NO. 46705-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEMARCUS GEORGE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 05-1-00143-9

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE.

1. Procedure

This is the second time this case has been before the appellate court. In his first trial defendant was convicted of murder in the second degree; in a split decision, the appellate court reversed due to the trial court's failure to instruct on self-defense. ***State v. George***, 161 Wn. App. 86, 249 P.3d 202 (2011).

On remand, the prosecution filed an amended information in Pierce County Cause No. 05-1-00143-9 to conform the charges with the first jury's acquittal on the charge of murder in the first degree. CP 107-08. The State proceeded to retrial on charges of intentional murder in the second degree in Count I and felony murder in the second degree in Count II; a firearm enhancement was alleged on each count and both counts stemmed from an incident that occurred on June 21, 2004, which resulted in the death of Isaiah Clark. *Id.*

During trial, the prosecution called Rickie Millender to the stand; Mr. Millender was in custody on other charges and indicated that he wanted to "plead the Fifth." 20RP 105-124.[1] The court found no basis for him to assert a Fifth Amendment claim and directed him to testify; when

[1] For the sake of consistency, the State will use the same designations for the various volumes of verbatim reports of proceedings as used by opposing counsel. *See* Appellant's Opening brief at Appendix A.

asked about the events of June 21, 2004, Millender maintained that he could not recall the events surrounding the death of his friend and that rereading transcripts of his prior statements would not refresh his recollection. 20RP 128-133. The court found him in contempt and the case recessed until the following Monday. 20 RP 135-141. On Monday, Mr. Millender admitted that he did have recall but stated he would plead the Fifth if asked questions in front of the jury because he didn't want to testify while he had charges pending. 21RP 12-13. When asked questions in front of the jury he refused to answer. 21RP 27-28. The court maintained its contempt ruling. 21RP 29. Ultimately, Millender was found to be unavailable as a witness and his former testimony was read to the jury. 22RP 7-24.

On Count I, the court instructed the jury on intentional murder in the second degree and the lesser crime of manslaughter in the first degree; the jury was instructed on second degree felony murder predicated on assault in Count II. CP 342-375. The court also gave instructions on self-defense. *Id.*

After deliberations, the jury returned verdicts finding defendant guilty of intentional murder as to Count I and felony murder in the second degree as charged in Count II. 25RP 188-190. The jury also returned

special verdicts finding defendant armed with firearm at the time of the commission of the crime. *Id.*

At sentencing, on September 19, 2014, the prosecutor indicated the two counts of murder in the second degree should be merged into one and defendant was sentenced on a single count of murder in the second degree to a standard range sentence of 175 months, based on an offender score of zero, plus 60 months of enhancement time for a total sentence of 235 months. 25RP 3-4, 59-60; CP 376-389. He was sentenced to 48 months of community custody and ordered to pay $4,385.96 in court costs, including extradition, and $10,622.92 in restitution. CP 376-389, 410-411.

Defendant field a timely notice of appeal from entry of this judgment. CP 390-404.

2. Facts

On June 21, 2004, Laura Devereaux stopped to fill her Ford Explorer with gas at a station/minimarket located on Pacific Avenue between 132nd and 133rd in Pierce County, Washington, 16RP 569, 572, 614-15. She pulled up to a pump, on the other side of island at the same pump she was at sat a white van; just in front of the white van was a blue Monte Carlo or Cutlass with a white top. 16RP 615-18. The van and Monte Carlo were at the pumps that were closest to the entrance to the

station's building/mini market. *Id.* While she was pumping her gas a car driven by a woman, later identified as Ms. Johnson, came into the station stopping at the island that was away from the building, between Ms. Devereaux and Pacific Ave. 16RP 618. Ms. Johnson got out of her car and went into the building. 16RP 627.

Ms. Devereaux testified that there were four people around the blue car. 16RP 619. She testified that the man who was later shot was standing on the sidewalk between the blue car and the store, a little bit to the side of the doors; another man, with braids, was with him who later moved toward the car. 16RP 620, 636. A woman was standing near the car and a man was between the blue car and the pump. 16RP 620-21. The man with braids who was standing near the victim went toward the man near the car and began to talk; the two men near the car were loud, but nothing they were doing caused Ms. Devereaux concern at that point. 16RP 621-22; 629; 18RP 15.

These two males then came over to Ms. Devereaux's side of the pump and started acting like they were going to fight. 16RP 622. She thought at first they were joking but kept her eye on them; their confrontation was verbal and she did not see any blows or touching between them. 16RP 623; 18RP 35, 45. At that point she heard a gunshot and both men hit the ground, as did she. 16RP 623. She also heard one of the men-not the one with the braids- say "Dog what did you just do?" 18RP 36. Ms. Devereuax heard five shots, there were two shots, a pause,

then three in quick succession. 16RP 624. During these shots, both the men that had been about to fight took off running. *Id.* Ms. Devereaux heard a car squeal and saw the blue and white car leaving. 16RP 625. She ran into the store, past the body of the man she had seen standing near the door. 16RP 625. He was lying face down with his head turned to the side; it looked to her like he had just fallen forward from where he had been standing. 16RP 625-26. She did not see any weapon near him. 16RP 626. After yelling inside the store for someone to "call 911" she went back to the man that had been shot; she did not see a weapon around him. 16RP 627.

On June 21, 2004, Monica Johnson, was with her four children at a gas station in Parkland in order to get gas for her car. 18RP 47-48. She pulled into the station and went to get money out of her purse; she could hear people arguing. 18RP 49. She got out of her car, crossed across the pumps, and headed toward the door of the building. *Id.* A two –toned Cutlass type car was parked at the pumps closest to the building. 18RP 51. Two men were standing near the driver side door of this vehicle; one, who was clean cut and seemed mellow, was pumping gas; the man not pumping gas, had braids and was very animated as he argued with the man pumping gas. 18RP 53-55. The passenger side door was open and a female was standing outside the car, with her back to the open door. 18RP 53, 57-58. Ms. Johnson could see that there was a man sitting upright in the back seat of this car as she passed it. 18RP 59-60, 133, 147.

Ms. Johnson testified a black man, later identified as Isaiah Clark, was standing in front of the doors leading into the store. 18RP 49. She asked him what was going on and he shrugged his shoulders. 18RP 49. 286. A white man was standing outside of the store, at the corner, as well. 18RP 53.

Ms. Johnson proceeded into the register. 18RP 56. The argument outside became very loud and drew her attention back outside. 18RP 56-57. She saw the defendant get out of the Cutlass, with a gun drawn and straight out, then she saw the muzzle flash, or spark, of the gunfire. 18RP 61-62, 150. She saw Clark begin to fall. 18RP 58, 65. Several more shots are fired at Clark as he is falling. 18RP 66-68, 150. Ms. Johnson testified Clark's hands were out of his pockets. 18RP 65-66. Ms. Johnson never heard Clark say anything or make any type of gestures or see him touch the defendant or the woman standing near the Cutlass; she never saw Clark with anything in his hands. 18RP 118-19. Immediately after the shots the driver, who was the man pumping gas, got into the car; defendant got into the back seat, and female got back into the front passenger seat and then the car sped off. 18RP 70-71.

Ms. Johnson checked on her children then went to Clark and tried to stop the bleeding. 18RP 72. He was in pretty much the same location as he had been when she went into the store. 18RP 117-18. The man with the braids came over to Clark; he appeared to know Clark and was distraught. 18RP 72-73. The man with braids started going through

Clark's pockets, he told Ms. Johnson that he didn't want them thinking "this was a dope case gone bad." 18RP 74. The man removed something "really small" from Clark's pockets, then said he was "going to get his [Clark's] mom." 18RP 74-75.

Brett Beal was working as the cashier at the Parkland gas station/mini-market on Pacific Avenue between 132nd and 133rd on June 21, 2004. 19RP 13-14, 26. He was working inside with customers, so did not see anything, but recalls hearing several shots fired at his station around 5:20 p.m. 19RP 26-27, 31. He believes that there was a series of four to six shots with a pause between the first one and the next several. 19RP 27. The shots were coming from the general vicinity of the car that was parked at pump 3. 19RP 28-29, 38-39. He looked to get the license plate number of the car; then immediately got on the phone to call 911, he gave the license information to the 911 operator. 19RP 29-30. Another customer came in with the license plate number, he compared his number with the other and they were the same number. 19RP 36. He estimates the suspect car left within a few seconds after the shots ended. 19RP 35. Mr. Beal testified that people went to where the man was laying on the ground; one woman came inside to ask for some towels to stop the bleeding. 19RP 39-40.

Daniel Brooks is a retired military man who is a frequent customer of the Parkland Shell station. 21RP 88-89. He was there on June 21, 2004, getting a can of gas for his lawn mower. 21RP 89-91. Mr. Brooks

filled his gas can at the pump on the other side of the island from where a dark car pulled for gas; but did not park his pickup at the pump. 21RP 92-93. He recalls that the driver of the dark car got out of this car and started pumping gas; he recalls that there was another person in the car. 21 RP 93-94. As the driver pumped his gas a husky man came over to talk with him; nothing about the tone of this conversation caused Mr. Brooks any concern at this time. 21RP 84-95. As for other people at the station, Mr. Brooks recalled a young white college student who was waiting for a ride; he thought there might have been another person near the building, but could not be sure. 21RP 91-92, 97-98. As Mr. Brooks walked to the building to pay for his gas, he walked by the Cutlass where the two men were talking; nothing about their conversation caused him any concern, but as he opened the door to the store he picked up on some tension in the conversation. 21RP 96-97.

