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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
Respondent,

v.

TROY BOTTEMILLER,  
Appellant.

OPENING BRIEF OF APPELLANT

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Appeal from the Superior Court of Pierce County,  
Cause No. 16-1-01559-1  
The Honorable Bryan Chushcoff, Presiding Judge

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A. ASSIGNMENT OF ERROR

1. Substantial evidence did not support the jury's finding that Mr. Bottemiller was engaged in criminal conduct that was substantially related to his need to defend himself against Mr. Gritzke.
2. The trial court abused its discretion in denying Mr. Bottemiller any recovery on the basis that Mr. Bottemiller was engaged in criminal conduct substantially related to Mr. Bottemille having to defend himself against Mr. Gritzke.
3. Error is assigned to the trial court's oral finding of fact that, "Mr. Bottemiller's illegal drug dealing was substantially related to the need to use any force at all. It gave rise to this homicide in many ways....[Mr. Gritzke] wouldn't be dead...if Mr. Bottemiller had not been a drug dealer."<sup>1</sup>

B. ISSUES PRESENTED

1. Did substantial evidence support the jury's finding that Mr. Bottemiller was engaged in criminal conduct that was substantially related to his need to defend himself against Mr. Gritzke where numerous witnesses testified that Mr. Gritzke did not care that Mr. Bottemiller possessed drugs and only contacted Mr. Bottemiller to question him about Mr. Bottemiller's supposed use of Mr. Gritzke's name? (Assignments of Error Nos. 1 and 3).
2. When Appellant was found not guilty of Murder, and when the jury announced, by a preponderance, that Appellant's force was justifiable, i.e., that he acted in self defense, was it an abuse of discretion by the trial judge to deny entirely, let alone fail to reduce, fees and costs claimed by Appellant, when: (1) pursuant to RCW 9A.16.110(3), in making the decision to reduce or deny costs and expenses, following a self defense verdict, the trial judge "shall consider" the "seriousness of the initial criminal conduct",

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<sup>1</sup> CP 249-252; RP 1726-1727.

and (2) when said criminal conduct of Appellant was merely incidental to the killing, i.e., the need for Appellant to defend himself, and (3) when Appellant's alleged criminal conduct was the belief of the deceased that Appellant had been using the name of the deceased in selling drugs at a time that was remote to the day of the killing, and (4) when, on the day of the killing, Appellant was merely sitting in a hotel room that he had rented, and, at that time, he was merely possessing drugs and money, and (5) when the deceased plotted to rob and assault Appellant, even before the deceased entered the room wherein Appellant ultimately shot him, and when said plot was incidental to Appellant's possession of drugs and money, and, (6) when, at the time of the shooting, the deceased had assaulted and robbed Appellant, and was backing Appellant into a corner, from which there was no escape, and when Appellant was justifiably concerned his gun would be taken from him by the deceased and used against him? (Assignments of Error Nos. 1, 2, and 3).

3. Under the circumstances set forth in the prior issue, should this Court remand to the trial court with instructions to order reimbursement of costs and fees of litigation and/or should this court remand with instructions of the percentage of the reduction of the fees and costs of litigation claimed by Appellant? (Assignments of Error Nos. 1, 2, and 3).
4. Should he prevail on appeal, is Mr. Gritzky entitled to reimbursement of all attorney's fees and costs incurred prosecuting his appeal?

C. STATEMENT OF THE CASE

**Factual and Procedural Background**

In 2008, Mr. Bottemiller was a senior in high school.<sup>2</sup> Mr.

Bottemiller had his wisdom teeth pulled and became addicted to opiates as

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<sup>2</sup> RP 24 (June 29, 2017, afternoon session). Several portions of the transcript are not numbered continuously with the main report of proceedings. Reference to these sections will be made by giving the RP citation followed by the date of the proceeding.

a result of the pain pills prescribed for the operation.<sup>3</sup> Mr. Bottemiller's addiction progressed from Percocet, to Oxycontin, and finally, by 2010, to smoking and then injecting heroin.<sup>4</sup> Mr. Bottemiller began selling heroin and meth, mostly heroin, to fund his drug habit and pay for hotels to live in.<sup>5</sup>

From 2010 to 2016, Troy Bottemiller, Sabrina Westfall, and Lucas Gritzke were acquaintances.<sup>6</sup> Mr. Bottemiller met Lucas Gritzke while they were in high school.<sup>7</sup> The men were more acquaintances than friends.<sup>8</sup> Ms. Westfall was Mr. Gritzke's girlfriend from December of 2010 to November of 2015 when Mr. Gritzke broke off the relationship.<sup>9</sup> Mr. Bottemiller was Ms. Westfall's good friend.<sup>10</sup> Ms. Westfall and Mr. Bottemiller would hang out together and get closer when Mr. Gritzke was in jail but remained just friends.<sup>11</sup> Mr. Gritzke argued with Ms. Westfall about her relationship with Mr. Bottemiller but eventually understood that Mr. Bottemiller was just a friend to Ms. Westfall.<sup>12</sup> While in jail Mr. Gritzke got mad at Mr. Bottemiller for hanging out with Ms. Westfall and

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<sup>3</sup> RP 22-24 (June 29, 2017, afternoon session).

<sup>4</sup> RP 24 (June 29, 2017, afternoon session).

<sup>5</sup> RP 24-25 (June 29, 2017, afternoon session).

<sup>6</sup> RP 702-703, 716

<sup>7</sup> RP 27 (June 29, 2017, afternoon session).

<sup>8</sup> RP 27 (June 29, 2017, afternoon session).

<sup>9</sup> RP 702.

<sup>10</sup> RP 703, 716.

<sup>11</sup> RP 703-704, 716.

