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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

YANCY WADE RAY, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Timothy Ashcraft, Judge

No. 16-1-03560-6

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**Brief of Respondent**

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

1. Whether, when viewed in the light most favorable to the State, the evidence was sufficient to support the jury's conclusion that defendant did not act in self-defense where defendant left and came back on his own to shoot the victim? (Appellant's Assignment of Error A)
2. Was defendant properly sentenced to a persistent offender life sentence without the possibility of parole when his prior Oregon conviction for Robbery in the Third Degree was rightly classified as his second strike offense pursuant to *State v. McIntyre*, and his current Murder in the Second Degree conviction constituted his third and final strike? (Appellant's Assignments of Error B and C)
3. Does House Bill 1783 require defendant's Judgment and Sentence be remanded to strike the DNA database fee, the \$200 filing fee, and interest accrual on non-restitution fees after June 7, 2018? (Appellant's Assignment of Error D)

B. STATEMENT OF THE CASE.

1. PROCEDURE

On September 6<sup>th</sup>, 2016, the State charged Yancy Ray, hereinafter "defendant," with one count of murder in the second degree in violation of RCW 9A.32.050(1)(a) while armed with a firearm, adding additional time to the presumptive sentence under RCW 9.94A.533. CP 1-2. Defendant was also charged with one count of Unlawful Possession of a Firearm in the First Degree in violation of RCW 9.41.040(1)(a). CP 1-2.

Defendant's Murder in the Second Degree charge constituted a "Most Serious Offense," qualifying him as a "Persistent Offender" under RCW 9.94A.030. CP 13. Defendant received notice on February 3, 2017, that this charge would classify him as a "Persistent Offender" and if found guilty, he would receive a sentence of life without the possibility of parole under RCW 9.94A.570. CP 13.

Trial began on October 4, 2017 in front of the Honorable Timothy Ashcraft. CP 6, 11-15, 128; RP 2. Motions in limine were heard on October 4, 2017, and October 5, 2017. RP 36-67, 72-104.<sup>1</sup> Defendant has two prior "serious offense" convictions: Manslaughter in the First Degree and Robbery in the Third Degree. CP 428-437. Defendant stipulated to his prior convictions for purposes of the Unlawful Possession of a Firearm in the First Degree charge. CP 428-437. The court instructed the jury to consider defendant's stipulation as fact. CP 428-437; RP 2099.

The jury heard from a total of 27 witnesses throughout the trial. The State presented testimony from five patrol officers, a forensic specialist, a crime scene technician, a paramedic, a communications analyst, two forensic scientists, the medical examiner, a latent print examiner, two police detectives, and a police sergeant, in addition to nine fact witnesses. CP 789-

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<sup>1</sup> The verbatim report of proceedings is contained in both numbered and dated volumes, with consecutive pagination therein. As such, the State will be citing "RP" followed by the relevant page number(s).

90.<sup>2</sup> Defendant called one additional police detective to testify, recalled two police officers to testify, and took the stand in his own defense. CP 789-90. Defendant's defense was that he shot and killed the victim, Hyson Sabb, out of self-defense. CP 23-48. During trial, defendant was permitted to introduce evidence of Sabb's prior murder conviction from 1995 and assault conviction from 2013 for the effect it had on defendant's state of mind. CP 23-70; RP 2326. The jury was orally instructed to limit the weight of Sabb's prior convictions only for its effect on defendant. RP 2488-89.

The jury was instructed on justifiable homicide. CP 526-550 (Instructions 14, 15, 16, 17). These instructions specified that the State has the burden of proving beyond a reasonable doubt that the homicide was not justified. CP 526-550 (Instruction 14). The jury heard closing arguments on November 14, 2017 and returned its verdicts on November 17, 2017. RP 2792, 2874.