After paying for his gas, Mr. Brooks started outside, he then saw the other man in the conversation take a swing at the driver, who was still pumping gas. 21RP 97. As Mr. Brooks started for his truck he heard a female voice holler "Don't shoot him; don't shoot him." 21RP 99. He turned to see a "guy piling out of the back seat of that car" through the passenger door; there was a female by the passenger seat. 21RP 99, 115-16. Mr. Brooks could see a gun in somebody's hand. 21RP 99. Mr. Brooks did a "tuck and roll" to come up on the other side of his truck. 21RP 99-100. The man who was coming out of the back seat of the car at

the pump began shooting at the man that had taken a swing at the driver. 21RP 99-101. Mr. Brooks thought that the man who was shot was the same man who had taken a swing at the driver of the car. 21RP 116. *Id.* Mr. Brooks described how the man who was shot ran around the car toward the guy with the gun. 21RP 101-02. Mr. Brooks heard five shots, one shot then four quick ones. 21RP 102. Mr. Brooks testified that he saw the man's body react to being hit by bullets and watched him go down. 21RP 112-13. Mr. Brooks got the license number of the suspect car, then went inside the store to relay this information to the cashier. 21RP 103-04. He then went back out to see if he could help the victim. 21RP 103-04.

Rickie Millender testified that he is a good friend of Isaiah Clark. 20RP 125-27. McGrew also had a friend Ranique Mosely who had been murdered in 2003. 20RP 128. When asked about the events of June 21, 2004, Millender maintained that he could not recall and that rereading transcripts of his prior statements would not refresh his recollection. 20RP 128-133. Millender's former testimony was read to the jury which provided the following evidence: Rickie Millender testified that he grew up with Freddie McGrew. 22RP 7-8. McGrew and Millender had a mutual friend Ranique Mosely who had been killed in 2003. 22RP 8. On June 21, 2004, Millender saw McGrew at the Parkland Shell and stopped his car because he wanted some clarification about the circumstances of Mosely's death. 22RP 8-9. Also in Millender's car were Clark and his

girlfriend, Kristal. 22RP 9. Millender caught up with McGrew as he came out of the building and followed him over to the car where he began pumping gas. 22RP 10-13. Millender could see there was a male in the back seat of the car and a female in the front; he didn't recognize either. 22RP 11. Millender tried to get McGrew to talk to him about Mosely, so he could get the full story from someone who was there the night Mosely was killed. 22RP 11-12. McGrew did not want to talk to him. 22RP 13. Millender persisted and he saw a male hand reaching for something under the back seat and was afraid that that person might be getting a weapon. 22RP 13-15. When McGrew tried to get in the car, Millender tried to stop him and get him to talk. 22RP 16. Upset, Millender took a swing at McGrew. 22RP 16-17. Millender then heard a series of shots and thought they might be aimed at him; he ran off, weaving as he ran to avoid being a target. 22RP 17. When he felt safe he stopped and looked back at the station; he saw Clark on the ground; the man who had been in the back of McGrew's car was standing over him, with a gun in his hand. 22RP 17-19. Everyone associated with McGrew's car must have gotten back into it, because it quickly left the station and none are left behind. 22RP 21. Millender went over to where Clark is laying; he is bleeding badly; Millender goes through his pockets to remove the drugs that Clark was carrying; he may have taken money too. 22RP 22, 42. Millender then left to go tell Clark's family members, who lived nearby, what had happened. 22RP 23-24.

Michael Clark, the victim's older brother, testified that he learned of his brother being shot when his brother's friend, Rick, had come to his house and told him; Mr. Clark then went to the gas station where it happened, which was a few blocks away, and saw his brother being put into an ambulance. 18RP 158-60.

Detective O'Hern arrived at the gas station later that night; many officers and other detectives were already there and working the scene. 19RP 100-10. He was given the license plate number and the name of the registered owner, Yvonne Rucks, of the suspect vehicle. 19RP 110. He and another detective went to the neighborhood of the registered owner and knocked on her neighbors' doors to see if they could gather any information as to who might be driving that car. 19RP 117. He learned that Freddie McGrew was Mrs. Rucks's son. 19RP 128. He then used records[2] to try to gather the names and photographs of any one who had been connected or associated with McGrew in any way. 19RP 129-130. Once he had that information he went back out to Mrs. Rucks' house; there he came in contact with a young female, later identified as Tamrah Dickman, who, it turned out, had been present at the shooting. 19RP 130-32; 24RP 173-74.

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[2] Detective O'Hern testified that his has many data sources available to him, including those of the Department of Licensing and LESA records. 19RP 104-105, 129-130. If any one files a police report for any reason or all, it will contain the names of people associated with that incident, and he can access those names. 19RP 104, 129-130, 168.

Det. O'Hern testified that when he interviewed Tamrah Dickman on June 23, 2004, she did not appear to be under the influence of alcohol. 24RP 173-74. In the interview she kept referring to the person in the back seat as "Duh Duh" and insisted that she did not know any other name for this individual. 24RP 175. Det. O'Hern did not bring up or discuss the name "Dmarcus" with her prior to taking a taped interview of Ms. Dickman; defendant's picture had been left in the detective's car. 24RP 175-76. During the taped interview, Ms. Dickman slipped and used the name "Dmarcus" to refer to the person in the back seat. 24RP 176. Det. O'Hern then retrieved a picture of DMarcus George from the car and Ms. Dickman identified it as being a picture of "Duh Duh." 24RP 177. Det. O'Hern directed Det. Ames to create a photo montage including Dmarcus George's photograph and show it to Ms. Johnson. 19RP 149-51.

On July 8, 2004, Ms. Johnson was shown a photo montage and asked if she recognized the shooter in any of the pictures. 18RP 120-24; 21RP 157-62. She identified the defendant's photograph as the shooter. 18 RP 124-25; 21RP 162. Ms. Johnson also made a courtroom identification of the defendant as being the shooter. 18 RP 125. Based upon Ms. Johnson's identification of defendant as the shooter from the photo montage, Det. O'Hern, tried to contact defendant, but was unsuccessful. 19RP 151-53. Charges were filed in January 2005 and an arrest warrant issued for defendant. 19RP 151-53. It was still outstanding when Det. O'Hern retired in February 2005. *Id.*

A medical examiner testified that the autopsy of Isaiah Clark's body revealed that he had died as a result of four bullet wounds. 16RP 499- 515,533. One bullet entered on the upper left back and traveled in a forward and downward direction into the body hitting the shoulder blade then hitting the rib cage where it broke into pieces, one of which perforated the lung. 16RP 502. This was a life threatening injury; it would have reduced the victim's ability to move his shoulder and left arm and caused pain, blood loss, and a partial collapse of the lung, impairing his circulation and ability to breathe. 16RP 528-29. A second bullet entered on the back of the left arm, continued through the arm, then into the left side of the chest, through the left lung, the center of the chest and the right lung before exiting the body. 16RP 508. The entrance wound of this injury showed signs of gunpowder stippling indicating that the muzzle of the gun was within three feet of the body at the time it was fired. 16RP 504-07, 508-09. The wound would cause severe impairment of the ability to breathe due to the collapse of both lungs and the rapid loss of blood out of circulation; it was life threatening in and of itself and likely unsurvivable. 16RP 530, 550.

The third bullet wound examined showed an entrance wound at the outside of the left arm; the bullet traveled through the armpit exited then went immediately entered the left chest, through the left lung and struck the bone of the thoracic spine (spinal column). 16RP 509, 510. This entrance wound also had stippling. 16RP 509. The entry into the

arm, exit and reentry in to the chest shows that the victim's upper arm was up against the left side of the chest when the bullet passed through. 16RP 511. This life-threatening wound would have caused blood loss and impaired the victim's ability to breathe. 16RP 531-32. The fourth wound examined had an entrance site on the front of the chest on the right side; passing beneath the skin through tissue in the chest, then exiting, then reentering traveling through the abdomen before ending up in the left flank area. 16RP 511-12, 524. This was also a life threatening wound. 16RP 533. The court admitted photographs where metal rods had been inserted into the bullet pathways so that the jury could understand the trajectory of the bullets, as the gun would have to aligned with the probe for each of the wounds. 16RP 526-28, 549. The medical examiner found no injuries, such as bruising, abrasions, or lacerations, on the victim's body that were consistent with him having been in a fight. 16RP 501, 512-13. Subsequent testing of Mr. Clark's blood and urine showed no alcohol in his system but was positive for the presence of cannabinoids (marijuana). 20RP 29-31.

A firearm expert with the Washington State Crime Lab examined fired casings and one unfired cartridge recovered at the crime scene and bullets recovered from the medical examiner and hospital. 19RP 147-4820RP 9-12, 72-78; 21RP 48-64. She concluded that all three fired cartridge casings were fired from the same 9mm gun. 20RP 80. The unfired cartridge case had extractor marks on it, but they had insufficient

microscopic detail to determine whether it had been in the same gun that fire the spent cartridges. 20RP 82. There was nothing about the cartridge that would eliminate it from having been in the same gun; there were marks on the cartridge that were consistent with it having hit the feed ramp as it came out of the magazine rather than loading into the chamber. 20RP 82-83. The bullets were consistent with a .38 or .9mm caliber gun. 20RP 86-89.

Defendant was arrested on his warrant on March 27, 2008 in Virginia. 19RP 81-83. Two detectives flew to Virginia and brought him back to Pierce County. 19RP 80-83.

The prosecution also admitted portions of defendant's former testimony which conveyed the following evidence: Defendant acknowledged that he was at the Shell station at 132nd and Pacific on June 21, 2004, which is in the state of Washington. 22RP 46. He acknowledged that Isaiah Clark was struck by four bullets at that station and that he died from these injuries. *Id.* Defendant acknowledged that the four bullets came out of his gun, and that he was pulling the trigger for each of those shots. 22RP 46-47. He testified that he was scared of Isaiah Clark and Rickie Millender and that is why he got his gun out; he was also afraid of a white man that was standing up against the building. 22RP 47-48.