<sup>12</sup> RP 717.

threatened Mr. Bottemiller.<sup>13</sup> Mr. Bottemiller, Ms. Westfall, and Mr. Gritzke would hang out and do drugs together, but there were lots of times Mr. Bottemiller did not do drugs.<sup>14</sup> Ms. Westfall and Mr. Gritzke dealt drugs together.<sup>15</sup>

In early January of 2012, Ms. Westfall was unemployed and needed \$250 to take a class to become an insurance agent but \$250 was all the money she had.<sup>16</sup> Mr. Botteiller promised to give the money to Ms. Westfall but never did.<sup>17</sup> Mr. Gritzke confronted Mr. Bottemiller about his failure to give Ms. Westfall the money and challenged Mr. Bottemiller to a fight.<sup>18</sup> Mr. Gritzke challenged Mr. Bottemiller to a fight in a parking lot in Federal Way, but Mr. Bottemiller did not wish to fight and went home.<sup>19</sup> Later that night, Mr. Bottemiller called Mr. Gritzke who told Mr. Bottemiller to come to his house to fight.<sup>20</sup> Despite Mr. Gritzke having a broken hand with a cast on it, Mr. Gritzke threw the last punch and was not injured in the fight.<sup>21</sup> Mr. Gritzke threw one punch and broke Mr. Bottemiller's nose.<sup>22</sup> Mr. Gritzke hit Mr. Bottemiller with his cast and

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<sup>13</sup> RP 733-734.  
<sup>14</sup> RP 718-719.  
<sup>15</sup> RP 232-233.  
<sup>16</sup> RP 720.  
<sup>17</sup> RP 720-721.  
<sup>18</sup> RP 720-721.  
<sup>19</sup> RP 721-722.  
<sup>20</sup> RP 722-723.  
<sup>21</sup> RP 723-724.  
<sup>22</sup> RP 723-725, 1280.

continued to attack Mr. Bottemiller once Mr. Bottemiller was on the ground.<sup>23</sup>

Mr. Bottemiller suffered serious injuries as a result of that assault.<sup>24</sup> Mr. Bottemiller's nose was crushed but Mr. Bottemiller also exhibits signs of a concussion and mental impairment, such as having no recollection of the fight, being confused, having difficulty completing sentences, forgetting the day of the week, losing his sense of smell, having difficulty breathing, and having cognitive difficulty for days following the fight.<sup>25</sup> Mr. Bottemiller required medical treatment and surgical intervention, including refracturing his nose and suffered permanent injury as a result of Mr. Gritzke's beating him.<sup>26</sup> The morning after the fight Mr. Gritzke called Mr. Bottemiller and said that if Mr. Bottemiller ever came to Mr. Gritzke's house again he wouldn't be leaving.<sup>27</sup> Mr. Bottemiller believed this was a death threat.<sup>28</sup>

After the fight, Mr. Bottemiller's relationship with Mr. Gritske changed completely.<sup>29</sup> Mr. Gritzke continually threatened Mr. Bottemiller and Mr. Bottemiller avoided Mr. Gritske at all costs.<sup>30</sup> Mr. Gritzke made

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<sup>23</sup> RP 662-664, 1277-1278.

<sup>24</sup> RP 1271-1272.

<sup>25</sup> RP 677-678, 1271, 1484, 1498-1499.

<sup>26</sup> RP 690, 1280.

<sup>27</sup> RP 1281-1282.

<sup>28</sup> RP 1281-1282.

<sup>29</sup> RP 28 (June 29, 2017, afternoon session).

<sup>30</sup> RP 28-29 (June 29, 2017, afternoon session).

multiple death threats against Mr. Bottemiller directly to Mr. Bottemiller and indirectly.<sup>31</sup> Mr. Bottemiller did occasionally encounter Mr. Gritske during drug deals, possibly once or twice per year, but those encounters were unplanned and short.<sup>32</sup> Mr. Bottemiller's family had multiple conversations in the house and on the phone about safety plans regarding Mr. Gritzke.<sup>33</sup> The family plan consisted of Mr. Bottemiller and his family avoiding contact with Mr. Gritzke and staying away from Mr. Gritzke and Mr. Gritzke's circle of friends, and tracking when Mr. Gritzke was in jail.<sup>34</sup>

Mr. Gritzke met Amanda Sweeney in the summer of 2014 and they began a romantic relationship in September of 2015.<sup>35</sup> Ms. Sweeny was using heroin daily and she and Mr. Gritzke both sold heroin.<sup>36</sup> In January of 2016, Mr. Gritzke's and Ms. Sweeney's house was raided and police found a safe containing two guns, several ounces of heroine, some meth, and about 60 Suboxone strips.<sup>37</sup> Mr. Gritzky was arrested and spent roughly 52 days in jail before being bailed out.<sup>38</sup>

As part of his security plan relating to Mr. Gritske, Mr. Bottemiller would type Lucas Gritzke's name into the jail roster in the Pierce County

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<sup>31</sup> RP 1282, 1285-1286.  
<sup>32</sup> RP 29 (June 29, 2017, afternoon session).  
<sup>33</sup> RP 1486-1487.  
<sup>34</sup> RP 1299, 1340, 1344-1345.  
<sup>35</sup> RP 230-231.  
<sup>36</sup> RP 230-231.  
<sup>37</sup> RP 233-234.  
<sup>38</sup> RP 236-238.

LINX browser because he felt safer when Mr. Gritzke was incarcerated than when Mr. Gritzke was out.<sup>39</sup> In February of 2016, Mr. Bottemiller became “scared” because he learned Mr. Gritzke had been jailed and charged with two counts of unlawful possession of a firearm in the first degree.<sup>40</sup> In the weeks prior to April 16, 2016, in the process of keeping track of Mr. Gritzke, Mr. Bottemiller learned that while Mr. Gritzke was in custody, he bragged he got into a fight with a guy over a dish soap box and beat the guy up and put him in the hospital.<sup>41</sup> Later, Mr. Bottemiller saw the individual who Mr. Gritzke beat up and described him as looking like “Frankenstein.”<sup>42</sup> Mr. Bottemiller was also aware of multiple violent drug “rips” (robberies) committed by Mr. Gritzke, in the weeks leading up to the killing.<sup>43</sup>

Around April 12, 2016, Ms. Westfall and Mr. Bottemiller rented a room at the Northwest Motor Inn.<sup>44</sup> Erik Jensen, Faith Worthington, and Taylor Nolte also stayed in the room.<sup>45</sup> Ms. Westfall and Mr. Bottemiller were selling drugs out of the room along with Mr. Jensen and Ms. Worthington, so other people were going in and out of the room.<sup>46</sup>

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<sup>39</sup> RP 1299.