The jury found defendant guilty of Murder in the Second Degree and Unlawful Possession of a Firearm in the First Degree. CP 551, 553; RP 2878. The jury also returned a special verdict finding that defendant was armed with a firearm at the time he committed the murder. CP 552; RP 2879.

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<sup>2</sup> RP 556, 611, 657, 700, 740, 883, 899, 1063, 1145, 1165, 1205, 1225, 1244, 1289, 1345, 1407, 1530, 1628, 1756, 1862, 1965, 2100, 2154, 2219.

Sentencing was held on January 5, 2018. RP 2912. The State argued that defendant should be sentenced as a “Persistent Offender,” pursuant to RCW 9.94A.030(38) and RCW 9.94A.570, to life without the possibility of parole. CP 554-650. Specifically, the State argued that two of defendant’s prior Oregon convictions, under a comparability analysis, constituted strike offenses under Washington law and warranted the life sentence. CP 554-650. In 1986, defendant was indicted by a Grand Jury in Multnomah County, Oregon on one count of Murder with a Firearm and one count of Robbery with a Firearm. CP 558. Defendant pled “no contest” to a lesser included crime of Manslaughter in the First Degree. CP 558. The robbery charge was dismissed. CP 558. In August 1993, defendant was indicted by a Grand Jury in Multnomah County, Oregon on one count of Robbery in the Second Degree. CP 559. Defendant plead “no contest” to the lesser included offense of Robbery in the Third Degree. CP 559. After hearing argument from both parties, the court found the convictions to be valid and comparable to Washington statutes. RP 2930-2.

The court found defendant to be a Persistent Offender and sentenced him to life in prison without the possibility of parole. CP 751-765; RP 2932. On the count of Unlawful Possession of a Firearm in the First Degree, the court found defendant to have an offender score of 9 and sentenced him to 116 months. CP 751-765, 773-781 (Conclusion of Law XXI); RP 2935. The

court imposed a \$500 Crime Victim assessment fee, a \$100 DNA collection fee, and a \$200 criminal filing fee. CP 755. Defendant filed a timely notice of appeal. CP 766.

## 2. FACTS

Defendant shot and killed victim Hyson Sabb, also known as “Good,” on September 3, 2016, at a known drug house in the Hilltop neighborhood of Tacoma, Washington. RP 561, 1418, 1536, 2431. Horace Smith, or “ATL,” rented the drug house, though he denied any drug use at the home. RP 1531, 1536-7, 1539. Neighbors remarked that the house had lots of traffic, with many people coming and going. RP 702, 743. The day of the murder was no different.

On September 3, 2016, Smith was moving out of the house, so a U-Haul truck was parked in the driveway. RP 1537-8. Evelyn “Demi” Watson, Eboni Peterson, and Kierra “Kiki” Jones were three of the witnesses that came and went from Smith’s the day of the murder. RP 815-6, 820, 1633,

Watson met Peterson, Sabb, Jones, and in passing, a person named “Slim,”<sup>3</sup> when she went to Smith’s house over the weekend to procure drugs. RP 823-5, 826. On the day of the murder, those present at Smith’s house ran out of drugs. RP 832. Watson was anxious for more to come, so she was looking out the window, waiting for a car to pull up. RP 831. Smith

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<sup>3</sup> Defendant identified his nickname as “Slim.” RP 2380.

told her someone was on his way. RP 834. When a white car with loud music pulled up, Smith said, “Slim’s here. It’s here.” RP 835.

At Smith’s house, Peterson saw defendant on the phone. RP 1435. She could not hear defendant’s phone conversation, but “got the gist that he was talking about getting some drugs,” so she interrupted defendant and told him that he should go through her for drugs. RP 1435-6, 1437. Her interruption made defendant upset, and they began arguing. RP 1436.