The defense called David Moore to testify. Mr. Moore was a service tech for pumps at gas stations and was at the Shell station at the

time of the shooting. 22RP 56. He was driving a white van parked at the pump that was closest to the building. 22RP 56-57. Directly in front of him was a car that had a couple of guys next to it on the driver's side, arguing. 22RP 57-58. Mr. Moore recalled a third man, who did not seem to be a part of the argument, walking around the car and bending over through the passenger side window; he thought there was also someone in the back seat of the car. 22RP 60-61. Mr. Moore testified that he could see the man's head inside the car but could not tell if he was reaching into the car. 22RP 61-62. After the man leaned in, Mr. Moore heard some shots coming from inside the vehicle; he saw the man stagger back and fall to his knees, then face down. 22RP 67, 74. Moments after the shots, the car in front of his van left the station. 22RP 68, 74.

Tamrah Dickman testified that in 2004 she was the girlfriend of Freddie McGrew and that she used to hang out with the defendant, whom she called "Duh-Duh." 23RP 67-68. Ms. Dickman testified that McGrew picked her up from work on June 21, 2004, in his Cutlass, and that defendant was asleep in the back seat and they went immediately to the gas station. 23RP 68-74. Ms. Dickman testified that there was a car full of five or six young black men at one of the pumps near Pacific; she gave a head nod at the car then McGrew told her not to talk to them. 23RP 75-77. McGrew got out and went into the store and the car with black males drove off around the corner. 23RP 77-78. She testified that one of the men from the car, later identified as Clark, came over to the building and

was sneaking up on Fred as he came out of the store. 23RP 79-80. McGrew just kept walking to the car, when another black male came up and got confrontational with McGrew. 23RP 80. Ms. Dickman described this man as saying that one of McGrew's friends had killed one of his friends and somebody had to pay for it. 23RP 82. Ms. Dickman got out of the car because "more guys kept coming from around the corner." 23RP 83-85, 87. She testified Clark was standing with his fist balled up, pacing, so Ms. Dickman though McGrew was going to be jumped and beat up by this bunch of guys. 23RP 83-85, 87.

Ms. Dickman woke defendant up. 23RP 85-86. Ms. Dickman testified that as defendant was getting out of the car, Clark was approaching her. 23RP 87. She testified that Clark punched defendant with his fist "in the face or the head, something to the top area I believe" and dropped him. 23RP 88-89. She testified that then Clark grabbed her "upper chest, breast area, with both hands." 23RP 89. She then testified that he started pulling her, ripping her bra and shirt, so she planted herself in the doorway holding on to the car, with an arm draped over the front window and the other on the door. 23RP 89-90. She closed her eyes and prayed that Clark wasn't going to take her; she kept her eyes closed until "our car was speeding off." 23RP 90-91. While her eyes were closed she heard shots fired that "were very, very close" to her; she could smell gunpowder. 23RP 96-97. As she heard the gunshots, and while her eyes were still closed, Clark began to pull her downward, sliding down her

body, when he got to the point he just had her wrist, he let go. 23RP 97, 116-17. Ms. Dickman testified that she believed that Clark had been hit by the gunfire, but still she did not open her eyes. 23RP 118. She believes that Clark let go and McGrew's car sped off at exactly the same time, while she was hanging out of it. 23RP 97. When she opened her eyes she was in the car with McGrew and defendant driving down Pacific. 23RP 97, 119-21. Ms. Dickman cannot explain how she got back into the car. 23RP 119-120.

Ms. Dickman remembers being interviewed by detectives two days after this event and that she told them about "Duh-Duh" being present. 23RP 101. She could not remember them asking her repeatedly if she knew his real name. 23RP 102. After reviewing a transcript she acknowledged that she lied to them when she told them she didn't know his real name. 23RP 103. She acknowledged that in her interview two days after the event she never said anything about Clark punching the defendant, but claimed she was drunk at the time of the interview. 23RP 103-04. She also acknowledged that she did not mention the whole mob of people that were going to jump Fred McGrew to the detectives , but stated that her "mind was everywhere and I was very drunk." 23RP 105-06. She also acknowledged that she did not testify in 2009 about a bunch of men trying to jump McGrew; she acknowledged she was sober at the time of her testimony. 23RP 106, 140-41. Her statement to detectives in 2004 spoke about two black men in a white car, Rickie [Millender] and

"the dead guy." 23RP 111. She acknowledge that when she testified in 2009 she said that Clark had grabbed her by the upper arms rather than her breast or bra, but said that "it's all the same, breast area and upper arms." 23RP 142. She acknowledged that when she testified in 2009, she never said anything about Clark balling his fist or pacing back and forth. 24 RP 20. On redirect, Ms. Dickman testified that she lied to the detectives in 2004 about knowing the defendant's name to protect him from retaliation. 23RP 128. She also acknowledged, however, that when she testified under oath in 2009 she stated that she did not know Duh-Duh's real name when she was interviewed by the detectives. 24RP 27.

Defendant testified that Freddie McGrew was his best friend growing up; they went to school together, played sports together and "hung out" together. 24RP 43-46. In June of 2004, Mr. McGrew was in a relationship with Ms. Dickman and was driving a Cutlass. 24RP 46-47. In the afternoon of June 21, 2004, having had little sleep the night before, McGrew told defendant that they needed to go pick up Ms. Dickman; defendant fell asleep in the back of McGrew's car. 24RP 49-52. When he woke up, he was at a gas station but he wasn't sure where; Ms. Dickman was shaking him telling him to wake up and "they're about to do something to Fred." 24 RP 51-54. He turned to see McGrew walking out of the store, Rickie Millender was behind him and a heavy set black man was standing over by the door. 24RP 54-59. McGrew went to put gas in the car, he did not react to Millender. 24RP 59-60. As defendant got out

of the car, he heard Millender say something about needing to talk about Ranique's death; defendant described McGrew as looking worried. 24RP 62. Millender was doing a lot of talking and McGrew was not. 24RP 65. Defendant was going to go around the car to diffuse the situation, but the man over by the door, whom defendant learned later was Isaiah Clark, approached defendant. 24RP 65-68. Defendant testified that Clark made "a gesture with his hand around his waist and at that time I perceived he had a weapon, so I stopped." 24RP 70. He described the gesture as one you use if you have a firearm on you; specifically he said Clark was pulling his shirt up "to let it be known that there's something there." 24RP 70. Defendant testified that at this point he got really scared and believed they were there to get retaliation from Ranique's death and it didn't matter if it was him, McGrew, or Dickman. 24 RP 71. Defendant saw McGrew try to get back in the car, but Millender stopped him and said "I told you guys, you guys are not going to leave here." 24RP 74. Defendant turned to get back in the car, Ms. Dickman was standing in the open doorway; defendant testified as he bent over to get into the car, Clark struck him on the back of his head with what felt like a piece of metal. 24RP 74-78. Defendant testified that he fell into the vehicle and thought that he was going to die:

> DEFENDANT: At the time when I fell into the vehicle, the only thing that was on my mind was like I'm going to die, this is the way, that I'm going to get shot. So I just remember everything happened really fast. I just remember

> like some hands in there and what I perceived at the time was something in his hand and I remember doing like with my left hand trying to do the best of my ability to – like to swing, to pin him towards the back seat or --.

24RP 79. Defendant went on to describe how he reached for his firearm, pointing it in the direction of Clark when he felt a grip on his forearm. 24RP 79-80. Defendant testified that with the first shot he wasn't sure if it was his gun firing or the one he perceived Clark as having. 24RP 80. He remembers feeling a tug or pull, firing more shots; he believes his gun was outside the car at that time. 24RP 82. After the shots he remembers being released, he crawled into the back seat. 24RP 82. Afterward, defendant got rid of the gun by throwing it into "a lake or something" and he also got rid of the clothing he was wearing; then he left the area and went to Louisiana. 24RP 83-85, 140. From there he went to Maryland and got a job, until he was arrested on the warrant. 24RP 85.

Defendant acknowledged that when he testified previously, he didn't mention that he thought Clark had a weapon, but did so because he "didn't want [Clark's] family to perceive [Clark] as more of a bad person" so he might have left things out. 24RP 86, 116. Defendant acknowledged that whether or not the man he shot four times was armed was a critical fact, but he chose not to disclose it. 24RP 122. In 2009 when asked whether he had seen a gun or any kind of weapon in Isaiah Clark's hand, defendant testified:

> DEFENDANT: I didn't see one, but I did – like I wasn't trying to look. I didn't know if he had one. I didn't know.

24RP 126. On redirect, defendant testified that he never saw a gun. 24RP 164.

Defendant acknowledged that McGrew had problems with a lot of people and that he had been with McGrew between five to ten occasions where people had shot at McGrew; defendant felt his life was in danger at these times. 24RP 101- 103, 167. Defendant never saw Clark touch Ms. Dickman. 24RP 113-114. After leaving the gas station, defendant had no injuries that needed medical treatment. 24RP 139-140. Defendant testified that he acted in self-defense. 24RP 166.

