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NO. 52245-4

(consolidated with NO. 52835-5)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DONALD BANGO,

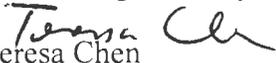
Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Judge John R. Hickman

No. 15-1-04977-3

BRIEF OF RESPONDENT

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I. INTRODUCTION

Prior to the opinion in *City of Seattle v. Erickson*, 188 Wn.2d 721, 734, 398 P.3d 1124 (2017), the trial court analyzed a *Batson* challenge under the bright-line rule which the supreme court would enact. The court found no purposeful discrimination in the exercise of a peremptory strike in a murder trial against a juror whose sister had been murdered. This determination is not clearly erroneous.

The pervasive narrative from the Defendant Donald Bango and the other eyewitnesses was a concern that the Defendant was trying to rob Jeffrey Shaw. Bango was associated with a man who had recently robbed Shaw. The Defendant arrived at a drug buy with guns and no money. As he waited, he was seen with several firearms, putting on his tactical gloves. Shaw and his friends fled. The Defendant persuaded Shaw to sell him the heroin, agreeing to meet in a public parking lot this time. There he tried to enter Shaw's vehicle. When entry was denied, he displayed a badge and ordered everyone out of the vehicle. As the group fled, the Defendant gave foot chase and shot into the car, killing Shaw. He claimed he shot in self-defense after Shaw raised a pistol and pulled the trigger twice without any discharge. The forensic evidence contradicted his claim. The first aggressor instruction was justified by the Defendant's attempt to rob.

II. RESTATEMENT OF THE ISSUES

1. Did the prosecutor's peremptory strike in a murder trial which was used against a juror whose sister had been murdered and who left an impression that she might not follow the court's instructions leave this Court with a definite and firm conviction that a mistake has been committed?
2. Did the trial court properly provide a first aggressor instruction where there was credible evidence that, if the victim raised the pistol, he did so because the Defendant provoked the need to defend against a robbery?
3. May the trial court's credibility determination in the CrR 3.5 hearing be reviewed?
4. Did the court abuse its discretion in excluding inadmissible hearsay?
5. Is there sufficient evidence for absence of self-defense where the Defendant's claim that the victim pulled the trigger twice without discharge was rebutted by eye witnesses, videotape, and forensic experts?
6. Where the trial court has already dismissed the felony murder count is there any basis for a claim of double jeopardy violation?

III. STATEMENT OF THE CASE

The Defendant Donald Bango killed Jeffrey Shaw during a drug transaction. CP 2-4.

Shaw used and sold drugs, sometimes with the assistance of a middle man. RP¹ 992, 995; RP (6/1/17) 52-56. Curtis Wikstrom was a mild

¹ Where no date is indicated, reference is to the 26-volume verbatim report of proceedings transcribed by Official Court Reporter Emily J. Dirton.

mannered DJ and a friend from Shaw's high school days. CP 175²; RP (6/1/17) 52. He served as a middle man when Daniel Lopez bought heroin from Shaw. CP 172-74; RP (6/1/17) 59; RP 1278-79, 1286, 1427. On one of these occasions, the Defendant had driven Lopez and met Wikstrom. *Id.*

A month or two later, the Defendant asked Wikstrom to assist him in buying heroin from Shaw. CP 173, 175; RP (6/1/17) 59, 81-82, 89. Shaw and Wikstrom knew that Lopez had been robbing drug dealers. CP 177, 179. But the Defendant told Wikstrom that he had fallen out with Lopez, and so Wikstrom agreed to set up the meeting. RP (6/1/17) 59-60.

As they waited for Shaw to arrive at the Newport Apartments, Wikstrom grew suspicious that the Defendant intended "to cause harm." RP (6/1/17) 82; RP 1173. He had backed into his parking spot where he waited with guns but no money. RP (6/1/17) 93-95, 108-09, 114-15; RP 1172. Bango claimed he had money for the heroin in the glovebox, but Wikstrom checked and found no money there. RP (6/1/17) 108-09, 114-15. The Defendant showed Wikstrom pictures of assault rifles on his phone. RP (6/1/17) 93; RP 1172. He cocked the 12-gauge shotgun on the floorboard by his feet and pointed to the backseat where he had a pistol and an AK-47. RP (6/1/17) 94-97, 100, 102, 106.

² The Defendant's interview (Exhibit 370) is transcribed at CP 171-203.

When Shaw arrived with his friend Jesse Neil, the Defendant pulled his rental car to the middle of the drive. RP (6/1/17) 59, 113-14; RP 990-91, 1043, 2246. Instead of giving the money to the middle man, the Defendant told Wikstrom to make Shaw come to him. RP (6/1/17) 89, 114-16. Wikstrom walked over to Neil's car to deliver the message to Shaw who in turn instructed Wikstrom to let Bango come to him. RP (6/1/17) 117-18. Returning to Bango's car, Wikstrom saw the Defendant pulling on black gloves,³ and he panicked. RP (6/1/17) 118; RP 1173-74. Wikstrom ran back to Neil's car, jumped in, and told him to "hit it in reverse and go." RP (6/1/17) 118, 122; RP 1008.