Peterson walked out of the house and defendant followed behind her. RP 1438. He was still on the phone. RP 1438. Both Peterson and defendant were arguing loudly. RP 1438-39. Peterson walked all the way down the steps and began walking when Sabb approached. RP 1441. Sabb started arguing with defendant, but Peterson had not realized defendant followed her. RP 1441. Sabb interjected, “man, you don’t talk to her like that.” RP 1442. Sabb told Peterson to go to the car – a burgundy Crown Victoria. RP 1443. While walking to the car, the argument between defendant and Sabb “ceased,” and defendant “came driving around the corner crazy” and almost hit Peterson in his light-colored car. RP 1444-5.

Sabb started yelling at Peterson to “get the gun.” RP 1445. Defendant had already left. RP 1445. Sabb’s girlfriend, Adreine Fuqua, was in the car where the gun was. RP 1986. Fuqua could not see the front of the house from where she parked. RP 1986-7. When Sabb got his gun, it was in

its case. RP 1991. Sabb began walking back to the house before the white car pulled up. RP 1991, 1992.

Fuqua saw a tall, slender black man wearing glasses get out of the car with a gun in his hand. RP 1996. He had the gun raised, and she saw him cock it back before he disappeared behind a bush in the yard. RP 1996, 1998-9. She heard gunshots once defendant disappeared behind the bush. RP 1999. Similarly, Peterson “heard a car erratically pull up and gunfire.” RP 1446.

Witness Kierra Jones was also present when defendant killed Sabb. RP 1641. Jones was inside Smith’s house when Sabb came inside with the case after defendant left. RP 1665-6. Sabb closed the gun case after realizing he did not have any bullets for the gun. RP 1655-6. Sabb even asked Jones if she had identification to go get bullets for him, but she refused. RP 1665. They were only inside for a few minutes before turning to leave. RP 1665.

Jones walked out of the house right in front of Sabb. RP 1675. They were met with defendant, who was walking toward them with the gun facing them. RP 1675. She recognized his voice from the earlier verbal altercation. RP 1675. Defendant said, “I told you I was coming back.” RP 1675. Jones dove behind the U-Haul before she heard shots ring out. RP 1677-8. When defendant fired, Sabb was holding only the locked gun case. RP 1678-9.

There was no time for a physical altercation to occur when defendant returned to the house; Sabb “didn’t have a chance to do anything.” RP 1679.

Because the house is so close to a local Tacoma Police Substation, police at the station heard the gunfire. RP 562-3. Officer Grunland recalled hearing two quick shots, and then three more shots. RP 563. Grunland explained that he could not tell just by listening if it was two different calibers, unless it was “a .22 being compared to a .45, you’d be able to tell the difference because of [...] percussion.” RP 566. He did not hear that difference in this case. RP 566-7. Grunland also explained that, based on his experience, this gunfire did not sound like a gunfight between two people, since the shots were not simultaneous. RP 567.

The police got in their cars and began looking for the source of the gunfire. RP 574. They got there quickly. RP 574. They found a black male on the ground, incoherently stating he had been shot, with a white female holding him. RP 580. Police applied pressure to the wound and called for the fire department. RP 581. Once the fire department arrived, they transported Sabb to the hospital. RP 581. There, he died from his injuries. RP 1212.

The bullet hit Sabb’s aorta, went through the bottom part of his spinal column, damaged his spinal cord, and exited his back. RP 1308. He likely died of blood loss. RP 1310. The medical examiner opined that the

injury to Sabb's spinal cord could have resulted in paralysis, but certainly would have resulted in a change to his legs. RP 1314. Likely, Sabb experienced weakness and an inability to sense things in his legs. RP 1315.

After Sabb had been transported to the hospital, police began securing the scene where Sabb had been laying. RP 582. Crime scene investigators were called out. RP 905, 1065. They found shell casings on the ground. RP 582, 1868. The shell casings were from a 9-millimeter. RP 950. Investigators found one live round, a shirt that had been cut off the victim, a blue nitrile gloves from the fire department, a balled-up gardening glove on the back of the U-Haul, a pair of glasses north of the porch, and a button on the stairway. RP 1868-9. On the porch, there was a box for a handgun that contained an unloaded .22 Ruger handgun,<sup>4</sup> and a pair of balled up gloves near the door threshold. RP 1869. On the barrel of the handgun, investigators found a fingerprint. RP 1002-3, 1027. The fingerprint belonged to Sabb's right thumb. RP 1389-90.