C. ARGUMENT.

1. NO IMPROPER 404(b) PROPENSITY EVIDENCE WAS ADMITTED IN DEFENDANT'S TRIAL.

An appellate court reviews a trial court's decision to admit or deny evidence of a defendant's past crimes or bad acts under ER 404(b) for an abuse of discretion. ***State v. Fisher***, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). It will review a trial court's interpretation of ER 404(b) de novo as a matter of law. *Id.* ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The rule expressly addresses evidence of *other* crimes, wrongs or acts, as opposed to acts that constitute the charged offense; it is usually applied to acts that occurred *prior* to the charged offense. *See* ***State v. Gresham***, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Before a trial court admits evidence under ER 404(b), it must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose of admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect of the evidence. ***State v. Lough***, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). A trial court abuses its discretion by not following the requirements of ER 404(b) in admitting evidence of a defendant's prior convictions or past acts. ***Fisher***, 165 Wn.2d at 744–45. A court should presume that evidence of a defendant's past acts is inadmissible and resolve any doubts on whether to admit the evidence in the defendant's favor. ***State v. Nelson***, 131 Wn. App. 108, 115, 125 P.3d 1008 (2006).

Defendant has assigned error as follows:

> The trial judge erred and George's rights to a fair trial were further violated by the repeated introduction of extremely prejudicial ER 404(b) evidence of 'propensity" over defense objection.

Appellant's Brief, Assignment of Error 3, at p.1. The specific evidence that is the subject of this assignment is not articulated within the assignment; the argument section pertaining to this assignment does not

clearly identify the scope[3] of the "propensity" evidence challenged but seems to focus on three parts of the record; each will be discussed below. A review of these parts of the record shows that no ER 404(b) evidence was admitted at trial.

While Monica Johnson was testifying on direct examination she described how she saw the defendant come out of the backseat of the Cutlass with the gun drawn and started shooting. 18RP 58-62. The prosecutor established that the defendant had come fully out of the car, with both feet on the ground, when he asked if the defendant was standing or hunched over. Ms. Johnson replied that he was "standing" and that she would "never forget the look on his face[,]" which she described as "very menacing." 18RP 63. Defense objections that this was "opinion" or "improper demeanor testimony" or "outside the case law" were overruled. 18 RP 63-64. The prosecutor then asked the witness to explain what she meant by menacing, she replied:

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[3] While defendant identifies where in the record the "propensity" evidence discussed above occurred in the trial proceedings, he also mentions, at one point in his brief, evidence "that George had been shot at before, that he was so 'used' to violence that he would not be scared and that he had possessed a gun in the past." Appellant's brief at p. 31. Defendant does not identify where in the record this evidence was adduced or show that error was preserved by a proper objection. A court does not consider claims for which there is no reference to the record nor citation to authority. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). RAP 10.3(a)(5). As defendant has failed to support these claims with proper citations to the record and supporting authority, the court should not review them.

> MS JOHNSON: There was no fear on the face. It was more –it was just a nonchalant. It was – it was a monster. It was nonchalant, like there was nothing to it. I'll never forget it.

18RP 64. Defense counsel moved to strike, which was overruled. *Id.*

Defendant relies solely upon ER 404(b) as the basis that this evidence was improperly admitted. The evidence adduced at trial was that Ms. Johnson had never met or seen the defendant before this incident. 19RP 62. Therefore, all of Ms. Johnson's testimony about the defendant came from her witnessing the charged crime and not some other prior event or act. Her description of defendant as having the face of a "monster" may have been hyperbole, but it was not ER 404(b) evidence. Defendant has failed to show any error in the admission of this evidence as being propensity evidence.

The next challenged piece of "evidence" occurred later in Ms. Johnson's testimony. On direct examination she was asked as to what a man with braids [Rickie Millender], who appeared to be a friend of the victim, was doing and saying immediately following the shooting while Ms. Johnson tried to assist the victim as he lay wounded on the ground. 18 RP 91-92. The prosecutor asked her to refresh her recollection as to what he said by reading a transcript of the recorded statement she made within a day of the incident; Ms. Johnson was directed to page five of the transcript to refresh her recollection. 18RP 92-93. After indicating that her memory had been refreshed, defense counsel objected on the grounds

of hearsay; the court reviewed page five of the transcript and overruled the objection. 18RP 93-94. Ms. Johnson then testified as follows, which pertained to something that was on page four of the transcript instead of five:

> I recall, after reading the statement I gave the next day, that he had also said, "this is the same guys who shot my home boys a certain time ago, a week ago" or to that effect.

18RP 94, 95-97. The court asked to see the transcript back and the jury was asked to step out of the courtroom. *Id.* The prosecutor explained that was not the statement he was trying to adduce; the court indicated that it was not the statement that it had read on page five when making its ruling. 18RP 95-97. Defendant counsel asked for a mistrial. 19RP 96-97. The prosecution was willing to stipulate that the jury could be informed that:

> The parties stipulate that there is no evidence that the defendant participated in any shooting that occurred prior to June 21st of 2004.

18RP 104. Defense counsel first proposed a curative instruction that included a comment on the witness's credibility that the court rejected on constitutional grounds. 18RP 108-09. When informed of what the court intended to do and given the opportunity to offer any suggestions for improvement, defense counsel stated that it was "opposed to any curative instruction" and that "[a] mistrial was the only acceptable remedy to the defense." 18RP 114. When the jury returned to the court room it was instructed as follows:

> Now you are to disregard the last statement of Ms. Johnson. Statements made by others in the presence of a witness and repeated by that witness may be inaccurate. There is no evidence that DMarcus George participated in any shooting that occurred prior to June 21st of 2004.

18 RP 116. Thus, the challenged evidence was not admitted by the court; the jury was told to disregard it; and was given an affirmative instruction that there was no evidence to support what had been indicated. Defendant has failed to show the court admitted any propensity evidence.

The next challenged piece of propensity "evidence" references an exchange during the cross-examination of the victim's brother, Michael Clark. On direct, Mr. Clark had testified that he learned of his brother being shot when his brother's friend, Rick, had come to his house and told him; Mr. Clark then went to the gas station where it happened, which was a few blocks away, and saw his brother being put into an ambulance. 18RP 158-60. On cross-examination the following occurred:

> DEFENSE COUNSEL: What was Rick's demeanor when he showed up at your house? Did he seem winded or excited?
>
> MR. CLARK: He was upset, saying that he shot him like their other friend who had been shot before.
>
> PROSECUTOR: I'm going to object and move to strike.
>
> COURT: The jury should disregard that last statement. So [defense counsel], any other questions?
>
> [...]

> DEFENSE COUNSEL: My question is, how did Rick appear to you when he came to the house?
>
> MR. CLARK: Upset.

18RP 163. Again this record does not reveal any ER 404(b) evidence that was admitted at trial. The challenged evidence was stricken and the jury was directed to disregard it.

These three are the only examples of improperly admitted 404(b) evidence identified in the appellant's brief. As argued above, one does not qualify as 404(b) evidence and the other two were not admitted. Defendant has failed to show any trial court error in the admission of propensity evidence.

2. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING THE IMPROPRIETY OF THE PROSECUTOR'S ACTIONS.

To prevail on a claim of prosecutorial error,[4] the defendant bears the burden of establishing both the impropriety of the prosecutor's remarks and their prejudicial effect. ***State v. Finch***, 137 Wn.2d 792, 839, 975 P.2d 967 (1999); ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) (citing ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)).

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[4] "'Prosecutorial misconduct' is a term of art, but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "Prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited March 14, 2016); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10, 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited March 14, 2016). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.,* ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial error on appeal unless the error was so "flagrant and ill intentioned" that no curative instruction would have obviated the prejudice it engendered. ***State v. Hoffman***, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); ***State v. Ziegler***, 114 Wn.2d 533, 540, 789 P.2d 79 (1990), ***State v. Belgarde***, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

a. Defendant never establishes the impropriety of the prosecutor's actions.

Before an appellate court should review a claim based on prosecutorial error, it should require "that [the] burden of showing essential unfairness be sustained by him who claims such injustice." ***Beck v. Washington***, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

A court does not consider claims for which there is no reference to the record nor citation to authority. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). RAP 10.3(a)(5). When an appellant fails to support his claims with proper citations to the record and supporting authority, the court should not review them.

Approximately thirteen pages of the defendant's brief is spent setting forth "facts" that he considers relevant to his claim of "the prosecutor's repeated, serious and ill-intentioned misconduct and other errors" which he argues deprived him of a fair trial. Appellant's brief at p. 10-24. Contained within this "facts" statement is the information that the

defense objections or motions for mistrial predicated on the claimed error were overruled by the trial court or that a lesser remedy was employed; this indicates that the trial court did not agree with defense counsel arguments. The next section of the brief argues that the egregious, ill-intentioned misconduct compels reversal. Appellant's brief at p. 24-35. Defendant concludes this section by arguing: [Defense c]ounsel's repeated objections throughout the trial and the repeated motions for mistrial make it clear how objectionable the misconduct and improper evidence was at the trial." Appellant's brief at p. 35.

What is wholly missing from the brief is the identification of a particular action or argument by the prosecutor, coupled with argument and citation to authority showing that such action or argument is, in fact, improper. Defendant's bald assertion that the arguments were "improper" is not enough to establish their impropriety. ***State v. Pam***, 1 Wn. App. 723, 726, 463 P.2d 200, 203 (1969) (Where no authorities are cited in support of a proposition, the court will ordinarily not consider such assignments unless it is apparent without further research they are well taken).

As noted above, it is defendant burden to establish the impropriety. Defendant has established neither the impropriety of the prosecutor's action nor any error in the court in overruling an objection, if one was made. Defendant has failed to properly present these claims for appellate review.

b. The court should disregard argument of prosecutorial error based upon the record from the first trial.