<sup>40</sup> RP 1289, 1299.

<sup>41</sup> RP 1451.

<sup>42</sup> RP 1453.

<sup>43</sup> RP 1453.

<sup>44</sup> RP 751-753.

<sup>45</sup> RP 753.

<sup>46</sup> RP 753-754.

On the night of April 15, 2016, Ms. Sweeney and Mr. Gritzke were playing slot machines at BJ's Bingo with their friend, Rebecca Freetus.<sup>47</sup> The group left when AJ, a friend of theirs, called and said he was staying in a tent.<sup>48</sup> The group picked up AJ and took him to the Quality Inn in Fife.<sup>49</sup> While the group was at the Quality Inn, AJ mentioned that he had received a text from Mr. Bottemiller's phone number that said, "Hey, if you need anything, this is Lucas."<sup>50</sup> Mr. Gritzke noted that people had told him that that kind of text had been happening a lot lately.<sup>51</sup>

Ms. Freetus said she knew where Mr. Bottemiller was because she had seen him recently.<sup>52</sup> The group went to the Northwest Motor Inn to look for Mr. Bottemiller because Mr. Gritzke wanted to ask Mr. Bottemiller why he was using Mr. Gritzke's name.<sup>53</sup> Mr. Gritzke also discussed robbing and assaulting Mr. Bottemiller. Mr. Gritzke was not interested in purchasing any drugs from Mr. Bottemiller, but the plan was that he would get into the room where Mr. Bottemiller was located by faking that he was going to buy drugs from Ms. Westfall.<sup>54</sup> They did not

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<sup>47</sup> RP 241-244.

<sup>48</sup> RP 244.

<sup>49</sup> RP 244.

<sup>50</sup> RP 245.

<sup>51</sup> RP 245.

<sup>52</sup> RP 245.

<sup>53</sup> RP 249-250, 252-253, 258-259.

<sup>54</sup> RP 259-260, 311-312.

see Mr. Bottemiller's car in the parking lot, so they went to Walmart.<sup>55</sup> As the group was pulling into the Walmart parking lot they saw Mr. Bottemiller's car pulling out of the parking lot.<sup>56</sup> Mr. Gritzke and the group bought some batteries at the Walmart then returned to the Northwest Motor Inn and saw Mr. Bottemiller's car in the parking lot.<sup>57</sup>

Mr. Gritzke met up with a man named Tarreq who was going to buy "a sack" from Mr. Bottemiller and Ms. Westfall so Mr. Gritzke accompanied the man to the room where Mr. Bottemiller was.<sup>58</sup> Ms. Westfall had warned Mr. Bottemiller that Mr. Gritzke was coming to the room to buy heroin and Mr. Bottemiller "was really against it."<sup>59</sup> Mr. Bottemiller didn't say why, but he was against Ms. Westfall selling to Mr. Gritzke.<sup>60</sup> Mr. Gritzke entered the room, saw Mr. Bottemiller, and immediately left and returned to the car where Ms. Sweeney was waiting.<sup>61</sup> Mr. Gritzke was upset because he felt that Mr. Bottemiller had disrespected him because Mr. Gritzke had walked into the room and Mr. Bottemiller did not say hello.<sup>62</sup>

When he returned to the car Mr. Gritzke was accompanied by Erik

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<sup>55</sup> RP 249-250.  
<sup>56</sup> RP 250.  
<sup>57</sup> RP 250, 253.  
<sup>58</sup> RP 258.  
<sup>59</sup> RP 464, 557, 761-762, 1027-1028.  
<sup>60</sup> RP 762.  
<sup>61</sup> RP 258-259.  
<sup>62</sup> RP 309.

Jensen who was on his way to 7-11 to sell some drugs.<sup>63</sup> As the group travelled to 7-11, Mr. Jensen said that Mr. Bottemiller had “three ounces and \$5,000 on him.”<sup>64</sup> Ms. Sweeney was worried that Mr. Gritzke might do something like rob Mr. Bottemiller and she didn’t want to go back to jail, so she told him “Don’t get any ideas. That’s not why we are here.”<sup>65</sup> Based on Gritzke’s words and conduct, Ms. Sweeney was also concerned that Mr. Gritzke would assault Mr. Bottemiller.<sup>66</sup> After Mr. Jensen sold his sack, the group returned to the Northwest Motor Inn and Mr. Gritzke told Ms. Sweeney he was going to talk to Mr. Bottemiller to find out “why this is happening.”<sup>67</sup> Ms. Sweeney was concerned that things would escalate to the point that cops might be called but Mr. Gritzke promised Ms. Sweeney that nothing was going to happen because Mr. Bottemiller was a “bitch” who wouldn’t fight Mr. Gritzke.<sup>68</sup> As Mr. Gritzke went up to the room to confront Mr. Bottemiller, due to Mr. Gritzke’s words and conduct, Ms. Sweeney was concerned that Mr. Gritzke intended to rob and assault Mr. Bottemiller.<sup>69</sup>

When Mr. Gritzke exited Mr. Bottemiller’s room the first time with

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<sup>63</sup> RP 256, 259-260, 765.

<sup>64</sup> RP 260.

<sup>65</sup> RP 260-261, 305-306.

<sup>66</sup> RP 310.

<sup>67</sup> RP 262.

<sup>68</sup> RP 262-263, 310-311.

<sup>69</sup> RP 320, 310, 335.

