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Court of Appeals
Division III
State of Washington

No. 31694-7-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

JASEN L. BERTRAM,
Defendant/Appellant.

BRIEF OF RESPONDENT

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I. RESPONDENT'S STATEMENT OF THE ISSUES

A. It was proper for the trial court to include Instruction 21, the aggressor instruction, WPIC 16.04, and the trial court used the proper language for that instruction.

B. The State disproved self-defense beyond a reasonable doubt and the evidence was sufficient to support Murder in the Second Degree.

C. Evidence was sufficient to support Robbery in the First Degree and Possession of Stolen Firearm convictions.

D. There was no ineffective assistance of counsel.

E. The trial court properly denied the motion for mistrial.

F. There was no cumulative error.

II. STATEMENT OF THE CASE

On or about June 3 or June 4, 2012, a 911 call was received reporting someone possibly having been shot near Dryden. RP 178, In. 20-21. Deputy Mark Hegberg from the Chelan County Sheriff's Office was dispatched. RP 180, In. 21-25. Deputy

Hegberg described that at approximately midnight, he was dispatched to an area of a country road where there were small cabins on one side and travel trailers and a parking lot on the other side of the road. He further indicated that the cabins were small, that there was a restroom facility there, and there is a general shower room in the area of the restroom. RP 181, ln. 12-24.

The deputy arrived on the scene and contacted the reporting party, Jason Hansch. RP 182, ln. 12-17. The trailer where the victim was located was described as a small RV trailer with a small kitchen and a couch. RP 182, ln. 22-24. When the deputy entered, he noticed the victim, Cody Johnson, lying on the floor of the hallway. There were several items on the counter, including whiskey and drug paraphernalia, and there was a couch cushion lying over Mr. Johnson's head with a black jacket covering the cushion. RP 183, ln. 15-20. The deputy checked to see if the victim was alive; he did not feel a pulse and the victim did not appear to be breathing. It was apparent to the deputy that the victim was deceased. RP 183, ln. 22-24.

Deputy Hegberg and Deputy Bryan Jones made sure nobody else was in the RV, backed out and called their supervisor, who called detectives. They put crime scene tape around the

immediate scene and stood by the door, securing the residence to make sure no one else entered until the detectives arrived. RP 184, In. 4-10.

Sgt. Kent Sisson also testified that he was involved in the homicide investigation. He was requested to locate a handgun that may have been removed from the trailer where the crime occurred. He and other officers were advised it was a Springfield 1911 semi-automatic handgun. RP 192, In. 2-8. They began to search about 50 feet from the trailer along North Dryden Road northerly toward Dryden. Then they came back and searched in the opposite direction toward Olalla Canyon Road. Sgt. Sisson and a group of individuals walked that area in an attempt to find the firearm. RP 192-193. At one point they were notified that a volunteer had located a bright blue metallic flashlight lying on the shoulder of the road. The flashlight was located off the right-hand side of the road if traveling east bound on the North Dryden Road. RP 193, In. 20-25.

Deputy Gene Ellis was also at the scene and advised Sgt. Sisson that while looking in the general area of the flashlight, the firearm they were seeking had also been found. RP 194, In. 2-5. A detective took possession of the flashlight and the firearm. RP

199, In. 6-7. Deputy Ellis testified that the gun and the flashlight in the courtroom were the same ones they collected that day, and that they found them approximately 1/10 of a mile from the crime scene. RP 205-206, In. 1. He further testified that the safety on the gun was in the "on" position. RP 207, In. 10-12. He indicated the hammer was back, the safety was on, and there was a round in the chamber. RP 211, In. 13-15. Furthermore, Deputy Ellis testified there was a clip in the gun and there were rounds in the clip. RP 213, In. 2-6. The gun was unloaded by Detective Manny Brincat, who testified that there were four bullets in the magazine and a bullet in the chamber. RP 221, In. 25; RP 222, In. 6.

Detective Jeff Middleton testified in the trial that he was called by a detective sergeant to look for a person by the name of Bridget Jack-Lee. RP 233, In. 1-4. He didn't know any details but they had information that Ms. Jack-Lee may have been a witness as to something that happened on the early morning of June 4. RP 233, In. 7-10. They eventually found Ms. Jack-Lee in the early morning hours of June 5. RP 233, In. 19-20. She was cooperative and was willing to talk to the detectives. RP 235, In. 7-13.

Detective Middleton also made contact with a person named Mr. Cleek on Brown Street in Wenatchee. Mr. Cleek had found a

backpack at the edge of his back yard and notified police after he had inspected the contents. There were two firearms in it along with miscellaneous clothing and other items. RP 236, In. 15-18. Mr. Cleek lives at 1111 Brown Street and the defendant Jasen Bertram's address was 1119 Brown Street, just a half a block away. RP 237, In. 15-25.