Defendant's appellate counsel moved to have the verbatim report of proceedings from defendant's first trial made part of the record of review in this case. Counsel's argument for this was because "it is common ...for the second trial to adopt rulings from the first trial and for the first trial record to be very important for the appeal of the second." *See* Motion to transfer Record from Previous Appeal, COA Case NO. 46705-4-II, filed December 2, 2014. The request seemed appropriate because use of the first record was limited to rulings in the first trial that would be applied in the second trial, so the State did not object. This is not how the record of the first trial has been used by opposing counsel in this appeal.

While appellate counsel cites several times to the record in the first trial, it is never because a ruling from the first trial was adopted in the second trial, but rather to argue that actions taken by the prosecutor in the first trial were improper. *See* Appellant's Brief at 27-29. Apparently, making an objection, which is sustained by the court, is improper. *See* Appellant's Brief at p. 28-29.

Defendant was given a new trial because the appellate court found the first trial court erred in denying instruction on self-defense. This appeal concerns what occurred at the second trial before a different judge and claims of prejudicial error must be based upon the record in the

second trial because he is appealing the judgment entered by Judge Culpepper in 2014, not the one entered by Judge Stoltz in 2009. RAP 2.2; CP 54-67, 376-389, 390-404. This court should disregard claims and arguments that rely upon the verbatim report of proceedings from the first trial, which will be supported by a citation to "1RP," "2RP," "3RP," or "S1RP." *See* Appendix A to Appellant's Brief. Of course, portions of the testimony of the first trial was admitted as evidence in the second trial, but citations to this evidence can be made using the verbatim report of proceedings from the second trial.

To the extent that counsel is arguing that the prosecutors were trying to mislead the jury in the second trial as to the nature of the defendant's testimony in the first trial, that is belied by the record in the second trial. The State announced that it was going to admit a couple of pages of defendant's former testimony in its case in chief and asked defense counsel if there were any additional portions of defendant's former testimony that she wanted presented with it. 18RP 87-88. Eventually counsel indicated that there was something additional she wanted. 20 RP 4. The evidence admitted as the defendant's former testimony included that defendant had testified he was scared of Isaiah Clark and Rickie Millender and that is why he got his gun out; he was also afraid of a white man that was standing up against the building. 22RP 47-48. This was a choice by defense counsel not to admit additional portions of his former testimony, not the prosecutor trying to hide the truth.

Additionally, to the extent that the prosecution impeached defendant with differences between his 2009 testimony and his 2014 testimony, defense counsel was free to try to rehabilitate him with whatever portions of the 2009 transcript showed a prior consistent statement. The biggest discrepancy in testimony, however, was that in 2014 defendant said he "perceived" Clark having a weapon/gun and that in 2009 it had been "I didn't see" a weapon/gun.; also in 2014 he testified to Clark having gestured, by lifting his shirt, to indicate he had a gun, but not so in 2009. 24RP 70, 79-80, 126. According to defendant, he did not reveal this piece of information in 2009 because he did not want's Clark's family to think badly of their relative. 24RP 86, 116. Defendant's decision not to testify about this in 2009 had nothing to do with what the prosecutor did or did not do in the first trial.

The court should dismiss this claim for failing to meet his burden of showing impropriety based upon the record in the second trial.

3. DEFENDANT HAS FAILED TO SHOW ANY ABUSE OF DISCRETION IN THE DENIAL OF HIS MOTIONS FOR MISTRIAL.

An appellate court applies an abuse of discretion standard in reviewing the trial court's denial of a mistrial. ***State v. Hopson***, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989); ***State v. Weber***, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). A reviewing court will find abuse of discretion when the judge's decision "is manifestly unreasonable or based

upon untenable grounds." ***State v. Stenson***, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's denial of a motion for mistrial will only be overturned when there is a "substantial likelihood" that the error prompting the mistrial affected the jury's verdict. ***State v. Russell***, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. ***State v. Mak***, 105 Wn.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); ***Hopson***, 113 Wn.2d at 284.

When reviewing a motion for mistrial based upon a trial irregularity, it must be remembered that the trial court has wide discretion to cure trial irregularities. ***State v. Gilcrist***, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). In considering whether a trial irregularity warrants a new trial, the court must consider (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction. ***State v. Escalona***, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The appropriate inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the trial that the defendant did not receive a fair trial. ***State v. Post***, 118 Wn.2d 596, 620, 826 P.2d 172 (1992).

Again it is difficult to precisely identify which denial of a motion for mistrial defendant claims was erroneous. Many motions were made and he does not expressly identify or articulate how the trial court abused

it discretion in denying any of them. There are three that are discussed enough factually to warrant response at least toproperly set forth where the denials in the record occurred and the basis for the court's ruling.

The circumstances regarding the trial courts handling of the irregularity with Ms. Johnson repeating Millender's hearsay statement about these being the "same guys who shot my home boys a certain time ago" has been fully laid out, *supra*, when discussing the claim of improper propensity evidence being admitted at trial. This irregularity was also the basis for a motion for mistrial. In deciding that a mistrial was not necessary, the trial court noted that the statement could have pertained to McGrew rather than defendant. 18RP 99-100. It decided that the combination of instructing the jury to disregard the comment coupled with a stipulation that there was "no evidence that DMarcus George participated in any shooting that occurred prior to June 21st of 2004" was sufficient to eliminate any prejudice, *See* 18RP 116. A jury is presumed to follow a court's instructions. ***State v. Hopson***, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989). Defendant fails to show an abuse of discretion in the denial of this mistrial.

Defendant also discusses at length actions of the prosecutor in referring to testimony at a prior "trial" rather than a prior "hearing" contrary to the court's ruling that the word "trial" would not be used. 24RP 129-130. The prosecutor apologized and stated that it was a slip of the tongue and not intentional; the court found that it was not intentional

24RP 141-43. The only other violation of this order in limine had occurred during the testimony of a witness, Mr. Brooks, who used it once. 21RP 89-90. The prosecutor indicated that she had advised him not to use the word prior to taking the stand. 21RP 117. No motion for mistrial was made based on that irregularity.

None of the attorneys could devise a curative instruction that wouldn't call more attention to the prosecutor's error. 24RP 146-155. The court denied the motion for mistrial. *Id.* Defendant fails to show an abuse of discretion in this ruling.

Finally, defendant asked for a mistrial based upon the prosecutor's PowerPoint slide that read: Defendant's testimony in 2009 ≠ Self Defense; as well as the accompanying argument. 25RP 89-90; 96-109. Defendant claims the only way for the jury to interpret this argument was that he had not claimed self-defense at the first trial, but was raising it for the first time in this trial. 25RP 117-18, Appellant's brief at p.22. The trial court disagreed with this interpretation of the argument. As he understood the argument the prosecutor was pointing out that "very important things were at stake in 2009 and there was no testimony about Clark having a gun," 25RP 105, and that the prosecutor was: "stating the facts in 2009 didn't establish self-defense and he saying he thinks your client then fabricated a story about the gun to try to get a better claim in self- defense. That's my understanding of the argument." 25RP 109. As the court found nothing improper in the argument, it denied the motion for

mistrial. 25RP 109-10. Moreover, there is no reason to believe that the jury would associate this with what the defendant did at the "first trial" when it had no evidnce that a "first trial' had occurred. It is unlikely that the jury would make the same leap as defense counsel did. Again, defendant has failed to show any abuse of discretion in this ruling denying the motion for mistrial.

Defendant's trial may not have been a perfect trial, but in the court's view it was a fair one. At sentencing the court stated that defendant's trial was "as fair as most trials and as complete as most trials." S2RP 55.

4. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFICIENT PERFORMANCE FOR HIS COUNSEL'S PROPOSED PATTERN INSTRUCTIONS ON JUSTIFIABLE HOMICIDE REGARDING FELONY MURDER; NOR HAS HE SHOWN PREJUDICE AS HIS ARGUMENT REGARDING THE DEFICIENCY OF THESE INSTRUCTIONS DOES NOT AFFECT THE JURY'S VERDICT ON INTENTIONAL MURDER IN THE SECOND DEGREE.

A party may not request an instruction and later complain on appeal that the requested instruction was given. ***State v. Studd***, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999); ***State v. Gentry***, 125 Wn.2d 570, 646-47, 888 P.2d 1105 (1995); ***State v. Henderson***, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). An invited error is present when the trial court's instructions contain the same error as the defendant's proposed

instructions. ***State v. Bradley***, 96 Wn. App. 678, 681–82, 980 P.2d 235 (1999), *aff'd*, 141 Wn.2d 731, 10 P.3d 358 (2000). When review of claimed instructional error is barred by the invited error doctrine, a defendant may try to get the issue reviewed as part of an ineffective assistance of counsel claim.

> We will adhere to our normal use of the invited error doctrine, but will review any invited instructional error in connection with an ineffectiveness of counsel argument[.]

Gentry, 125 Wn.2d at 646-47; *see also* ***State v. Elmore***, 139 Wn.2d 250, 280, 985 P.2d 289 (1999)(If any instructional error was invited and the defendant does not assert an ineffective assistance of counsel claim, then the claim as to the instructional error is not reviewable). The invited error doctrine bars a party from raising an alleged error, even when that error is of constitutional magnitude. ***City of Seattle v. Patu***, 147 Wn.2d 717, 720–21, 58 P.3d 273 (2002).

Defendant wants to argue that three of the trial court's instructions on justifiable homicide, Instruction Nos. 24, 25, and 26, improperly stated the law as to the degree of perceived threat of harm for felony murder. Appellant's Brief at pp. 35- 41. As defendant's trial counsel proposed instructions that were identical to the court's instructions in all material respects, *see* Defendant's proposed instructions Nos. 6, 8, and 10 at CP 276-304, defendant is precluded by the invited error doctrine from raising

this claim directly, as may only assert that his attorney was ineffective for proposing such instructions.