Mr. Jensen, Mr. Gritzke asked Mr. Jensen about Mr. Bottemiller using Mr. Gritzke's name and said he wanted to confront him.<sup>70</sup> Mr. Jensen, who had spent almost every day of the prior month with Mr. Bottemiller selling and taking drugs,<sup>71</sup> did not believe that Mr. Bottemiller had been using Mr. Gritzke's name to get Mr. Gritzke's former heroin-purchasing clientele.<sup>72</sup> Mr. Gritzke was not concerned about Mr. Bottemiller selling heroin to Mr. Gritzke's former heroin customers because Mr. Gritzke and Ms. Sweeney had stopped selling drugs.<sup>73</sup> Mr. Gritzke and Ms. Sweeney knew Mr. Bottemiller was selling drugs and would likely have drugs and cash but that had nothing to do with why they went to confront him.<sup>74</sup> Mr. Gritzke was concerned about Mr. Bottemiller using Mr. Gritzke's name.<sup>75</sup> Mr. Gritzke was "pissed off" because he had found out Mr. Bottemiller was using Mr. Gritzke's name.<sup>76</sup> Mr. Gritzke was upset that Mr. Bottemiller was using Mr. Gritzke's name because Mr. Gritzke would get in trouble if word got out that he was selling drugs.<sup>77</sup>

When Mr. Gritzke and Mr. Jensen returned to the hotel room, Mr. Gritzke got within a foot and a half of Mr. Bottemiller and in an

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<sup>70</sup> RP 467.

<sup>71</sup> RP 448-452.

<sup>72</sup> RP 467.

<sup>73</sup> RP 323.

<sup>74</sup> RP 329.

<sup>75</sup> RP 323.

<sup>76</sup> RP 332.

<sup>77</sup> RP 323.

aggressive manner and tone confronted Mr. Bottemiller about impersonating Mr. Gritzke.<sup>78</sup> This surprised Ms. Westfall because she had been with Mr. Bottemiller for almost two full months and Mr. Bottemiller had not been impersonating Mr. Gritzke.<sup>79</sup> Mr. Gritzke demanded that Mr. Bottemiller give Mr. Gritzke his cell phone.<sup>80</sup> Mr. Gritzke was yelling that he had heard Mr. Bottemiller had been impersonating him and demanded Mr. Bottemiller's phone so he could make sure Mr. Bottemiller had not been doing that.<sup>81</sup> Mr. Bottemiller produced his cell phone and Mr. Gritzke ripped the phone from Mr. Bottemiller's hands and told Mr. Bottemiller to "give me everything else you have," meaning Mr. Bottemiller's drugs and money.<sup>82</sup> Mr. Gritzke put Mr. Bottemiller's phone in his pocket where police later recovered it, postmortem.<sup>83</sup>

While Mr. Gritzke was demanding Mr. Bottemiller's phone, money, and drugs, Mr. Gritzke was pounding his fists and was getting closer to Mr. Bottemiller as Mr. Bottemiller remained seated and spoke calmly and softly, trying to defuse the situation.<sup>84</sup> At some point during his demands for the phone Mr. Gritzke said, "I'm going to kick your

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<sup>78</sup> RP 467, 474, 574, 766.

<sup>79</sup> RP 766.

<sup>80</sup> RP 574.

<sup>81</sup> RP 1309.

<sup>82</sup> RP 770-772, 1232, 1309-1310.

<sup>83</sup> RP 179-180, 195-196, 203-204, 1232, 1310.

<sup>84</sup> RP 773, 1285, 1302, 1310-1311.

ass.”<sup>85</sup> After Mr. Gritze took Mr. Bottemiller’s phone and demanded the money and drugs, Ms. Westfall got between the men to see if she could change Mr. Gritzke’s mind.<sup>86</sup>

Mr. Gritzke taunted Mr. Bottemiller and challenged him to fight.<sup>87</sup> Mr. Gritzke was flinching at Mr. Bottemiller, quickly jerking his body at him as if he was going to lunge at him.<sup>88</sup> Mr. Gritzke’s hands were clenched and he was pumping his fist.<sup>89</sup> Mr. Bottemiller put his hands up to cover his head and pulled away from Mr. Gritzke.<sup>90</sup> Mr. Bottemiller never made a fist.<sup>91</sup> Mr. Bottemiller told Mr. Gritzke that he had not been impersonating him.<sup>92</sup> Mr. Bottemiller was scared and nervous and didn’t raise his voice.<sup>93</sup> Mr. Bottemiller was trying to remain calm and soft spoken because he was scared and trying to calm the situation down.<sup>94</sup>

Mr. Jensen observed that it seemed like Mr. Bottemiller didn’t know what was going on and that you could tell he was nervous by the tone in his voice.<sup>95</sup> In response to the aggression, Mr. Bottemiller got to a point where he was scared and needed to get Lucas Gritzke away

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<sup>85</sup> RP 575, 773.

<sup>86</sup> RP 772.

<sup>87</sup> RP 952-953.

<sup>88</sup> RP 1050.

<sup>89</sup> RP 1314.

<sup>90</sup> RP 1314.

<sup>91</sup> RP 1314.

<sup>92</sup> RP 1312.

<sup>93</sup> RP 476, 573.

<sup>94</sup> RP 1302, 1310-1311.

<sup>95</sup> RP 475.

immediately, so he told him, “Hey, stuff is in my car,” even though there was not actually anything in the car.<sup>96</sup> Mr. Bottemiller told Mr. Gritzke the stuff was in his car because he was trying to put space between himself and Mr. Gritzke since Mr. Gritzke was getting angrier and angrier.<sup>97</sup>

Mr. Gritzke started walking towards the door and saw that Mr. Bottemiller was not behind him. RP 479. When Mr. Gritzke realized Mr. Bottemiller was not following him to the door, he turned around and said, “really” before he started walking back towards Mr. Bottemiller. RP 584. Mr. Gritzke was going forward towards Mr. Bottemiller with his hands out front. RP 482. Mr. Bottemiller stood up and pulled out a gun. RP 479. Lucas Gritzke responded with “really” before he took another step towards Troy Bottemiller. RP 479.

Once Mr. Gritzke started coming towards him, Mr. Bottemiller felt threatened for his life and worried that Lucas Gritzke was going to come and take the gun and use it against him or severely beat him with it.<sup>98</sup> Mr. Bottemiller backpedaled to create distance between himself and Mr. Gritzke.<sup>99</sup> Mr. Bottemiller pulled the gun in hopes that Mr. Gritzke would stop or leave.<sup>100</sup> Mr. Bottemiller was concerned because Mr. Gritzke

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<sup>96</sup> RP 1058, 1315.