Investigators then found a partially loaded 9-millimeter semi-automatic handgun underneath a bush in front of the house. RP 1076, 1870. There was a casing jammed in the action of that gun. RP 1870. The spent casings found in the yard were the same brand and caliber as the remaining

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<sup>4</sup> RP 928.

ammunition in that handgun. RP 954, 1072. Investigators were unable to recover fingerprints from the 9-millimeter. RP 1027, 1093.

Defendant's Lexus sedan was parked in front of the house with the door open. RP 1869, 2388. There was a possible bullet strike to the door of the Lexus. RP 1870. They recovered a spent 9-millimeter bullet fragment near the car. RP 952.

Defendant fled to his friend Ronson Clay's house after the shooting. RP 2496. Clay did not notice any injuries whatsoever to defendant. RP 1177-8. Clay drove defendant to Walmart, where he got in his wife's car. RP 2712. Ultimately, defendant fled to Oregon because he felt he was being threatened. RP 2572-3. Defendant did not arrive back to Tacoma until September 21, 2016. RP 2736. Before going to the police, defendant went to a friend's house in Hilltop off of 9<sup>th</sup>, before walking to an attorney's office. RP 2736-7. Defendant was not scared to walk on the Hilltop at this point, because it was "right in front of the police station." RP 2736. Defendant ultimately turned himself in to police accompanied by an attorney that day. RP 2518-9.

C. ARGUMENT.

1. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THE EVIDENCE FIRMLY SUPPORTS THE JURY'S CONCLUSION THAT DEFENDANT DID NOT SHOOT AND KILL HYSON SABB IN SELF DEFENSE WHERE DEFENDANT LEFT AND QUICKLY RETURNED ON HIS OWN TO SHOOT AND KILL THE VICTIM WITHOUT ANY PROVOCATION.

A defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). When reviewing the sufficiency of the evidence, the court examines whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Thus, sufficient evidence supports a conviction when, viewing it in the light most favorable to the State, any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

In a challenge of the sufficiency of the evidence, the evidence is viewed in the light most favorable to the State, and all reasonable inferences are drawn in favor of the State. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265-66, 401 P.3d 19 (2017). Further, the defendant admits the truth of all

the State's evidence. *Id.* at 265. In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence. *Id.* at 266.

Whether an individual acted in self-defense is typically a question for the trier of fact. *McBride v. Walla Walla County*, 95 Wn. App. 33, 975 P.2d 1029 (1999), *review den'd* 138 Wn.2d 1015, 989 P.2d 1137, *as amended, amended* 990 P.2d 967. If a defendant argues that his actions were the result of self-defense, he must produce evidence demonstrating his lawful use of force. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Once credible evidence tending to prove self-defense has been raised, the burden then shifts to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Graves*, 97 Wn. App. 55, 982 P.2d 627 (1999). This obligation remains at all times during the prosecution of a homicide case. *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983). If there are conflicting statements during trial, "credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he did not act in self-defense. This claim fails where the record shows the State presented evidence to disprove the self-defense argument and the jury was instructed on self-defense. On

appeal, defendant attempts to reargue his case at trial. However, his argument fails to abide by the standard of review requiring that he admit the truth of all the State's evidence, and all inferences be most strongly construed against him. See *State v. Cardenas-Flores*, 189 Wn.2d at 265 (citing *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010)).