A defendant has a right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and that the deficient performance prejudiced the trial. *Id.* at 687; ***State v. Nichols***, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. ***State v. McFarland***, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995). To show prejudice, the defendant must prove that, but for the deficient performance, there is a reasonable probability that the outcome would have been different. ***In re Personal Restraint of Pirtle***, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If one of the two prongs of the test is absent, we need not inquire further. ***Strickland***, 466 U.S. at 697; ***State v. Foster***, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

When a claim of deficient performance is based upon the failure to take some action - such as bring a motion, propose an instruction or make an objection - the defendant must show that court would have likely ruled in his favor had his attorney bought the motion, proposed the instruction, or lodged the objection. ***State v. McFarland***, 127 Wn.2d 322, 899 P.2d

1251 (1995); ***State v. Cienfuegos***, 144 Wn.2d 222, 25 P.3d 1011 (2001); ***State v. Price***, 127 Wn. App. 193, 203, 110 P.3d 1171 (2005).

Courts indulge in "a strong presumption that counsel's performance was reasonable" and the defendant bears the burden of overcoming that presumption. ***State v. Grier***, 171 Wn.2d 17, 33, 246 P.3d 1260, 1268 (2011); ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

This Court may quickly dispense with this claim because defendant's arguments about the deficiency of the self- defense instructions only pertain to a claim of self-defense for felony murder. *See* Appellant's brief at p. 36. Defendant makes no argument on appeal that the instructions were deficient with regard to the intentional murder that was charged in Count I. Even if this court were to assume merit to defendant's legal argument, he cannot show that the outcome of his trial would have been different; he still would have been convicted of murder in the second degree under the intentional prong of murder in the second degree. As defendant cannot show the prejudice prong of the ***Strickland*** test, his claim should be summarily rejected.

Defendant alleges that his attorney was deficient for not proposing a different self –defense instruction for the felony murder charge in Count II. The felony murder charge alleged that defendant killed Isaiah Clark in the course or in furtherance of committing either first or second degree assault against Clark. The State argued that the predicate assault occurred

when defendant shot Clark multiple times. *See* CP 342-375, Instruction No 22, *see* Appendix A; 25RP 69-71. The trial court instructed the jury on justifiable homicide based on a pattern instruction. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 16.02, at 234 (2008) ("WPIC"); CP 342-375, Instruction No. 24, See Appendix B.

The instructions in this case are consistent with ***State v. Ferguson***, 131 Wn. App. 855, 129 P.3d 856 (2006). In ***Ferguson***, the defendant was charged with felony murder - predicated on first and second degree assault - for stabbing the victim during a fistfight initiated by the victim. *Id.* at 856–59. The trial court refused to give WPIC 17.02, defining the force that one may lawfully use in an assault case. *Id.* at 859–60. On appeal, Ferguson argued that WPIC 16.02 set the standard of proof too high and that the jury should have been instructed that he could use the knife to defend against the assault if he was in fear of injury rather than death or great personal injury as set forth in WPIC 16.02. The Court of Appeals rejected this argument and held that the trial court properly gave a justifiable homicide instruction rather than a general self-defense instruction. *Id.* at 862. The Court of Appeals discussed the nature of the threat that must be present to use lethal force:

> To justify killing in self-defense, the slayer must believe that he or someone else is about to suffer death or great personal injury (some cases call it great bodily injury or great bodily harm). RCW 9A.16.050(1); ***State v. Walden***, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997); ***State v. Churchill***, 52 Wash. 210, 223, 100 P. 309 (1909). Simple

> assault or an ordinary battery cannot justify taking a human life. [***State v.***] ***Walker***, 136 Wn.2d [767] at 774, [966 P.2d 883 (1998)].

Ferguson, 131 Wn. App. at 860-61. The Court of Appeals went on to discuss the Supreme Court's decisions in ***Walden***, ***Walker***, and ***Churchill*** and how the law in Washington requires a showing of a reasonable belief that death or great personal injury was *imminent*, before a person could use lethal force to defend himself or another. The Court of Appeals concluded:

> In this case, the trial court did not err in giving WPIC 16.02 instead of WPIC 17.02. Ferguson's actions led to another's death and the jury was properly instructed about the circumstances under which deadly force is lawful. We hold that WPIC 17.02 can never be given in a felony murder case where assault is the predicate felony because it can never be reasonable to use a deadly weapon in a deadly manner unless the person attacked had reasonable grounds to fear death or great bodily harm. *See*, ***Walden***, 131 Wn.2d at 475, 932 P.2d 1237.

Ferguson, 131 Wn. App. at 862.

The holding of ***Ferguson*** echoed what the Supreme Court had expressed in ***State v. Brightman***, 155 Wn.2d 506, 122 P.3d 150 (2005) where is discussed the policy behind justifiable homicide:

> Justifiable homicide, and indeed all self-defense, is unmistakably rooted in the principle of necessity. Deadly force is only necessary where its use is objectively reasonable, considering the facts and circumstances as they were understood by the defendant at the time. [citations omitted]. For example, in ***State v. Nyland***, this court held that adultery did not justify taking a human life[.]

> [...]
>
> But the ***Nyland*** court also noted that "a killing in self-defense is not justified *unless* the attack on the defendant's person threatens life or great bodily harm." [47 Wn.2d 240, 242, 287 P.2d 345 (1955)] (emphasis added). Thus, the ***Nyland*** court contemplated an individualized determination of necessity, even where an attack on the defendant's person occurred.

State v. Brightman, 155 Wn.2d at 521-22; *see also* ***State v. Nyland***, 47 Wn.2d 240, 243, 287 P.2d 345 (1955) (citing four prior decisions of the Supreme Court stating the same principle). The law is clear that lethal force is lawful only where it is necessary – where its use is objectively reasonable, considering the facts and circumstances as they were understood by the slayer at the time, to repel an attack that threatened life or great personal injury.

The facts of defendant's case are nearly identical to those in ***Ferguson***, except defendant used a gun where Ferguson used a knife. Thus, even if trial counsel had proposed an instruction based upon WPIC 17.02 with regards to the felony murder charged in Count II, the trial court would have refused it under the controlling case law.

Defendant argues that cases such as ***State v. McCreven***, 170 Wn. App. 444, 284 P.3d 793 (2012), *review denied* 176 Wn.2d 1015 (2013) and ***State v. Slaughter***, 143 Wn. App. 936, 186 P.3d 1084 (2008), *review denied*, 164 Wn.2d 1033, 197 P.3d 1184 (2008), support his position.

In ***Slaughter***, Division I of the Court of Appeals was addressing instructions where Slaughter claimed a defense of excusable homicide against his charge of felony murder and the trial court gave the excusable homicide instruction, WPIC 15.01, that instructed the jury that "[h]omicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means." ***Slaughter***, 143 Wn. App. at 942, 186 P.3d 1084. The court also gave a modified instruction based on WPIC 17.02 to explain the term "lawful force" as it related to the excusable homicide issue. 143 Wn. App. at 942. Slaughter argued that this self -defense erroneously omitted the State's burden to disprove self-defense, but Division I rejected that argument as the purpose of the instruction was not to set forth the standard for self-defense, but to explain the term "lawful force." Division I also distinguished ***Ferguson*** stating that it was not controlling "it was not an excusable homicide case and does not address the specific issues raised here." ***Slaughter***, 143 Wn. App. at 946.

Defendant, unlike Slaughter, did not assert a claim of excusable homicide. Thus, he fails to show that he would have been entitled to a modified WPIC 17.02 instruction under ***Slaughter*** had his attorney proposed one.

Defendant is correct that ***McCreven*** provides *some* support for his theory. What is problematic is that ***McCreven*** is inconsistent with what the Supreme Court stated first in ***Churchill*** and continued to state in

Nyland, ***Walden***, ***Walker***, and ***Brightman***. In ***Churchill***, the Supreme Court was faced with a challenge to the use of the words "great bodily harm" in the court's instructions on self-defense. Churchill had been attacked by the victim and argued that he should only have to show that he was in fear of "bodily harm." 52 Wn. at 223. The Court rejected this argument stating:

> The contention of the appellant that one who is in apparent danger of 'bodily harm' can take the life of his assailant would give encouragement to the taking of human life upon the merest pretext of danger. We are not content to recognize or announce a doctrine so fraught with danger to both the public peace and the safety of the citizen.

Id. ***Churchill*** was cited with approval in ***Walker***, 136 Wn.2d at 774 and relied upon by the court in ***Ferguson***, *supra*. The Court did not retreat from this holding in ***Walker***, ***Nyland***, *supra*, or ***Brightman***, *supra*, all of which involved the use of lethal force. According to the Supreme Court, when a person uses lethal force to repel an assault and claims self-defense, his use of force is lawful only upon a showing of a reasonable belief that death or great personal injury was *imminent* and that the person used no more force than necessary.

The Supreme Court has been consistent that the fear of injury relevant to taking a life in self-defense is a fear of death or great personal injury. The ***McCreven*** court cannot overrule this controlling law. The court in ***McCreven*** did not cite to ***Churchill***, ***Walker***, ***Nyland*** or ***Brightman***, or distinguish these cases in any manner that would justify a

holding that is inconsistent with Supreme Court precedent. The court in ***McCreven*** cites to ***State v. Walden***, but Walden did not employ lethal force, his claim of self –defense was to charges of assault in the second degree. Consequently, the ***McCreven*** court was not examining the correct line of authority to determine what level of fear is required to lawfully use lethal force. ***McCreven***, being inconsistent with controlling case law, is not persuasive authority.