<sup>97</sup> RP 1315-1316.

<sup>98</sup> RP 1329.

<sup>99</sup> RP 778, 1314-1318.

<sup>100</sup> RP 1318, 1521.

appeared to not be afraid of the gun and continued to walk aggressively towards Mr. Bottemiller.<sup>101</sup> Because Mr. Gritzke did not slow down after taking Mr. Bottemiller's phone, Mr. Bottemiller thought that nothing was going to slow him down. RP 1329. Mr. Bottemiller raised and fired his gun once to defend himself, but not intending to kill Mr. Gritzke. RP 1318-1319, 1323. Unfortunately, Mr. Gritzky was hit by the bullet and died.<sup>102</sup>

On April 18, 2016, Mr. Bottemiller was charged with murder in the second degree.<sup>103</sup> Mr. Bottemiller asserted the defense of self-defense at trial and indicated that, if found innocent, he would be seeking to be reimbursed under RCW 9A.16.110.<sup>104</sup>

The jury found Mr. Bottemiller not guilty of second-degree murder, not guilty of either first- or second-degree manslaughter, and found that he had acted in self-defense.<sup>105</sup> The jury also found that Mr. Bottemiller had "engaged in conduct substantially related to giving rise to the crime" with which he was charged.<sup>106</sup>

Based on this finding, the trial court ruled that Mr. Bottemiller was not entitled to **any reimbursement** of the money he spent defending

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<sup>101</sup> RP 1320-1322.

<sup>102</sup> CP 3-4.

<sup>103</sup> CP 1-2.

<sup>104</sup> CP 5.

<sup>105</sup> CP 76-79, 81.

<sup>106</sup> CP 81.

himself against the second-degree murder charge, despite being found not guilty due to his acting in self-defense.<sup>107</sup>

Mr. Bottemiller has appealed the trial court's ruling denying Mr. Botteiller's attorney fee, costs, and expenses reimbursement.<sup>108</sup>

D. ARGUMENT

Under RCW 9A.16.020(3), the use of force against another person is lawful "[w]henever used by a party about to be injured...in preventing or attempting to prevent an offense against his...person...in case the force is not more than is necessary."

RCW 9A.04.020(1)(b) clearly states that one of the purposes of RCW title 9A is "To safeguard conduct that is without culpability from condemnation as criminal." The purpose of RCW 9A.16.110 "is to ensure that costs of defense shall befall '[n]o person in the state' if he or she acts in self-defense; and ... reimbursement is available when such person incurs costs in defending against some kind of 'legal jeopardy.'"<sup>109</sup> RCW 9A.16.110 plays an important part of this safeguarding of conduct because it provides a strong financial disincentive for the State to pursue unfounded charges against individuals who lawfully use force in self-

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<sup>107</sup> CP 249-252.

<sup>108</sup> CP 253-257.

<sup>109</sup> *State v. Villanueva*, 177 Wn. App. 251, 255, 311 P.3d 79, 81 (2013), citing *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 500, 909 P.2d 1294 (1996) (alteration in original) (quoting former RCW 9A.16.110(1) (1989)).

defense.

To protect the right of citizens of this state to use lawful force in self-defense, the Legislature has provided, in RCW 9A.16.110, for reimbursement by the State of the costs a defendant incurs in successfully defending against a criminal prosecution for assault. Under the statute, when a person charged with assault is found not guilty by reason of self-defense, the State is required to reimburse such person “*for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense.*”<sup>110</sup> (our emphasis)

The reimbursement is not an independent cause of action.<sup>111</sup> Rather, the reimbursement proceedings are held, as was done in this case, at the conclusion of the criminal trial. Although held at the conclusion of the criminal trial, the reimbursement proceedings are conducted under the civil rules of procedure and evidence, and the civil standard for self-defense applies.<sup>112</sup>

In *State v. Manuel*, 94 Wn.2d 695, 619 P.2d 977 (1980), the court established the procedural requirements for reimbursement. The reimbursement proceedings are conducted under the civil rules of procedure and evidence. The civil standard of self-defense applies; its focus is entirely objective. The subjective considerations which inhere in the criminal standard are not an element. The burden of proof shifts. In the criminal trial, the State must

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<sup>110</sup> RCW 9A.16.110(2).

<sup>111</sup> RCW 9A.16.110(2).

<sup>112</sup> *State v. Park*, 88 Wn.App. 910, 915, 946 P.2d 1231 (1997).

prove beyond a reasonable doubt the force was not lawful. In the civil proceeding, the defendant is required to show by a preponderance of the evidence that his acts were “reasonably necessary to defend himself or another against an attack which he did not provoke or invite.” *Manuel*, 94 Wn.2d at 700, 619 P.2d 977.<sup>113</sup>

RCW 9A.16.110 “contemplates an objective determination that the person's actions were justified, whereas justification in defense of a charge of assault or homicide is determined by examining the situation as it appeared to the defendant, under all of the circumstances.”<sup>114</sup>

The statute provides that in order for a defendant to be entitled to an award of reasonable costs, “the trier of fact must find that the defendant's claim of self-defense was sustained by a preponderance of the evidence.”<sup>115</sup> The statute directs that “[i]f the trier of fact makes a determination of self-defense, the judge shall determine the amount of the award.”<sup>116</sup> The statute allows the judge to deny **or reduce** the amount of the award if the trier of fact also determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant.<sup>117</sup>

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<sup>113</sup> *Park*, 88 Wn. App. at 915, 946 P.2d 1231.

<sup>114</sup> *State v. Manuel*, 94 Wn.2d 695, 699, 619 P.2d 977 (1989).

<sup>115</sup> RCW 9A.16.110(2).

<sup>116</sup> RCW 9A.16.110(2).

<sup>117</sup> RCW 9A.16.110(3).