The jury was instructed on murder in the second degree as follows:

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

- (1) That on or about the 3<sup>rd</sup> day of September, 2016, the defendant acted with intent to cause the death of Hyson Sabb;
- (2) That Hyson Sabb died as a result of defendant's acts; and
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

CP 526-550 (Instruction 7). The jury was also instructed on justifiable homicide:

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

Homicide is justifiable when committed in the lawful defense of the slayer 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 any 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.

CP 526-550 (Instruction 14).

The State's evidence overwhelmingly proved that defendant shot and killed Hyson Sabb absent self-defense or provocation. This case came down to two distinct theories of what happened the night of the murder. The jury heard from 25 witnesses establishing the facts and physical evidence proving that defendant shot and killed Hyson Sabb. The only evidence showing that defendant may have acted in self-defense came from defendant himself, who the jury necessarily discredited as evidenced by finding him guilty of murder in the second degree.

Defendant killed Sabb on September 3, 2016, at a known drug house in the Hilltop neighborhood of Tacoma, Washington. RP 561, 1418, 1536. Defendant came to the house earlier in the day to deliver drugs, but he did not have what was asked for. Defendant was trying to secure the drugs when Peterson interrupted him. RP 1435-6. This interruption sparked an argument where defendant told Peterson, "Bitch, watch your mouth." RP 1436, 1667. Sabb interjected in the argument, defending Peterson. RP 1442. Sabb told Peterson to go to the car. RP 1443. On her way to the car,

defendant drove his car “around the corner crazy” and almost hit Peterson. RP 1444. Sabb started yelling “get the gun” to Peterson. RP 1446.

After Sabb obtained his gun, Kierra Jones was inside Smith’s house with Sabb when Sabb discovered he didn’t have any bullets for the gun. RP 1655-6, 1671. Sabb asked Jones to go get bullets for him, but she refused. RP 1665. Fuqua was still in the car when defendant pulled up. RP 1995. She saw a man matching defendant’s description get out of the car with a gun in his hand and go into the yard. RP 1996. Fuqua also saw defendant cock the gun. RP 1999.

Both Jones and Sabb went to leave the house. RP 1675. As they walked out of the door, they were met with defendant pointing a gun at them. RP 1675. Jones assumed this was the same person from the earlier argument because she recognized his voice. *Id.* Defendant said, “I told you I was coming back.” *Id.* Jones described this person as tall, black with short hair. RP 1675. Defendant was parallel in the yard to the back tire of a U-Haul truck that was parked in the driveway with the gun pointed at Sabb and Jones. RP 1676-7. Jones dove behind the U-Haul as she heard two to three shots ring out. RP 1678. Sabb was holding the closed gun case in his hand, not the gun itself. RP 1679. Jones affirmatively stated that there was no physical altercation before defendant shot Sabb, only a verbal altercation before defendant left in his car. RP 1679. Sabb did not have a chance to

defend himself when defendant returned with a gun and opened fire upon him. RP 1679.

Defendant's explanation of events was discredited by the evidence, was not corroborated by any other witnesses, and was ultimately not believed by the jury. Defendant claims he owed Sabb a \$230 drug debt, despite selling the marijuana he had purchased from Sabb for a profit, being on disability receiving \$735 a month, working three to four days a week, having a wife with a full-time government job and being able to borrow money from her, and being able to afford \$300 monthly luxury car payments.<sup>5</sup> Defendant claimed not paying the drug debt is what made Sabb angry, not his argument with Peterson. RP 2389. Defendant then left the scene. He returned without all of the money he owed, even though he claimed he was scared of Sabb. RP 2415-7. Defendant claimed that his short payment started a physical altercation and shoot out that no one else witnessed, and other witnesses affirmatively testified did not happen. This alleged fight resulted in wounds that defendant's friend, Ronson Clay, did not see when defendant arrived at his house immediately after the killing. RP 1177-8.

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<sup>5</sup> RP 2378, 2389, 2536-7, 2541, 2583, 2589, 2591, 2650.