Additionally, the ***McCreven*** court cited to ***Ferguson*** to support this statement: "[W]here the State charges a defendant with second degree felony murder under RCW 9A.36.021(1)(c), assault with a deadly weapon, a self-defense instruction may be reasonably patterned after WPIC 16.02." ***McCreven***, 170 Wn. App. at 467. It held the trial court in McCreven's case properly gave a self-defense instruction based on WPIC 16.02 for the second degree felony murder charged under RCW 9A.34.021(1)(c) (deadly weapon)." *Id.* The error that it found was that the trial court did not give a jury instruction patterned after WPIC 17.02 for the second degree felony murder charge the State alleged occurred during an assault in violation of RCW 9A.36.021(1)(a) (without a deadly weapon). *Id.*

In defendant's case, the jury was instructed that "[a] person commits the crime of assault in the second degree when he assault another with a deadly weapon." CP 342-375, Instruction No. 16. Thus, even ***McCreven***, does not support the giving of WPIC 17.02 under the facts of defendant's case. In sum, defendant cannot show that the trial court would

have given WPIC 17.02 even if his attorney had proposed it as it did not state the proper standard for the facts of his case.

Finally, defendant cannot show that this was not a tactical decision. As noted earlier, defendant concedes that the instructions given below were proper for his claim of self-defense against the charge of intentional murder. His attorney may have concluded that presenting differing standards for self-defense for Counts I and II would confuse the jury and be of little use as the jury would have to find self-defense under both standards in order for defendant to be fully acquitted of the crime of murder in the second degree. His attorney could have made a tactical choice to argue under one standard rather that to split argument time and the jury's focus with two different standards.

Defendant has failed to show either deficient performance or resulting prejudice necessary to succeed on his claim of ineffective assistance of counsel. This claim should be dismissed.

5. THE TRIAL COURT PROPERLY MERGED THE JURY VERDICTS FINDING DEFENDANT GUILTY OF INTENTIONAL SECOND DEGREE MURDER AND FELONY MURDER IN THE SECOND DEGREE INTO A SINGLE COUNT AND IMPOSED SENTENCE ON A SINGLE COUNT OF MURDER IN THE SECOND DEGREE; DEFENDANT HAS FAILED TO SHOW ANY VIOLATION OF DOUBLE JEOPARDY.

The double jeopardy provisions of the federal and state constitutions protect a defendant from being punished multiple times for the same offense. ***State v. Turner***, 169 Wn.2d 448, 454, 238 P.3d 461 (2010); Fifth Amendment; Washington Const. Art. I, sec. 9. Double jeopardy may be implicated when multiple convictions arise out of the same act, even where the court has imposed concurrent sentences. ***State v. Calle***, 125 Wn.2d 769, 774, 888 P.2d 155 (1995); ***State v. Meas***, 118 Wn. App. 297, 304, 75 P.3d 998 (2003). This is because a conviction alone, even without an accompanying sentence, may constitute "punishment" in the double jeopardy context. ***Turner***, 169 Wn.2d at 454–55 (citing ***State v. Womac***, 160 Wn.2d 643, 657, 160 P.3d 40 (2007)). Accordingly, where a jury finds the defendant's conduct violated many different criminal statutes, some of which are lesser included offenses, the trial court "'should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense.'" ***Turner***, 169 Wn.2d at 463 (quoting ***State v. Trujillo***, 112 Wn. App. 390, 411, 49 P.3d 935 (2002)).

Applying these principles to varying fact situations, the courts have established some parameters. Division II of the Court of Appeals found no double jeopardy violation where a defendant was convicted of attempted first degree murder and the lesser included assault in the first degree, but the trial court only entered judgment only on the attempted murder conviction. ***Trujillo***, 112 Wn. App. at 409-411.

In ***Womac***, the Supreme Court held that the trial court violated double jeopardy when it entered judgment on three distinct counts - homicide by abuse, second degree felony murder, and first degree assault - for Womac's conduct in causing the death of his infant son, even though it only sentenced the defendant on the homicide by abuse. ***Womac***, 160 Wn.2d at 647, 658–60. Notably, the trial court in ***Womac*** declared at sentencing that the jury's guilty verdicts on the lesser counts were "valid." *Id.* at 658–60.

In ***State v. Turner***, and its consolidated case of ***State v. Faagata***, the Supreme Court dealt with facts that fell somewhere between those in ***Trujillo*** and ***Womac***. 169 Wn.2d 448. Turner had been convicted of first degree robbery and second degree assault arising out of a single shoplifting event; Faagata had been convicted of first degree murder and second degree felony murder for the death of a single person. *Id.* at 451. The trial court in Turner's case vacated the assault conviction and sentenced only on the robbery, but "issued a written order stating that the assault conviction was a valid conviction for which Turner could be

sentenced if his other conviction was overturned on appeal." *Id.* at 452. The trial court in Faagata's case vacated the felony murder conviction, but only conditionally, and sentenced only on the first degree murder; it further indicated that the felony murder conviction could be reinstated if the other murder conviction failed on appeal. *Id.* The Supreme Court found a double jeopardy violation in each case, noting that while Turner's and Faagata's judgments complied with ***Womac*** because neither listed or imposed sentence on the lesser offenses, the trial courts in each case had specifically directed, in one way or another, that the convictions on the lesser offenses remained valid. ***Turner***, 169 Wn.2d at 464. It held:

> [W]e conclude that a court may violate double jeopardy either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid. To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.

Turner, 169 Wn.2d at 464-65.

A slightly different situation is presented, however, when a jury convicts a defendant of two different *means* of committing a single offense in separate counts, as opposed to finding that he committed alternative *crimes*. In ***State v. Johnson***, 113 Wn. App. 482, 487-88, 54 P.3d 155 (2002), *review denied*, 149 Wn.2d 1010, 69 P.3d 874 (2003), the

jury convicted the defendant of second degree intentional murder and second degree felony murder. The trial court found that these charges, pertaining to the same victim, reflected alternative *means* of committing a single offense; it merged the convictions and imposed sentence on one crime. ***Johnson***, 113 Wn. App. at 488. In upholding the conviction and sentence against a challenge on double jeopardy grounds, the ***Johnson*** court discussed the different uses of the word "merger." The appellate court agreed with the trial court's analysis that when a defendant is convicted of two alternative means of committing a single crime, there could be only one conviction. 113 Wn. App. at 489. The Court of Appeals reasoned that in this situation the word "merger" was meant to denote that two convictions have become one and, as a result, the defendant is only punished once. *Id.*

Similarly, in ***State v. Meas***, *supra*, a defendant was convicted of both first degree premeditated murder with aggravating circumstances ("aggravated murder") and first degree felony murder. The court imposed punishment on the aggravated murder and noted on the judgment that "Count II [referencing the felony murder] is deemed to have merged with the defendant's conviction in Count I" referencing the aggravated murder and, further, that "Defendant shall be sentenced only upon the conviction on Count I." 118 Wn. App. at 300, n.1, 304-05. The appellate court found no double jeopardy violation because the trial court had merged multiple convictions for the same crime into a single count. *Id.* at 305-6.

Division II has held that ***Meas*** remains good authority after ***Womac*** and ***Turner***. ***State v. Fuller***, 169 Wn. App. 797, 833-35, 282 P.3d 126 (2012). Fuller was convicted, in separate counts, of premeditated murder in the first degree and felony murder in the first degree for the death of the same victim. *Id.* at 802. At sentencing, the court recognized that sentencing Fuller on both counts would violate double jeopardy and explicitly ordered "[I]n order to avoid any appearance that the defendant was convicted multiple times for [this] murder, Counts I and II shall be merged into a single count of murder in the first degree committed by alternative means, premeditated and felony." ***State v. Fuller***, 169 Wn. App. at 835. The written judgment and sentence stated that Fuller was convicted of one count of first degree murder and the order merging the convictions was not appended to the judgment. *Id.* On appeal, Fuller argued that this violated his double jeopardy rights and the decisions in ***Womac*** and ***Turner***. Division II of the Court of Appeals disagreed, rejecting Fuller's argument that ***Turner*** requires a trial court to permanently dismiss all lesser or alternative guilty findings to comport with double jeopardy and that ***Meas*** is no longer good law. 169 Wn. App. at 833-35.

Double jeopardy violations are questions of law that are reviewed *de novo*. ***State v. Fuller***, 169 Wn. App. 797, 832, 282 P.3d 126 (2012), *review denied*, 176 Wn.2d 1006 (2013).

In this case, defendant was convicted of intentional murder in the second degree in Count I and felony murder in the second degree in count II. 25RP 188-190. For purposes of double jeopardy, second-degree intentional murder and second-degree felony murder are alternative means of committing the crime of second-degree murder. ***State v. Berlin***, 133 Wn.2d 541, 553, 947 P.2d 700 (1997).

At sentencing, the prosecutor made the following statement to the court:

> PROSECUTOR: Well, he was convicted for Counts I and II.
>
> [...]
>
> PROSECUTOR: Both charges of Murder in the Second Degree. On both we had firearm sentencing enhancements. Those counts do merge. So we have prepared a Judgment and Sentence that sentences the defendant solely on Count I, which is one charge of [...] Murder in the Second Degree with a firearm enhancement.

S2RP 3. The verbatim report of proceedings does not reveal any further comments by the court about the multiple verdicts or convictions or their continuing "validity." The court then entered a judgment sentencing defendant on a single count of murder in the second degree, based upon an offender score of zero; the court imposed a standard mid-range sentence of 175 months plus an additional 60 months for a single firearm enhancement. CP 376-389.