The three men left, but the Defendant kept calling. RP (6/1/17) 118-19, 121. Wikstrom told the men that the Defendant had a lot of guns and no money and was "not doing what he was supposed to be doing." RP 1174. But Shaw was curious and finally answered Wikstrom's phone. RP (6/1/17) 122; RP 1182-83. Shaw arranged to meet the Defendant in a public place, letting the Defendant know that he would be bringing his own protection,⁴ a handgun which was at his waistband. RP 1175-84, 1190.

³ The Defendant claims that video contradicts Wikstrom's testimony regarding the gloves. Brief of Appellant at 4-5 (citing Exh. 118). This misrepresents the record. The video is not from the Newtown Apartments encounter, but a later encounter at 7-Eleven. RP 951-52, 1139. Police located two pair of gloves in the Defendant's vehicle. CP 166; RP 1625, 1637, 1642-44 (tactical gloves for shooting).

⁴ The Appellant misstates that it was Wikstrom who passed along this information in advance. Brief of Appellant at 4 (citing RP 995).

As they arrived at the 7-Eleven, Wikstrom asked Neil to keep the car in reverse, intuiting that they would want to “hit the gas.” RP 1195. The Defendant stood at Shaw’s door and asked to sample the product. RP 1200. When Shaw did not agree, the Defendant asked to see the product weighed. RP 1012, 1019, 1200, 1204. As Shaw placed the rock of heroin on the scale on the center console, the Defendant asked to enter the car. RP 1013, 1019-20. They refused, and instead Shaw invited the Defendant to look through the window at the scale. RP 1019-20. The Defendant unzipped his coat, pulled out a badge, said, “Here’s how we’re going to do this,” and told them to get out of the car. RP 1191, 1205, 1208. He “told us there was cops all around us and get the fuck out of the car.” RP 1021.

Shaw never drew his gun. RP 1021, 1027, 1179, 1203-04. Instead he screamed for Neil to go. RP 1022, 1206. But Neil froze, believing the Defendant to be a police officer. *Id.* Wikstrom yelled that the Defendant was pulling his handgun from his coat pocket, and he ducked. RP 1206-07. Then Neil drove off, and the Defendant started shooting. RP 1022-23, 1207. The 7-Eleven video shows the Defendant chasing the car as it backs up right, and then there is the muzzle flash. Exh. 118. He shot twice. RP 1444, 1447, 1533-34, 2678.

A bullet went through Shaw’s ribs, lungs, and heart, severing both major arteries at the top of the heart, killing him. RP (6/8/17) 44, 49-50.

Wikstrom called 911, and Neil ran traffic lights driving directly to the hospital. RP 1024, 12. Not wanting his friend to get in trouble, Neil cleared Shaw's pockets, removing the gun and the stash of cash Shaw always carried. RP 1025-27, 1049-51, 1449-51, 1457, 1514-15. He threw the rock of heroin on the ground, and Wikstrom disposed of the rest of the drugs. RP 1025, 1030.

Initially, the Defendant was charged with murder and criminal impersonation. CP 1-7. The information would be amended to add a charge of witness tampering after the Defendant arranged through another inmate to make sure Wikstrom did not testify. CP 8-10, 157-59; RP 850-51, 1786-88, 1793-94, 1810-11, 1838-39, 1856, 1986.

Voluntariness hearing. Before jury selection, the court held a CrR 3.5 hearing. RP 25-27. Detective Brian Vold testified that he, together with Detective Louise Nist, began the Defendant's interview with the Miranda advisement at 8:39 pm. RP 110-13. The detective collected background information, offered the Defendant the use of the restroom and some refreshment, and focused on developing rapport. RP 115-16, 138.

Ten minutes in, at 8:49, Bango requested an attorney. RP 114. At 8:50, a minute later, he rescinded that request, asking to reengage. RP 114, 116, 140.

Det. Vold advised that he would only agree to reengage if the Defendant would consent to be recorded "for his sake and for my sake." RP 114-15, 177. The detective reviewed the device to make sure he did not overwrite another recording and then started the recording at 8:54. RP 117, 143-44. The recording begins with another Miranda advisement, a summary of what had just taken place in the preceding few minutes, and the Defendant's expressed willingness to talk without an attorney. CP 171-72; RP 117-20; Exh. 370.

The interview lasted two hours during which time the Defendant made many improbable statements, admitted he had lied, and began over several times. CP 179-83 (claiming he was not trying to buy heroin and failing to mention the badge), 189-90 (claiming he was not even there); RP 120-21.

He claimed he shorted Shaw the full amount, paying him \$294 instead of \$300. CP 179-80. But Wikstrom and Neil did not recall a payment. RP 1026, 1212. The Defendant's statement was also incongruous with the money that was recovered. There was \$340 in Shaw's pockets and \$161 in his wallet. RP 1024, 1449-51, 1457, 1514-15.