Defendant further claimed the physical altercation lead to Sabb shooting at defendant and eventually coming face to face with Sabb's gun. Defendant said he survived only because the gun jammed. RP 2429. Defendant made that claim even though an expert explained that an error in recoil and casing ejection does not affect bullet trajectory. RP 1911, 1914, 2823. Thus, a jammed casing would not have prevented defendant from being shot.

Defendant admitted to shooting Sabb. He claimed he used a .38 revolver, likely in an attempted explanation for the investigators not finding a .38 casing, yet a witness watched him cock the gun he used. This claimed .38 revolver did not cock. RP 2420. No revolver was ever recovered, even though defendant claimed he left it in his car, and police arrived at the scene almost immediately from their substation that was a block away. Moreover, defendant explained his flee from town as being afraid of Sabb's friends, and not at all as a manifestation of his consciousness of guilt. Even though defendant began contacting attorneys within the hour of the shooting, fled the state, and turned himself in with counsel. RP 1820, 2518-9, 2572-3.

In admitting the truth of the State's evidence as appellate procedure requires, the State overwhelmingly proved that defendant shot and killed Hyson Sabb. There was no physical altercation for defendant to protect himself from. Defendant left after an argument. Then, he returned to

retaliate. Because there was no physical altercation or threat of imminent harm or death, defendant's claim that the State did not sufficiently disprove self-defense fails. Thus, this Court should affirm defendant's convictions.

2. DEFENDANT WAS PROPERLY SENTENCED TO A PERSISTENT OFFENDER LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE WHEN HIS PRIOR OREGON CONVICTION FOR ROBBERY IN THE THIRD DEGREE WAS RIGHTLY CLASSIFIED AS HIS SECOND STRIKE OFFENSE PURSUANT TO *STATE V. MCINTYRE*, AND HIS CURRENT MURDER IN THE SECOND DEGREE CONVICTION CONSTITUTED HIS THIRD AND FINAL STRIKE.

The Persistent Offender Accountability Act (POAA) states that a persistent offender shall be sentenced to life imprisonment without the possibility of release. RCW 9.94A.570. A defendant is a persistent offender if he has been convicted in Washington of a most serious offense and has on at least two other prior occasions been convicted of a most serious offense in Washington or any other state. RCW 9.94A.030(37)(a). Washington's most serious offenses are defined in RCW 9.94A.030(33)(a)-(w).

Whether an offense may be classified as a most serious offense is reviewed de novo. *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991). The State has the burden of proving comparability by a preponderance of the evidence. *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d

1225 (2004). Courts apply a three-part test when deciding how to characterize an out-of-state conviction under Washington law during sentencing: (1) convert the out-of-state crime to its Washington counterpart, (2) determine the sentencing consequences of the Washington counterpart, and (3) assign those consequences to the out-of-state conviction. *State v. Russel*, 104 Wn. App. 422, 440, 16 P.3d 664 (2001) (citing *State v. Berry*, 141 Wn.2d 121, 130-31, 5 P.3d 658 (2000)). For a foreign offense to be classified as a most serious offense, the foreign offense must be legally or factually comparable to a Washington statute that proscribes a most serious offense. *In re Pers. Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). The statutes in effect at the time the defendant committed the foreign offense control the analysis. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). The elements of the foreign offense are first compared with the Washington offense's elements to determine whether they are legally comparable. *State v. Latham*, 183 Wn. App. 390, 397, 335 P.3d 960 (2014) (citing *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 542 (1999)). Offenses are legally comparable if their elements are substantially similar or if the foreign offense is not broader than the Washington offense. *Id.*; *State v. Jordan*, 180 Wn.2d 456, 461, 325 P.3d 181 (2014). If the elements of the two statutes are not identical or if the foreign statute is broader than the Washington definition of the particular crime, the trial court must then

determine whether the offense is factually comparable. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