1. **There was insufficient evidence to support the jury’s finding that Mr. Bottemiller was engaged in criminal activity that was substantially related to the events giving rise to the crime with which he was charged.**

The jury was asked to determine whether a preponderance of the evidence established that Mr. Bottemiller was engaged in criminal conduct “substantially related” to the events giving rise to Mr. Bottemiller’s need to shoot Mr. Gritzke in self-defense.

Chapter 9A.16 RCW does not provide a definition of “substantially related.” Counsel for Mr. Bottemiller could not find any case defining “substantially related” in the context of self-defense. “Substantial” defined as “real; actual; true; not imaginary” or “considerable; ample; large.”<sup>118</sup>

It was not disputed at trial that Mr. Bottemiller *possessed* drugs, however, this fact was not central to Mr. Gritzke’s plan to assault or rob Mr. Bottemiller. However, numerous witnesses testified that Mr. Gritzke was not motivated that night by Mr. Bottemiller’s drug possession. Numerous witnesses testified that Mr. Gritzke contacted Mr. Bottemiller to ask Mr. Bottemiller why he was using Mr. Gritzke’s name, and that said use of Gritzke’s name had nothing to do with the night in question, but stemmed from the days and weeks leading up to the night of Gritzke’s

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<sup>118</sup> Webster’s New College Dictionary, (2005), p. 1428.

death. Ms. Sweeney explicitly and repeatedly testified that the fact Mr. Bottemiller possessed drugs and had money “had nothing to do with” why Mr. Gritzke and Ms. Sweeney went to the motel on the night of the shooting.<sup>119</sup> Mr. Jensen testified that Mr. Gritzke said he wanted to talk to Mr. Bottemiller about Mr. Bottemiller using Mr. Gritzke’s name.<sup>120</sup> The first thing Mr. Gritzke said to Mr. Bottemiller once Mr. Gritzke began the assault was, “I have been hearing you are impersonating me.”<sup>121</sup> Mr. Gritzke did not begin with a demand that Mr. Bottemiller hand over any drugs or money, did not challenge Mr. Bottemiller for taking away Mr. Gritzke’s former drug clientele, and did not chastise Mr. Bottemiller for being a drug dealer. Mr. Gritzke’s concern was whether Mr. Bottemiller was using Mr. Gritzke’s name, not whether Mr. Bottemiller possessed drugs. Mr. Gritzke cared not about Mr. Bottemiller’s possession of drugs. Mr. Gritzke’s animus towards Mr. Bottemiller was fueled by his longstanding animosity towards Mr. Bottemiller and his jealousy of Mr. Bottemiller’s relationship with Ms. Westfall. **Even if Mr. Bottemiller had no drugs or money on his person, Mr. Gritzke would still have found some excuse to enter the room and assault Mr. Bottemiller.**

The facts introduced at trial were that Mr. Gritzke and Mr.

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<sup>119</sup> RP 323, 329, 332.

<sup>120</sup> RP 467.

<sup>121</sup> RP 1309.

Bottemiller had a pre-existing confrontational relationship and that Mr. Gritzke wanted to contact Mr. Bottemiller about the incorrect reports that Mr. Bottemiller was using Mr. Gritzke's name, not about Mr. Bottemiller's drug possession. The facts introduced at trial also established that Mr. Gritzke had an explosive temper to the point that he has a history of beating people, including Mr. Bottemiller so badly that they required medical treatment at a hospital. Mr. Gritzke undoubtedly attacked Mr. Bottemiller and continued to behave aggressively towards Mr. Bottemiller even after Mr. Bottemiller produced a firearm. However, the facts introduced at trial did not establish by a preponderance of the evidence that Mr. Gritzke's attack on Mr. Bottemiller was substantially related to Mr. Bottemiller's criminal activity of possessing drugs.

Mr. Gritzke confronted Mr. Bottemiller about Mr. Bottemiller allegedly using Mr. Gritzke's name and this confrontation escalated into Mr. Gritzke robbing Mr. Bottemiller and behaving in a manner so threatening that Mr. Bottemiller was justified in shooting Mr. Gritzke in self-defense. The preponderance of evidence introduced at trial did not establish that Mr. Gritzke's assault and robbery of Mr. Bottemiller was substantially related to Mr. Bottemiller's drug possession.

2. **The trial court abused its discretion in denying Mr. Bottemiller any reimbursement of his attorney fees, costs, or other expenses incurred defending against the charge.**

Under RCW 9A.16.110(3),

Notwithstanding a finding that a defendant's actions were justified by self-defense, if the trier of fact also determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant the judge may deny or reduce the amount of the award. In determining the amount of the award, the judge shall also consider the seriousness of the initial criminal conduct.

The Court of Appeals court reviews an interpretation of RCW 9A.16.110 de novo but reviews a determination of the amount of an award for abuse of discretion.<sup>122</sup> A trial court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons.<sup>123</sup> A court bases its decision on untenable grounds or reasons when it applies the wrong legal standard or relies on unsupported facts.<sup>124</sup>

- a. *The trial court's ruling was based on unsupported facts.*

As discussed above, the facts introduced at trial did not support a

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<sup>122</sup> *Villanueva*, 177 Wn. App. 251, 254 & n.1, 311 P.3d 79; *McGreevy v. Or. Mut. Ins. Co.*, 90 Wn. App. 283, 289, 951 P.2d 798 (1998), overruled on other grounds by *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001). See also *State v. Decker*, 198 Wn. App. 1024 (2017), review dismissed, 189 Wn.2d 1011, 403 P.3d 43 (2017) (note: unpublished).

<sup>123</sup> *State v. Cavetano-Jaimes*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015).