He claimed that he had not brought any weapons despite the fact that he owned many weapons, was well trained in the use of weapons, and claimed he anticipated he might be robbed. CP 174-75, 179, 186, 198; RP

93, 97, 195-96. Instead he claimed he used a gun that Wikstrom supposedly brought to a deal with an old high school friend and which Wikstrom supposedly dropped noisily, but failed to notice. CP 175-76, 181.

The Defendant perseverated on Daniel Lopez and drug robberies (lics). CP 179-80, 186, 189, 191, 195, 201-02. He said Lopez had robbed Shaw. CP 201. Shaw confronted Bango about being involved in Lopez's robberies and warned the Defendant not to try to rob him, advising that he had brought his own protection. CP 180, 186, 197.

The Defendant claimed he displayed the lanyard badge around his neck to communicate "don't try no bullshit I'm a cop." CP 185-86. When Det. Vold pointed out that Bango had arrived at the meeting with the badge already around his neck, the Defendant claimed he had put it on, anticipating that *Shaw* might try to rob *him*. CP 186. Then he "could tell 'em hey, I'm 5 O and then get out of it." CP 186.

The Defendant argued the police should believe he did not intend to rob Shaw, because "I wouldn't do a lic by myself." CP 187. He claimed he shot Shaw in self-defense with Wikstrom's gun after Shaw pointed a gun at him and pulled the trigger twice with no discharge. CP 180-81, 198, 202. However, Shaw's recovered gun was loaded, operable, and showed no signs of any misfire. RP 1905, 1949-52, 2131-34, 2680, 2685. The Defendant claimed he saw the hammer move, but Shaw's gun did not have a visible

hammer. CP 180; RP 2123-24, 2681. He said he drove to Puyallup where he traded Wikstrom's gun to someone else for pills. CP 183. The murder weapon was found at Hyde Park along the route the Defendant had driven to meet Shaw, and therefore his likely route of egress. RP 1963-64, 2678; RP (6/1/17) 85-86.

Confronted with inconsistent facts each time, the Defendant acknowledged he had been "thinking through this all night," concerned that he would be "in jail for life." CP 195. He was "trying to cover up" and "playing chess." CP 190-91. When he made no headway, he said "that's why I asked for a lawyer." CP 200. The detective pointed out that the Defendant had rescinded that request, been readvised of his rights, and waived them. CP 201. The Defendant then accused the detective of lying about Shaw not having a gun. CP 201. The detective corrected him, saying he knew Shaw had a gun. CP 201. He just did not believe Shaw had used it. CP 201.

The Defendant testified at the CrR 3.5 hearing that he had asked for an attorney immediately upon being advised of his rights. RP 190. He claimed the detective had coerced a waiver by threatening to search his home thereby involving his wife and children. RP 190-92.

The Defendant's signature on the Miranda form rebutted his first claim. RP 200-01, 413-15. The detective's testimony rebutted the second

claim. RP 223-24. Det. Vold testified he did not tell the Defendant that his wife's residence would be searched, that his wife would be arrested, or that DSHS would take his children. RP 223-24. The Defendant had been living in hotels and motels, not with his wife. RP *Id.* There was "zero linkage" to the Defendant's wife and no nexus between the crime and the Puyallup home which would have justified a search warrant. *Id.* "That topic never came up in any shape or form in this investigation." RP 224.

The judge found that the detective was credible, and the Defendant was not. RP 417-19.

Jury selection: The State exercised a peremptory strike against Juror 26, and the defense raised Batson challenge. CP 801. The defense considered that Juror 26 was the only African American juror who could be seated on the jury. RP 810-11. There was one other African-American juror who could be seated as an alternate. *Id.*

The State disagreed with the defense's characterization of Juror 26 as being racially cognizable as an African American. RP 813-14. The juror had explained that her mother is Okinawan and Japanese. RP 580. Her father is multiracial, representing "three American races" including English and German, but "listed as mulatto in the genealogy." *Id.* The juror had explained that she had grown up all around the world due to her father's employment in the military. *Id.* Professionally, she had developed a

concept, a neologism, to describe her unique perspective of being “from more than one cultural frame of reference.” RP 579. “Multicentricism” describes “the world view of individuals who come from split-genetic philosophical, cultural frames of reference who think and communicate and access information from more than one frame at the same time without confusion, utilizing multiple levels of sensitivity transmission.” *Id.*

The juror explained that, in 1991, someone had affronted her with the N-word. RP 578. But she herself had described an Asian family culture. RP 577-81 (sister’s Japanese name and juror’s food culture). The prosecutor pointed out that Juror 26 was not the only Asian juror who could be seated. RP 814. “I would hazard a guess [there] are two Pacific Islanders still in the first 12 that are in the box that have been passed by the State repeatedly”. RP 814.

