal. *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998).

In the present case, the court held a CrR 3.5 hearing and ruled that defendant's statements were made voluntarily after he had been advised of his *Miranda* warnings. RP 101. The court, however, failed to enter written findings. Because the trial court failed to enter written findings of fact and conclusions of law, the State joins in defendant's request that this court remand for the entry of findings consistent with the trial court's oral ruling and pursuant to CrR 3.5(c).

D. CONCLUSION.

For the reasons argued above, the State respectfully requests that this court affirm defendant's convictions for two counts of attempted first degree murder and one count of drive by shooting. The State asks this court to remand for the sole purpose of entering written findings of fact and conclusions of law.

DATED: JANUARY 17, 2010

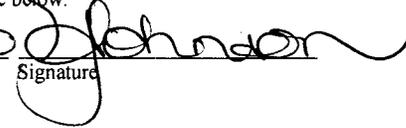
MARK LINDQUIST
Pierce County
Prosecuting Attorney



KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

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.

1/9/10 
Date Signature

10 JAN 19 PM 3:17
STATE OF WASHINGTON
BY _____
COUNTY OF PUYALLUP