<sup>124</sup> *Cavetano-Jaimes*, 190 Wn. App. at 295.

finding by the jury or an independent finding by the court that Mr. Bottemiller's drug possession was substantially related to his need to defend himself against Mr. Gritzke. If the jury's finding was unsupported by the facts introduced at trial, then the judge never lawfully obtained the discretion under RCW 9A.16.110(3) to determine if Mr. Bottemiller's reimbursement should have been reduced or eliminated.

b. *Even if the jury's finding was supported by substantial evidence, the trial court abused its discretion in denying Mr. Bottemiller any reimbursement.*

As discussed above, RCW 9A.04.020(1)(b) clearly states that one of the purposes of RCW title 9A is "***To safeguard conduct that is without culpability from condemnation as criminal.***" (our emphasis). The purpose of RCW 9A.16.110 "is to ensure that costs of defense shall befall '[n]o person in the state' if he or she acts in self-defense; and ... reimbursement is available when such person incurs costs in defending against some kind of 'legal jeopardy.'"<sup>125</sup> RCW 9A.16.110 plays an important part of this safeguarding of conduct because it provides a strong **financial disincentive** for the State to pursue unfounded charges against individuals who lawfully use force in self-defense.

In *State v. Anderson*, 72 Wn.App. 253, 863 P.2d 1370 (1993),

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<sup>125</sup> *Villanueva*, 177 Wn. App. at 255, 311 P.3d 79, 81 (2013), citing *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 500, 909 P.2d 1294 (1996) (alteration in original) (quoting former RCW 9A.16.110(1) (1989)).

*review denied* 124 Wn.2d 1010 (1994), the court held that Sampson, a defendant in that case, who was guilty of much more intentional, malevolent, and serious criminal conduct than Mr. Bottemiller was entitled to full reimbursement. Sampson was having sex with a prostitute, he was drunk, and he was attempting to buy drugs, late at night, for the prostitute when the killing occurred. The *Anderson* court noted that: "Sampson's case is similar but not identical. On January 16, 1991, after ingesting cocaine and alcohol, he 'deliberately sought out a drug transaction in a high crime area', while armed with a loaded handgun. A confrontation ensued, and he shot two men, killing one."<sup>126</sup> The *Anderson* court held that an individual found not guilty because he or she was acting in self-defense is **not disqualified** from being reimbursed by the State under RCW 9A.16.110 just because "*the need to use self-defense was precipitated by unsavory or even illegal activities.*"<sup>127</sup> (our emphasis). The *Anderson* court held that RCW 9A.16.110 "*allows recovery of appropriate expenses by anyone who, according to a preponderance of evidence, acted lawfully in self-defense.*"<sup>128</sup> (our emphasis).

Unlike Sampson, who actively sought out a dangerous situation in a high crime area, Mr. Bottemiller was complicit only in peaceably

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<sup>126</sup> *Anderson*, 72 Wn.App. at 257, 863 P.2d 1370.

<sup>127</sup> *Anderson*, 72 Wn.App. at 259, 863 P.2d 1370.

<sup>128</sup> *Anderson*, 72 Wn.App. at 259-260, 863 P.2d 1370

possessing drugs as he sat in a hotel room that he had rented. Mr. Bottemiller wanted nothing to do with Mr. Gritzke. It was Mr. Gritzke who plotted and formulated a ruse to enter the room, so that Mr. Bottemiller would not leave before Mr. Gritzke would arrive.

The legislature amended RCW 9A.16.110(3) to include a requirement that the trier of fact make a determination of whether "the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant." The 1995 amendment also added language that if such a finding was made, "the judge may deny or reduce the amount of the award" and "in determining the amount of the award, the judge shall also consider the seriousness of the initial criminal conduct."

The post-1995 language of RCW 9A.16.110 makes clear that the defendant's participation in criminal conduct is not a bar to that defendant being reimbursed when acquitted after a finding he acted in self-defense.

The new version of RCW 9A.16.110 provides, in pertinent part,

(3) Notwithstanding a finding that a defendant's actions were justified by self-defense, if the trier of fact also determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant the judge may deny *or reduce* the amount of the award. *In determining the amount of the award, the judge shall also consider the seriousness of the initial criminal conduct.*

(4) Whenever the issue of self-defense under this section is decided by a judge, the judge shall consider the same questions as must be answered in the special verdict under subsection (4) [(5)] of this section.

(5) Whenever the issue of self-defense under this section has been submitted to a jury, and the jury has found the defendant not guilty, the court shall instruct the jury to return a special verdict in substantially the following form:

	<b>answer yes or no</b>
1. Was the finding of not guilty based upon self-defense?	.....
2. If your answer to question 1 is no, do not answer the remaining question.	
3. If your answer to question 1 is yes, was the defendant:	.....
a. Protecting himself or herself?	.....
b. Protecting his or her family?	.....
c. Protecting his or her property?	.....
d. Coming to the aid of another who was in imminent danger of a heinous crime?	.....
e. Coming to the aid of another who was the victim of a heinous crime?	.....
f. Engaged in criminal conduct substantially related to the events giving rise to the crime with which the defendant is charged?	.....

RCW 9A.16.110(3), (4) and (5) make clear that the defendant's participation in criminal activity is **but one factor of seven, including the seriousness of the criminal conduct in which the defendant was engaged**, the judge must consider in determining the amount of the award. **The Legislative directive that the trial court must consider the**

**seriousness of the defendant's initial criminal conduct strongly indicates that the Legislature intended there to be an inverse relationship between the seriousness of the criminal behavior by the defendant and the amount of reimbursement permitted by the court. The Legislature clearly did not intend that a trial court could deny all reimbursement simply because a defendant committed some minor infraction.**

Further, courts interpreting RCW 9A.16.110 have found that reimbursement of a reasonable amount of attorney's fees and costs is mandatory. In 1998, Division II of the Court of appeals interpreted the 1995 version of RCW 9A.16.110 in *State v. Jones*, 92 Wn.App. 555, 964 P.2d 398 (1998) and held that under RCW 9A.16.110, "the State **must** reimburse for fees and costs reasonably billed by retained counsel of record,"<sup>129</sup> and that, " the State must reimburse for post-acquittal costs reasonably incurred in the trial."<sup>130</sup>

***Anderson* has never been overruled or abrogated** following the 1995 amendments to RCW 9A.16.110. Under *Anderson* and *Jones*, the State must reimburse a defendant acquitted because the trier of fact found the defendant acted in self-defense the amount of fees and costs that would reasonably compensate the defendant's retained counsel. This is true even

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<sup>129</sup> *Jones*, 92 Wn. App. at 566, 964 P.2d 398 (emphasis added)

<sup>130</sup> *Jones*, 92 Wn. App. at 567, 964 P.2d 398.

if the defendant was found to have been engaged in criminal conduct at the time he or she was required to act in self-defense. A defendant who successfully asserts he acted in self-defense **must** be reimbursed by the State for reasonable attorney's fees and costs incurred at trial and post-trial.