However, if the court considered the juror to be African American, she would not be “the sole black juror that can sit on this panel when we do know that there’s one more that’s potentially coming that could end up on the panel.” RP 814. “We haven’t excluded the only black juror.” *Id.*

The prosecutor then explained that his reasons for exercising a peremptory strike. Her sister had been murdered. RP 815. Defense counsel had stricken another juror for this reason. *Id.* “I’ve got concerns whether or not this is a good case for anybody.” *Id.*

He was also concerned with “what I perceive is a forgiving nature ... the way she presented [how] her perceptions and other people’s perceptions” could differ drastically. RP 815. The juror had equated the smell of gasoline with the smell of kimchee. RP 581, 815. “That’s the type of [] thing that I worry about in a self-defense case.” RP 815. And this would be so regardless of race or ethnicity. RP 816 (“to quote somebody recently walking up the stairs, this juror would have been struck if she was a white redhead or a 60-year old white male”).

Unlike in the *Batson* case, here no other peremptory strikes had been exercised against jurors of any racially cognizable minority group so as to suggest a pattern of discriminatory intent. RP 817-19. Nor was the judge aware of past discriminatory behavior by the prosecutor. RP 818.

The court noted that Juror 26 indeed had a unique job, perspective, and outlook on the world. RP 816-17. She also had a strong, volunteered point of view and commanded respect. RP 817 (“both sides were very deferential to her”).

The court denied the challenge, finding no pattern of purposeful elimination of minorities and a credible, nondiscriminatory basis to exercise the strike. RP 820.

Defense renewed the challenge after the verdict in a motion for new trial. CP 484-516. The State responded. CP 539-44.

The court noted that the law changed⁵ after the Defendant's trial. CP 551. For the purposes of this motion, the court decided to consider Juror 26 to be of African American descent. *Id.* Although the court did not find a prima facie case of racial discrimination, it engaged in that analysis as if that standard had been met. *Id.* The court found that "the State did articulate sufficient race-neutral reasons for excusing Juror No. 26." CP 553. And it believed that the peremptory strike was not based on a racial motivation or even an unconscious bias. CP 552.

Jury instructions: The defense objected to a first aggressor jury instruction, proposed by the State. RP 2600. The prosecutor explained that the jury could conclude from the evidence that the Defendant was attempting to rob Shaw and that this "resulted in them throwing the car into reverse and Mr. Shaw grabbing for the gun and the defendant then shooting him." RP 2601. "I think there's a lot of ways we [can] get there, that he was the initial aggressor here." RP 2601.

The court permitted the instruction, explaining "I don't think there is no material issue of fact that the defendant was not the first aggressor. I think that's a factual issue that the jury is entitled to decide." RP 2601.

⁵ *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017) issued ten days after the verdict in this case. CP 487.

In closing argument, the prosecutor described this first aggression – the attempt to rob. RP 2662, 2669.

The jury convicted the Defendant of intentional murder in the second degree with a firearm enhancement, felony murder, criminal impersonation, and tampering with a witness. CP 419-25. The court dismissed the felony murder count. CP 521.

IV. ARGUMENT

A. The court’s finding that there was no discriminatory intent in the exercise of the peremptory strike is not clear error.

The Defendant challenges the removal of Juror 26.

The legal standard for a *Batson* challenge changed after the trial.

Batson detailed a three-part analysis:

1. The trial court must determine whether there is a prima facie case of purposeful discrimination based on the inferences arising from the totality of relevant facts.
2. If a prima facie case has been made, then the party requesting to remove the juror must provide a race-neutral explanation for the strike.
3. Finally, the trial court must then consider if the challenger has established purposeful discrimination.

Batson v. Kentucky, 479 U.S. 79, 93-94, 97-98, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Ten days after the jury verdict, the Washington Supreme Court adopted a bright-line rule requiring that a trial court recognize a prima facie case of discrimination when the sole member of a racially cognizable group

has been struck from the jury. CP 487; *City of Seattle v. Erickson*, 188 Wn.2d 721, 734, 398 P.3d 1124 (2017).

In 2010, the Washington Supreme Court had rejected this same bright-line rule in a 5:4 vote. *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010), *abrogated by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017). However, the concurring fifth justice in *Rhone* explained in a later case that she only concurred for the reason that the parties were not on notice of a new rule. *State v. Meredith*, 178 Wn.2d 180, 186, 306 P.3d 942 (2013), *abrogated by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017). Nor was the supreme court inclined to adopt a rule where the trial court had not considered the argument. *State v. Saintcalle*, 178 Wn.2d 34, 35, 309 P.3d 326, 329 (2013), *abrogated by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017).

In this case, defense raised the argument at the time of objection. RP 801. In an abundance of caution, the trial court found that the multiracial individual of predominantly East Asian heritage was African American. The trial court also found, in an abundance of caution, that although another African American individual could be seated as an alternate juror, it would proceed *as if a prima facie case of discrimination had been made*. CP 551 (“engaged in an analysis as if that test had been met”). Because the court engaged in this analysis, the Defendant’s fixation on the court’s

disagreement that there was a prima facia showing of discrimination (Brief of Appellant (BOA) at 21-22) is not meaningful. The State also concedes it is appropriate to apply the *Erickson* bright-line rule to this case.