Here, defendant's Persistent Offender status was predicated on prior out-of-state convictions for Manslaughter in the First Degree and Robbery in the Third Degree. CP 773-781; RP 2913. At sentencing, the State provided certified copies of Judgment and Sentences for all of defendant's relevant felony convictions. CP 554-650. The State also included a Stipulation on Prior Record and Offender Score containing the above two convictions that defendant certified as correct from a previous Pierce County conviction, as well as defendant's Oregon and Washington Department of Corrections records. CP 554-650. At sentencing, defendant challenged the validity of the plea forms of both convictions because they did not contain factual statements. RP 2915. The trial court heard argument from both parties and orally ruled,

As the parties are aware, the issue of review at the appellate level of any determination regarding persistent offender is reviewed de novo, so my reasoning is superfluous in that effect [...] The main issue here that's been raised is the issue of whether the prior convictions count towards the Persistent Offender Act and whether they are facially invalid such that it would switch the burden to the State to show they're constitutional. There does not seem to be any dispute, but I am finding that the State has proved the existence of the prior offenses, and therefore, the issue becomes whether they're constitutional, which they are presumed to be, unless [...] there is a constitutional infirmity on its face or it's facially invalid, which the case law suggests means it has to be

unconstitutional without further elaboration. That's primarily out of the *State v. Ammons* case, 105 Wn.2d 175. [...] The Court does not believe that the defense has shown – made an affirmative showing of facial invalidity. The reference to alleged infirmities or missing elements in the plea documents is not an affirmative showing, in this Court's opinion. [...] So I find the two prior convictions are valid, which leads to the issue of comparability.

RP 2931-2. The court further ruled that the convictions are comparable, stating,

As to the robbery claim as pointed out by the State, Washington courts have already determined that the robbery conviction in Oregon is comparable to Washington. As to the manslaughter claim, this Court does find that it is both legally and factually comparable to Washington, which essentially answers the questions.

RP 2932.

Here, defendant only challenges the use of his Oregon Robbery conviction as a predicate offense. Brief of Appellant, 25. Regarding defendant's Oregon Robbery conviction, the trial court concluded:

IX.

That the defendant's 1993 Oregon conviction for the Robbery in the Third Degree pursuant to ORS 164.395 by plea on October 21, 1993, is constitutionally valid.

X.

That the defendant's 1993 Oregon conviction for Robbery in the Third Degree is legally and factually comparable to Washington's Robbery in the Second-Degree statute at the time, RCWs 9A.56.190 and 9A.56.210, and pursuant to *State v. McIntyre*, 112 Wn. App. 478 (2002).

XI.

That the defendant's Oregon conviction for Robbery in the Third Degree is a Most Serious Offense under Washington law.

CP 773-781.

Defendant was convicted under ORS 164.395. CP 554-650. This Court has already determined that the elements of that statute are equivalent to Washington's Robbery in the Second Degree statute as defined by RCW 9A.56.190. *State v. McIntyre*, 112 Wn. App. 478, 482-483, 49 P.3d 151 (2002). This Court further held that the sentencing consequences of the Washington counterpart is treated as a Class B felony and a violent offense. *Id.* at 483. Washington's Robbery in the Second Degree is enumerated as a "most serious offense." RCW 9.94A.030(33)(o). As such, the trial court properly classified defendant's Robbery in the Third Degree conviction as a strike offense. Once legal comparability has been established, it is unnecessary to move forward to examine factual comparability. *See McIntyre*, at 483 (*citing State v. Russel*, 104 Wn. App. 422, 442, 16 P.3d 664 (2001)).

Defendant's Oregon Manslaughter in the First Degree charge was also properly classified as comparable to Washington's Manslaughter in the First Degree statute at the time, RCW 9A.32.060. CP 773-781 (Conclusion of Law 4). Defendant assigns no error to the trial court's finding.