In this case, Mr. Bottemiller's criminal conduct related to the ultimate shooting was very minimal. Mr. Bottemiller possessed drugs, the purchase of which Mr. Gritzke used as the excuse to get close enough to Mr. Bottemiller to question Mr. Bottemiller about whether Mr. Bottemiller was using Mr. Gritzke's name. Mr. Bottemiller did not actively seek out Mr. Gritzke and try to sell the drugs to him. On the contrary- Mr. Bottemiller intentionally tried to avoid Mr. Gritzky and was forced into a confrontation with him due to Mr. Gritzky's criminal behavior.

Combining the fact that *Anderson* has never been overruled with the Legislative mandate that the trial court consider the seriousness of the defendant's initial criminal conduct means that the default is that a defendant who successfully asserts self-defense is entitled to full reimbursement unless his or her initial criminal conduct is so heinous that some reduction is warranted. The rule is not that the slightest offense will result in a full denial of all reimbursement.

The trial court abused its discretion in finding that Mr.

Bottemiller's conduct was sufficiently reprehensible to bar him from any reimbursement for having to defend against the charge of murder. The trial court's ruling failed to give sufficient deference to the Legislatively stated purpose of RCW title 9A "to safeguard conduct that is without culpability from condemnation as criminal."<sup>131</sup> The trial court also failed to respect the purpose of RCW 9A.16.110 that "is to ensure that costs of defense shall befall '[n]o person in the state' if he or she acts in self-defense; and ... reimbursement is available when such person incurs costs in defending against some kind of 'legal jeopardy.'"<sup>132</sup>

Mr. Bottemiller's drug possession, while criminal behavior, was not only unrelated to Mr. Gritzke's use of force against Mr. Bottemiller, but was merely incidental conduct that was significantly less culpability than a defendant like Sampson. *Supra*. The trial court's ruling denying Mr. Bottemiller any reimbursement was an abuse of discretion because it was not factually or legally supported. Courts have already ruled that engaging in criminal conduct is not a bar to reimbursement and individuals who engaged in far more egregious conduct than Mr. Bottemiller have been reimbursed for their attorney's fees, costs, and expenses in defending against a criminal prosecution. At most, the trial

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<sup>131</sup> RCW 9A.04.020(1)(b).

<sup>132</sup> *Villanueva*, 177 Wn. App. at 255, 311 P.3d 79, 81 (2013), citing *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 500, 909 P.2d 1294 (1996) (alteration in original) (quoting former RCW 9A.16.110(1) (1989)).

court in this case should have reduced Mr. Bottemiller's reimbursement, not denied it in toto.

**3. Should he prevail in this appeal, Mr. Bottemiller is entitled to reimbursement of all attorney's fees, costs, and expenses incurred in prosecuting this appeal.**

RAP 18.1 authorizes an award of attorney's fees to a party on appeal if such an award is authorized by "applicable law" and the party requests the attorney fees in its brief.

Under RCW 9A.16.110(2), an acquitted criminal defendant is entitled to reimbursement for attorney fees reasonably incurred in connection with his criminal defense and reasonably incurred Upon [sic], prevailing in his appeal. *State v. Lee*, 96 Wn.App. 336, 346, 979 P.2d 458 (1999); *State v. Jones*, 92 Wn.App. 555, 565, 964 P.2d 398 (1998). Because we hold that the trial court abused its discretion, Bessey prevails in his appeal and we award him reasonable attorney fees and costs on appeal.<sup>133</sup>

The State agreed that the amount of attorney's fees requested by counsel for Mr. Bottemiller was reasonable.<sup>134</sup> Should Mr. Bottemiller prevail, he is entitled under both RAP 18.1 and RCW 9A.16.110(2) to reimbursement for all attorney fees and costs incurred in prosecuting this appeal.

E. CONCLUSION

The preponderance of evidence in this case does not support a finding that Mr. Bottemiller's need to use force to defend himself against

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<sup>133</sup> *State v. Bessey*, 191 Wn. App. 1, 7-8, 361 P.3d 763 (2015).

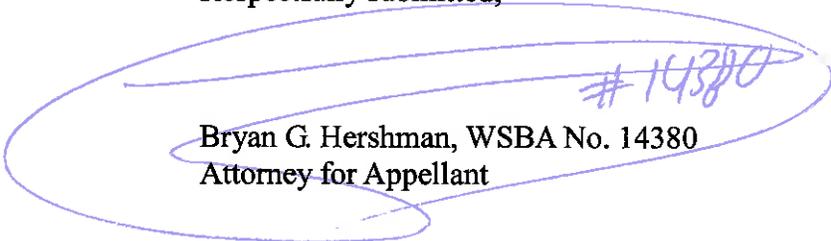
<sup>134</sup> CP 229-230.

Mr. Gritzke was substantially related to any criminal conduct of Mr. Bottemiller. Mr. Gritzke was a violent man who had a history of threatening and assaulting Mr. Bottemiller and who turned what could have been a calm and reasonable discussion into a violent situation by his unprovoked threatening behavior. Given the lack of evidence to support a finding that Mr. Bottemiller's criminal conduct was substantially related to his need to defend himself, the trial court abused its discretion in denying Mr. Bottemiller any reimbursement for having to defend against the charge.

For the reasons stated above, this court should grant Mr. Bottemiller's appeal and remand for entry of an order awarding him full reimbursement of all fees and costs incurred defending against this charge. Further, this court should award Mr. Bottemiller full reimbursement for all fees and costs incurred prosecuting this appeal.

DATED this 7<sup>th</sup> day of September, 2018.

Respectfully submitted,

  
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Attorney for Appellant

**LAW OFFICE OF BRYAN G. HERSHMAN**

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**Transmittal Information**

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