We move on to the second step. When a prima facie case of discriminatory purpose has been made, the court must require the striking party to explain the basis for the strike. *Erickson*, 188 Wn.2d at 734.

The prosecutor provided several reasons for exercising the strike:

1. Juror 26's sister had been murdered.
2. The juror was of the belief that individuals can reasonably perceive objective phenomena entirely differently.
3. The juror's invention of words and fields of study suggested she might not follow the court's instructions.

CP 541-42.

First, Juror 26's younger sister had been murdered, making this a less than ideal trial for her. CP 541; RP 815. Courts regularly remove jurors **for cause** when they or someone close to them have been victims of similar crimes. This results in rape trials with juries who claim not to know anyone who has been sexually assaulted – an unlikely statistic and troublesome demographic, but not offensive to *Batson*. The theory may be that these jurors will be too emotional or will experience discomfort which will interfere with their ability to hear the evidence as it is being presented. Or the court may be concerned that these jurors will not be able to separate the

facts of the particular case from their own, personalizing the evidence or comparing it to the evidence from their own experience. Or there may be a concern that these jurors will try to exact justice from this defendant that was not obtained in their own experience. In this case, the prosecutor was also concerned about the juror's forgiving nature. RP 815. She could use the Defendant as a proxy for her forgiveness of her sister's murderer.

Second, the prosecutor expressed a concern that the juror had unlikely perceptions. CP 541; RP 815. She thought gasoline smelled like kimchee. RP 581. And she believed that this extreme divergence of perception was common. This could be troublesome in a case where the Defendant claimed he had seen and heard Shaw pull the trigger. A reasonable person would not find this credible. RP 2684-88. A reasonable person would perceive from the video that the Defendant shot as Shaw was retreating, not attacking. But was this a reasonable juror or would she believe that there were simply different, equally valid perceptions? The prosecutor did not want to take the chance in this self-defense case.

Finally, the prosecutor noted that the juror was creative and independent-minded, having invented new fields of study and associated terminology. CP 541-42. This suggested a rebel's spirit and that she might be less likely to follow the court's instructions.

The Defendant objects to this last reason as being “exactly why the Court altered the *Batson* test for Washington courts.” BOA at 24. But the bright-line rule is not meant to seat jurors who will disregard court instruction. The bright-line rule was adopted “to more adequately recognize and defend the goals of equal protection.” *Erickson*, 188 Wn.2d at 733. And here, the prosecutor was not concerned about the juror’s racial or ethnic perspective, but with whether she would recognize the court’s authority to define terms.

The last step in the *Batson* analysis is the trial court’s determination whether, based on the explanation and the totality of the circumstances, the strike was racially motivated. *Erickson*, 188 Wn.2d at 734. *Batson* challenges are reviewed for clear error, deferring to the trial court to the extent that its rulings are factual. *Saintcalle*, 178 Wn.2d at 41. Clear error exists when the court is left with a definite and firm conviction that a mistake has been committed. *Id.* The trial court’s ultimate finding as to discriminatory intent will largely turn on credibility evaluations. *State v. Hicks*, 163 Wn.2d 477, 493, 181 P.3d 831, 839 (2008) (cited favorably by *Erickson*, 188 Wn.2d at 730); *Batson*, 476 U.S. at 98 n. 21. The lower court’s finding is, accordingly, given “a high level of deference” on review. *Id.*

The Defendant argues that the standard of review is *de novo*. Brief of Appellant at 24 (citing *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018)). This is incorrect. *Jefferson* is a GR 37 case, which interprets subsection (e)'s requirement for a determination of "an objective observer." *Jefferson*, 192 Wn.2d at 249-50. It does not apply to this case. CP 551 ("The Court is not considering GR 37 which was not in place at the time of the Bango trial."). Nor has the Defendant argued that GR 37 applies here. This trial was concluded on June 26, 2017. RP 2778-83. The rule was adopted effective April 24, 2018. The standard remains clearly erroneous, giving great deference to the trial judge.

The trial court noted that the sister's killing would have been a legitimate basis to strike for cause. CP 552. "[T]he State and Defense often strike jurors who answer such questions in a positive manner." *Id.* In this case, neither party had challenged her for cause. RP 582. But either party might have maintained reservations on this basis, and it would be a non-offensive justification for a peremptory strike. CP 552. "[T]he prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97.

The court noted that "unique perceptions of the world," even by jurors who assert that they can follow the court's instructions, "can certainly be the subject of peremptory challenges." CP 552. And the court made a

credibility determination that the prosecutor was not motivated by racial bias, even unconscious, when considering the juror's "philosophy on cultural influences and the development of special vocabulary to describe that philosophy." *Id.*

In considering the totality of the circumstances, the court noted that it "saw no pattern of eliminating all people of color or ethnic minorities." CP 553.