Manslaughter in the First Degree is a “most serious offense.” RCW 9.94A.030(33)(k). Defendant’s current charge, Murder in the Second Degree, is a Class A felony and constitutes his third “most serious offense” under RCW 9.94A.030(33)(a). *See* RCW 9A.32.050(2). As such, defendant was properly found a Persistent Offender and sentenced to life without the possibility of parole pursuant to RCW 9.94A.570. CP 751-765.

Defendant here challenges the comparability of his Robbery in the Third-Degree conviction as a strike offense in Washington because he plead “no contest” to the charge. Brief of Appellant, 20. Defendant argues that, “although the crimes are legally comparable, the issue is whether there was a factual basis for the no contest plea to robbery third degree, sufficient to warrant inclusion of the conviction to sustain a Persistent Offender sentence of life without the possibility of parole.” Brief of Appellant, 20-21. Defendant’s argument need not be reached, as discussed supra, this Court has clearly held that the inquiry ends after legal comparability has been found. *McIntyre*, at 483. Our Supreme Court agreed in *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998), that the analysis moves forward to a factual comparison only if, after a legal comparison, the elements of the crimes are not identical, or the foreign statute is broader than the Washington statute. Defendant’s challenge to the trial court’s conclusion that the crimes are factually comparable is therefore moot, and this Court

should affirm defendant's persistent offender life without the possibility of parole sentence.

3. HOUSE BILL 1783 REQUIRES DEFENDANT'S JUDGMENT AND SENTENCE BE AMENDED TO STRIKE THE DNA DATABASE FEE, \$200 FILING FEE, AND INTEREST ON NON-RESTITUTION FEES AFTER JUNE 7, 2018.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783), effective June 7, 2018, amended the legal financial obligation (LFO) system in Washington State. Particularly, House Bill 1783 eliminates interest accrual on the non-restitution portions of LFOs as of June 7, 2018, and establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction. Laws of 2018, ch. 269, §§ 1, 18. House Bill 1783 also amended the discretionary LFO statute, former RCW 10.01.160 and RCW 36.18.020(h) to prohibit courts from imposing discretionary costs or the \$200 filing fee on indigent defendants. Laws of 2018, ch. 269, §§ 6, 17.

Our Supreme Court recently held in *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) that House Bill 1783 applies to cases that are pending on appeal. Defendant's case, like *Ramirez*, is still pending on direct appeal and is therefore subject to the provisions of House Bill 1783.

Defendant was found indigent at the time of sentencing. CP 767-769. The sentencing court imposed a mandatory \$500 crime victim

assessment fee, \$100 DNA database collection fee, and a \$200 criminal filing fee. CP 755. The court also ordered that the financial obligations shall accrue interest from the date of the judgment. CP 756. Because defendant's case is subject to House Bill 1783, the State agrees that the \$100 DNA database fee and the \$200 criminal filing fee should be stricken, and as of June 7, 2018, interest cannot accrue on non-restitution portions of defendant's LFOs. Defendant is still subject to the mandatory \$500 crime victim assessment fee. CP 755. Defendant's Judgment and Sentence should be remanded to reflect these changes.

D. CONCLUSION.

In admitting the truth of the State's evidence and viewing all evidence in the light most favorable to the State, the evidence proving that defendant did not kill Hyson Sabb in self-defense was overwhelming, could have been found beyond a reasonable doubt by a reasonable trier of fact, and this Court should affirm defendant's convictions. Defendant's prior foreign convictions for Manslaughter in the First Degree and Robbery in the Third Degree were properly classified as strike offenses in Washington, defendant was properly sentenced to a persistent offender life sentence without the possibility of parole, and this Court should affirm defendant's sentence. Lastly, due to a recent change in law, the State agrees that defendant's Judgment and Sentence should be remanded to strike the \$100

DNA database fee and the \$200 criminal filing fee, and interest cannot accrue on non-restitution portions of these fees after June 7, 2018.

DATED: February 6, 2019.

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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.

2.6.19 Therendal

Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**February 06, 2019 - 1:46 PM**

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