Defendant contends that his double jeopardy rights have been violated, however, by comments that the prosecutor made while giving his recommendation and by a notation on the judgment. The challenged comments are the ones italicized in the following excerpt:

> PROSECUTOR: My recommendation, Your Honor, is to impose the high end of the range, that is 220 months, and there is a 60-month sentencing enhancement [...].
>
> Judge, that was the sentence that the Court imposed after the first trial, and it's a sentence that I believe is still appropriate to give. You know the reality is that on June 21st of 2004, this defendant murdered Mr.Clark in cold blood, fled the scene, fled the state, fled the west coast, and lived his life for four years as a fugitive from justice. All the while the Clark family [was] left wondering if justice would ever be served, all the while with that hole that will never be repaired in their family.
>
> *This jury has spoken. They have found this defendant guilty of both felony and intentional murder.* And in addition to that they found beyond a reasonable doubt that this was not self –defense. This was an unnecessary killing.

S2RP 8. This statement was accurate; the jury did find defendant guilty of both of these alternative means of committing the crime of murder in the second degree. Looked at in context, the prosecutor was emphasizing that defendant's culpability was more than the strict liability present in a felony murder; the jury found that defendant had the intent to kill and that his actions were not justifiable as self-defense – in short, a "cold blooded" murder. This was proper argument aimed at getting the court to impose a sentence at the high end of the range. Considering the prosecutor's earlier

statements that there was only one crime for the court to sentence upon, it is a stretch to interpret these comments as an argument that defendant had committed two crimes and should be punished more severely.

Moreover, defendant has presented no authority that a prosecutor's comments at sentencing can violate double jeopardy. All of the case law in this area focuses on comments made by the sentencing court, not the prosecutor. Defendant does not identify any comments by the trial court in his case similar to those found improper in ***Womac*** or ***Turner***. As defendant presents not authority that a prosecutor's comments at the sentencing hearing have any impact on the double jeopardy analysis, this court should summarily dismiss this argument. An appellate court need not consider argument that is unsupported by citations to the record or by any citation to authority. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Defendant also asserts that the notion on his judgment which reads:

> The court DISMISSES without prejudice Count II, the guilty verdict for Murder 2° w/FASE on double jeopardy grounds given the conviction for Count I.

CP 376-389. While the State will acknowledge that, under ***Fuller***, this notation was unnecessary as the sentencing court was simply merging two alternative means of committing the same crime into a single count. Even that it would have been more consistent with ***Fuller*** to omit it entirely, the fact that it was unnecessary does not mean that it violates double jeopardy.

The notation dismisses the verdict rendered on Count II and nothing in the judgment or the court's statements at the sentencing hearing speak of that verdict being still "valid." Not only did the court not impose punishment on Count II, it was not listed on the judgment. CP 376-389. Defendant fails to explain how a notation dismissing the verdict can be equated to "reducing it to judgment" so that adverse collateral consequences might befall him. Anyone looking at the wording of the notation would conclude no other conviction exists. The facts of this case bring it closer to ***Fuller***, than to ***Womac*** or ***Turner***. Defendant has failed to show any reversible error under the relevant case law.

6. DEFENDANT FAILS TO SHOW THAT THE FACTS OF HIS CASE ARE SUFFICIENTLY SIMILAR TO THOSE IN ***O'DELL*** AS TO REQUIRE A REMAND FOR A NEW SENTENCING HEARING.

In ***State v. O'Dell***, 183 Wn.2d 680, 358 P.3d 359 (2015), the Washington Supreme Court held that "a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like O'Dell, who committed his offense just a few days after he turned 18." *Id.* at 696. After being convicted of rape of a child in the second degree for having sex with a 12 year old, O'Dell asked the trial court to impose an exceptional sentence below the standard range because his capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the law was significantly impaired by youth. *Id.* at 685.

The defense attorney also pointed out that had the offense occurred two weeks earlier, O'Dell would be facing a significantly shorter period of incarceration in a juvenile justice facility as opposed to the 78-102 month sentence he faced in a prison. *Id.* The trial court acknowledged these arguments but stated that it could not consider age as a mitigating circumstance under the decision in ***State v. Ha'mim***, 82 Wn. App. 139, 916 P.2d 971 (1996), *aff'd*, 132 Wn.2d 834, 940 P.2d 633 (1997). The Court of Appeals affirmed the sentence, but the Supreme Court took review to clarify the holding in ***Ha'mim***.

On review the court noted the disagreement between the parties as to what ***Ha'mim*** held:

> O'Dell contends that ***Ha'mim*** absolutely bars a sentencing court from considering "youth and its attributes as mitigating factors." And he argues that we should overturn ***Ha'mim*** because this prohibition is incorrect and harmful. The State interprets ***Ha'mim*** differently; it argues that age "may be relevant," under ***Ha'mim***, "for the statutory mitigating factor that the defendant's capacity to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law, was significantly impaired." But it contends that a defendant must provide some evidence that youth in fact impaired his capacities, since youth does not per se automatically reduce an adult offender's culpability.

O'Dell, 183 Wn.2d at 689. The Supreme Court generally agreed with the State's analysis and stated that ***Ha'mim*** "did not bar trial courts from considering a defendant's youth at sentencing; it held only that the trial court may not impose an exceptional sentence automatically on the basis of youth, absent any evidence that youth in fact diminished a defendant's

culpability." *Id.* The Supreme Court found, however, that the record showed the trial judge in O'Dell's case had improperly interpreted ***Ha'mim,*** just as O'Dell had done. The Supreme Court remanded for a new sentencing hearing now that is had clarified the law.

Defendant contends that he should be given a new sentencing hearing on the basis of ***O'Dell*** so that he can ask for an exceptional sentence below the standard range on the basis of his youth. Defendant fails to show that his case is sufficiently similar to those in ***O'Dell*** to justify this action.

The first and foremost distinguishing factor is that O'Dell asked for an exceptional sentence from the trial court based upon his youth; defendant did not. O'Dell was given the remedy of a new sentencing hearing because the trial court misinterpreted the relevant law in the first hearing and believed that it could not impose an exceptional sentenced based on youth. Defendant has no argument that his sentencing judge was misapplying the law. At defendant's sentencing hearing the State asked for a high end standard sentence and defendant asked for a sentence at the bottom of the standard range. S2RP 7-10, 39-41. The court after listening to all parties, imposed a mid- range sentence. S2RP 51-60. The court in defendant's case was not asked to consider an exceptional sentence and did not misinterpret the law.

O'Dell was ten days past his 18th birthday when he committed his crime of having sex with a 12 year old; defendant was 20 years and four

months old when he committed murder. Both the differences in the respective ages of O'Dell and defendant as well as the nature of their crimes make it less likely that youth would diminish defendant's culpability than it would for O'Dell. There is no showing that defendant did not understand the wrongfulness of his actions or that he lacked the ability to conform them to the law. Rather, defendant felt that his actions were justified. Further, the evidence showed that promptly after committing this crime the defendant fled the state and his parent's home; he managed to live as a fugitive, finding a place to live and means of support and that he managed to conform his actions to the law so as to avoid arrest for many years. 24RP 83-85, 140.

Certainly, there is evidence that defendant's choice of friends in the Tacoma area, particularly Freddie McGrew, was unwise and immature, but the court heard that evidence and considered it in imposing sentence. It was not Freddie McGrew who drew a gun and opened fire, it was defendant.

In his brief defendant cites to evidence that he contends supports imposition of an exceptional sentence downward. *See* Appellant's brief at p. 51. All of this evidence was from the sentencing hearing that followed defendant's first trial in front of a different judge; he cites to none that was presented at the second sentencing hearing following retrial. It is the second sentencing hearing that is under review, not the one in the first trial. Defendant provides no evidentiary support for his argument from the

record that is the subject of this appeal. The second sentencing court cannot abuse its discretion by failing or refusing to consider information that was not presented to it. Defendant contends that the second sentencing judge "dismissed the idea that [defendant's] age and circumstance of youth had any relevance except maybe to make him *more* culpable." Appellant's brief at p. 51. His citations to the record in the second sentencing hearing to support this argument, however, have nothing to do with youth and, thus, do not support his claim. *See* Appellant's brief at p. 52.

In sum, defendant cannot show that any error occurred under ***O'Dell*** so as to justify a remand for a new sentencing hearing. Defendant does not argue that his attorney was deficient for failing to seek an exceptional sentence below the range. The fact that the court imposed a mid-range sentence indicates that the court would have been disinclined to go below the standard range. Thus, he has failed to show any error occurred below that would justify remand for a new sentencing hearing.

D. CONCLUSION.

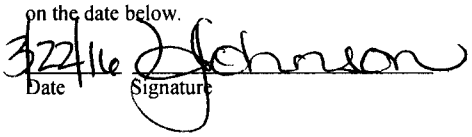
For the foregoing reasons this court should affirm the judgment below.

DATED: MARCH 22, 2016

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB #, 14811

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.



Date Signature

APPENDIX "A"

Jury Instruction No. 22

INSTRUCTION NO. 22

To convict the defendant of the crime of murder in the second degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 21, 2004, the defendant committed:

(a) assault in the first degree; or

(b) assault in the second degree; and

(2) That the defendant caused the death of Isaiah Clark in the course of and in furtherance of such crime or in immediate flight from such crime;

(3) That Isaiah Clark was not a participant in the crime of assault in the first degree or assault in the second degree; and

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

If you find from the evidence that elements (2), (3), (4), and either alternative element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that either (1)(a) or (1)(b) has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "B"

Jury Instruction No. 24

INSTRUCTION NO. 24

It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer and/or another when:

1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;

2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. 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.

PIERCE COUNTY PROSECUTOR

March 22, 2016 - 1:43 PM

Transmittal Letter

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Court of Appeals Case Number: 46705-4

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