Based on the trial court's credibility determinations and the bases proffered, one is not left with a definite and firm conviction that a mistake has been committed. This trial court's decision finding no racially discriminatory purpose was not clearly erroneous.

B. The court properly provided a first aggressor instruction where there was evidence from which the jury could have concluded that Defendant's attempt to rob Shaw provoked him to pick up a gun in self-defense.

The Defendant challenges the court's use of a first aggressor instruction. BOA at 25. A first aggressor instruction is appropriate where there is credible evidence that the defendant provoked the need to act in self-defense. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999); *State v. Sullivan*, 196 Wn. App. 277, 289, 383 P.3d 574 (2016), *rev. denied* 187 Wn.2d 1023 (2017). The evidence is reviewed in the light most favorable to the State, who requested the instruction. *Sullivan*, 196 Wn. App. at 289.

The evidence here supported as many theories as the Defendant provided stories. However, certainly Wikstrom and Shaw were fearful that the Defendant was trying to rob Shaw. The Defendant was desperate, suffering from withdrawal. CP 177 (“didn’t want to be hurting and sick”). He was associated with Lopez, who had just robbed Shaw, a dealer known to carry both heroin and a lot of cash. He had shown up with guns and no money. He parked with his car facing out as if to make an escape after getting what he came for.

The Defendant was making demands incompatible with someone making only a moderate purchase from someone who owed him no favors and did not know him. He wanted to meet the dealer face to face. This meant Wikstrom would not be compensated for his role. And it meant Shaw would be exposed while holding both product and cash.

Preparing to meet Shaw, the Defendant began to pull on his tactical gloves. This terrified Wikstrom, and they fled.

The Defendant tried to assuage their concerns on the phone, but Shaw demanded they meet in a public place and advised that he was bringing protection. Shaw told Bango that he knew about his association with Lopez. He warned Bango not to try to rob him.

When they met a second time, again the Defendant made power plays. He changed up the meeting place from Safeway to 7-Eleven at the

last minute. He put his phone on the top of Neil's car in a gesture of dominance. Despite how poorly this meeting was going, he requested more favors – a taste, to watch the product weighed out in front of him, and to enter their car.

He had lost his opportunity to rob Shaw in a dark neighborhood. He was denied his opportunity to rob Shaw in the cover of Neil's vehicle. But he had one more ploy. The Defendant thought he could strong-arm Shaw with a pretense of authority. Bango showed his badge and demanded everyone get out of the car. Shaw did not believe the Defendant was police. He told Neil to drive away. And Wikstrom saw the Defendant's gun.

As the car was reversing and they were fleeing, the Defendant claimed that Shaw raised a handgun without discharging a bullet, which communicated a threat to the Defendant to stop pursuing them. If the jurors believed Shaw raised his gun, they could have found it was precipitated by the robbery attempt and the unlawful arrest. Shaw had a right to resist the unlawful arrest with reasonable and proportionate force. *State v. Valentine*, 75 Wn. App. 611, 617, 879 P.d 313 (1994).

The Defendant tries to frame his act as limited to the showing of the badge. BOA at 28. This one gesture cannot be viewed in isolation. It would be akin to saying there is nothing harmful about plugging in an appliance, disregarding that the appliance is under the water in the bathtub with a

human being. Context is important. *Sullivan*, 196 Wn. App. at 289 (the provoking act can be part of a course of conduct).

The evidence is reviewed in the light most favorable to the State. The Defendant did not pull a badge merely to identify himself. He did not pull the badge to say, everyone calm down and let's complete this illegal drug transaction peacefully. And he did not pull the badge to say, please don't hurt me or you'll be in big trouble. He said, "Here's how we're going to do this," and he "told us there was cops all around us and get the fuck out of the car." RP 1021, 1191, 1205, 1208. This was an attempt to get them to hand over the drugs and money. This was not mere words or a mere display. It was a robbery. And the parties knew Bango was armed.

The prosecutor expressed this in closing. RP 2662, 2669. If the jury believed Shaw lifted the gun at this point, there was credible evidence to show that the Defendant provoked the need to act in self-defense. The instruction was justified under the standard.

Reversal is not required where an erroneous jury instruction was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). In this case, the Defendant's entire claims rests upon his credibility. He was caught in numerous lies. He lied about not being there, about only buying pills, omitting the badge, about where he got the gun that he used to kill Shaw, about how he disposed of the gun, about the

kind of gun Shaw possessed, about paying for the drugs, about the ability of Shaw's weapon to fire without discharge with a visible hammer, about not chasing after the car, about being unable to run, etc. He falsely accused the detective of turning the tape off and on and threatening his wife and children. He falsely claimed he asked for an attorney immediately, contrary to his signature on the Miranda form. Even taking him at his word, he appeared dishonest. He claimed he shorted Shaw in the price and stole and sold Wikstrom's gun. He admitted on tape that he was "trying to cover up" and "playing chess." And finally, he intimidated a witness.

Based on the testimony of eye witnesses, the videotape, the forensic evidence, and the Defendant's lack of credibility, if the instruction were error, it would be harmless beyond a reasonable doubt. There was no credible claim of self-defense.

C. The trial court made no error in admitting the Defendant's statements.

The Defendant challenges the admission of his recorded statement. BOA at 31.

Initially, he claims his statement was coerced. BOA at 31. The test for determining whether a confession is voluntary is whether the behavior of the state's law enforcement officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined. *State v. Tucker*, 32 Wn. App. 83, 85, 645 P.2d 711 (1982).

The Defendant claimed that his statement was coerced by a threat to apply for a search warrant for his wife's domicile and involve CPS if the circumstances justified it. Subjective fear of legal process is not coercion. *State v. Osborne*, 35 Wn. App. 751, 754, 669 P.2d 905, 908 (1983), *aff'd*, 102 Wn.2d 87, 684 P.2d 683 (1984) (citing *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) (a defendant who pled guilty after his incarcerated, co-defendant wife threatened to kill herself was not coerced)).

But in any case, Detective Vold testified that this did not happen. The court found the detective credible and the Defendant not credible. The Defendant takes issue with this finding. BOA at 34-35. However, the time to have raised this argument has past. Credibility determinations are solely for the trier of fact, and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125, 126 (2003).

Secondarily, the Defendant asks this Court to create a rule requiring interrogations to be recorded in order to be admissible. BOA at 36. Notwithstanding that this interview was actually recorded, this is the wrong venue for the request. The Defendant notes that the Washington Supreme Court has repeatedly denied the request for such a rule. BOA at 37 (citing denied petitions for review in 1992 and 2009). The Defendant fails to note that the Washington Supreme Court denied the request much more recently.

Drafting quality rules requires a body of objective and qualified rule-making experts. However, last year WACDL proposed a court rule⁶ directly to the Washington Supreme Court, circumventing the Criminal Law Section and the Rules Committee. Proposed CrR 3.7 would have required audiovisual recording of all “custodial and non-custodial interrogations of person under investigation for any crime.”

The Washington Supreme Court received 176 comments (some with multiple signators).⁷ A minority (68 individuals) favored the rule. The WAPA Executive Director observed that the extension of protections beyond those in constitutions “are policy questions best left to the legislature” which “possesses mechanisms for gathering public input such as hearings and committees that this court lacks.”⁸ The trial judges who commented agreed and criticized the attack on their discretion.⁹ The proposed rule would have conflicted with SSB 5714 which admits testimony subject to a cautioning instruction, properly leaving the question to the factfinder. Laws of 2019, ch. 359 (SSB 5714).

It also conflicts with Chapter 9.73 RCW which respects a person’s right not to be recorded. In this case, the recording did not begin until the

⁶ Proposed CrR 3.7. <https://bit.ly/2BnNm7g>

⁷ http://www.courts.wa.gov/court_rules/?fa=court_rules.commentDisplay&ruleId=669

⁸ <https://bit.ly/2oH1BkT>

⁹ <https://bit.ly/2C4z9MF> ; <https://bit.ly/36r1zhW> ; <https://bit.ly/2WxaEBI> ; <https://bit.ly/2oIMkju> ;

Defendant consented. This is consistent with our privacy laws. RCW 9.73.080 (criminalizing recording without consent). The detective informed the Defendant that, regardless of his desire to reengage, the detective would no longer talk to him unless and until he agreed to be recorded.

Many commenters noted that a court rule would come with no funding to purchase, store, and maintain equipment and data. One of the reasons body-worn cameras are a rarity is because they are cost prohibitive in many jurisdictions. The Tacoma Police Department has an audiovisual system, Case Cracker, but it is undependable, which is why the detective made an audio recording only. RP 127-28, 175.

After reviewing the comments, the Washington Supreme Court ultimately rejected WACDL's proposed rule.¹⁰ This court is not in a better position than the Washington Supreme Court to create a rule.

D. The court did not abuse its discretion in excluding inadmissible hearsay.

The Defendant complains that the court excluded hearsay testimony. BOA at 39. The defense wanted to elicit testimony that the Defendant told Wikstrom that Daniel Lopez had stolen the guns in the photos on the Defendant's cell phone. RP 1315. The prosecutor objected, noting that this

¹⁰ <https://bit.ly/2JeLVfN>

was hearsay. RP 1315. The prosecutor also noted that if the testimony was elicited, it would open the door to more information about the robberies, including the fact that the Defendant was suspected of being involved in those thefts. RP 1316; RP (6/1/17) 40 (listed in police reports as both a suspect and reportee). The court excluded the testimony, advising that the Defendant could testify to this information if he took the stand, “but I’m not going to elicit it from Mr. Wikstrom.” RP 1315-16.

Citing *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999), the Defendant concedes evidentiary rulings are reviewed for an abuse of discretion. BOA at 39. *Finch* also provides that an out-of-court statement by a party opponent is inadmissible hearsay when it is self-serving, rather than offered against the speaker. *Finch*, 137 Wn.2d at 824-25. See ER 801(d)(2) (admits only “admissions” offered “against” the party opponent).

Here, the defense proposed to elicit hearsay to prove the Defendant was no longer in possession of guns and not complicit in Lopez’s robberies. But a defendant is not allowed to elicit his own exculpatory out-of-court statement through a witness.

The problem with allowing such testimony is that it places the defendant’s version of the facts before the jury without subjecting the defendant to cross-examination. *State v. Bennett*, 20 Wash.App. 783, 787, 582 P.2d 569 (1978). This deprives the State of the benefit of testing the credibility of the statements and also denies the jury an objective basis for weighing the probative value of the evidence. *Id.*

Finch, 137 Wn.2d at 825.

The Defendant claims that he was entitled to present any evidence to the jury so long as it met the threshold of relevancy. BOA at 39-40. The Defendant does not have a right to present hearsay evidence.

A defendant's right to admit evidence pursuant to his right to compulsory process **is subject to established rules of procedure and evidence** designed to assure both fairness and reliability in the ascertainment of guilt and innocence. *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In this case, the right to compulsory process does not allow the defendant to escape cross-examination by telling his story out-of-court.

Finch, 137 Wn.2d at 825 (emphasis added).

The court did not abuse its discretion.

E. There is sufficient evidence for the conviction.

The Defendant challenges the sufficiency of the evidence for absence of self-defense. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* A reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). After viewing the evidence in the light

most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119 Wn.2d at 201.

Under this standard, the Court must consider that the State's witnesses were credible and the Defendant was not. The State's eyewitnesses testified that Shaw never removed his handgun from his waistband. RP 1021, 1027, 1179, 1181, 1184, 1203-04. The expert witnesses testified that Shaw's gun did not have a visible hammer. Therefore, Bango did not see or hear the hammer move. The expert described that the gun was loaded and operable. Therefore, Bango did not see it misfire. In other words, the Defendant did not reasonably believe that he was in in any imminent danger or that Shaw intended to harm him.

The Defendant claims "[t]he videotape confirmed Mr. Bango's statement to Vold that he saw Shaw reach for and raise his gun" prior to the Defendant firing. BOA at 44. This is not what the videotape shows. Exh. 118. Neil's car is visible at the top of the frame in screen 10. The camera faces the driver's side. It is possible to make out two occupants in the front seat, but not their features, clothing, or any object. The Defendant approaches from the top of the screen and places something on Neil's car.

He retrieves something from his own vehicle, closes the door, stands at the front passenger door, and appears to converse with the front seat passenger. The Defendant pulls the lanyard badge from his coat and takes a step to the rear as if to allow the passenger to open the door and exit. Neil begins to back his car up. The Defendant chases the car a full car length as it backs up straight. He chases the car as it backs right in a circle. A branch obscures the passenger compartment. And finally, as the car has turned almost 180° from its parking spot, the Defendant shoots. Neil's car leaves, and the Defendant returns casually to his own vehicle. The video does not show Shaw reach for or raise a gun.

The Defendant claims he accurately described Shaw's gun. BOA at 44 ("make, model and distinctive writing on the barrel"). If this were true, it could be because Shaw described it to him in the phone call or in person. RP 2714, 2728 (defense counsel arguing this). But it is simply not the record that he accurately described Shaw's weapon. The Defendant described an unloaded or misfiring 1911 style Para Ordnance, stainless and black with visible hammer and dovetail. CP 179-80. Shaw's gun was a fully operable .40 caliber Smith & Wesson Kahr pistol with no visible hammer and with an unspent cartridge in the chamber. RP 2121, 2680. The Kahr does not have the dovetail design.

The Defendant argues that Instruction No. 44 relieved the State of the burden of disproving self-defense. BOA at 44. This is false. The instruction explains that self-defense is not being raised as a defense to criminal impersonation. This is consistent with the Defendant's own story that he pulled out the badge *before* Shaw raised his weapon. CP 185-86. It is also consistent with the Defendant's theory of the case. RP 2722, 2728.

There is sufficient evidence for the convictions.

F. The appeal does not raise a plausible double jeopardy claim.

The Defendant claims a double jeopardy violation for convictions for both intentional murder and felony murder. BOA at 45. There is no factual basis for the claim. The Defendant only has a conviction for one count of intentional murder in the second degree. CP 521-22, 525. The felony murder count was dismissed at sentencing. CP 521.

The Defendant claims, without demonstrating, that the dismissal was inadequate, and that the magic language should have been vacation. BOA at 45-46 (arguing the court "erred when it dismissed the conviction for felony murder rather than vacated it."). However, there is no remedy to be given where there is nothing to vacate. There is only one conviction. There is no plausible double jeopardy claim raised in this brief.

V. CONCLUSION

The State requests this Court affirm the Defendant's convictions and sentence.

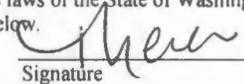
RESPECTFULLY SUBMITTED this 4th day of November, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney


TERESA CHEN WSB# 31762
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file of U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her 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.

11-4-19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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