Detective Randy Grant arrived at the homicide scene at approximately 1:40 in the morning of June 4. RP 244, In. 12. He described the scene similarly as Deputy Hegberg; very dark. RP 245, In. 7-23; RP 246, In. 23. Sgt. Moore wrote a search warrant to make entry into the trailer which was granted. RP 248, In. 3-8. In his interview with Jason Hansch, the detective indicated that Mr. Hansch talked about Bridget Jack-Lee. RP 249, In. 10-11. Also, Ms. Jack-Lee's wallet and driver's license were found inside the trailer with the victim's body. RP 249, In. 19-22.

Detective Grant described what was inside the trailer: the victim was lying on the ground with his feet down toward the bed at the foot of the trailer and his head at the other side. They saw a blood pattern along one of the walls in the trailer, along the outer door of the bathroom and a storage area beside it. The detective saw a lot of clutter. Immediately after opening the door directly to

the left of the detective, there was a whiskey bottle and some drug paraphernalia. The detective said that in front of him was a 42-inch television box. He didn't know at the time what was in the box. He noted there was a lot of clutter around the kitchen area, and the couch was directly in front of him. In the back of the trailer there was a bed just beyond the victim's feet; they could also see some other items on the bed. RP 250, ln. 7-21.

Detective Grant further indicated there was a blood trail that started along the right side of Mr. Johnson, the victim; it started about equal to where Mr. Johnson's knees were and went along from there. There was a mirror outside the bathroom door which was closed. RP 250, ln. 23-25; RP 251, ln. 1-2. The blood trail that the detective described told him a couple of things. In general, the detective indicated it showed that something had moved from point A to point B; blood had already formed on it, it hits the wall and then goes back and forth. RP 253, ln. 15-21.

Detective Grant went on to testify that based upon the blood trail that extended from where it started, it was evident that the victim's head went against the wall and slid back to where he was lying flat on the floor. The victim's head was only about 3 or 4 feet off the floor when shot. RP 254, ln. 13-23.

The detective also stated that evidence was collected at the scene. They took a camouflage mask which was sitting on the bed directly in line with the narrow hallway of the trailer. Underneath the mask was a Glock .40 caliber pistol. They took the gun and the three casings that were found at Mr. Johnson's feet. RP 255, In. 13-19. The body of the victim was collected from the scene by the coroner. RP 255, In. 20-23. The mask was sent to the crime lab for analysis. RP 256, In. 12-15.

Detective Grant also testified that they did a thorough search of the trailer and did not find a bag of heroin, but did find two small baggies containing a small amount of crystal powder, which he believed, based upon his experience and training, were possibly crystal meth but that was not tested at the crime lab. RP 697, In. 1-14.

Detective Mitch Matheson also testified. RP 449, In. 23-24. He indicated that he measured the outside of the trailer. It was exactly 25 feet and was a standard 8-foot width unit. RP 453, In. 9-11. He described the scene as did Detective Grant. RP 457-458. Detective Matheson further indicated that he found a list in the house which described a couple of items, one of which was a .45 caliber gun and two .22 caliber guns. RP 459, In. 1-4. He

indicated they located a couple of .40 caliber bullet rounds that were lying in the area—one was underneath the victim's left leg and it became visible when the victim was removed. RP 460, In. 2-8. He further indicated that they located what he described as a camouflage-type balaclava, or something you put on your head. RP 461, In. 4-10. They also located a handgun underneath the balaclava. RP 461, In. 10-11.

Detective Matheson indicated they found the body in the bathroom/bedroom area of the trailer. Because the body was lying a particular way right by where the door opens up, it was surmised that most of the activity probably took place in this area and the victim was shot at a downward angle, and that's why the detective looked for the shells in a particular area. RP 469, In. 2-9. He also testified that a line of blood was approximately 2 feet above the floor. RP 472, In. 8-10. Furthermore, upon finding the Glock, they received information that the Glock was a stolen firearm. RP 474, In. 24-25; RP 475, In. 1-5. A firearm was stolen from the Gorge Amphitheater near George, Washington. RP 475, In. 11-14. They further determined that the defendant, Jasen Bertram, had worked at the Gorge Amphitheater during that frame time. RP 476, In. 5-8.

Detective Sergeant Jerry Moore also testified in this case. RP 509, In. 9-18. Sgt. Moore indicated that the deputies secured the trailer the night the incident occurred. RP 511, In. 1-4. They determined that the deceased person was Cody Johnson. RP 511, In. 16-17. They did receive a telephonic search warrant in this case. RP 512, In. 12-18. He indicated they took three shell casings, found two rounds, two bullets in the trailer, a Glock pistol on the bed, they found a head covering that could be worn over one's head like a mask, they took some clothes, and the deceased was also removed from the trailer. RP 514, In. 9-15. They discovered the third bullet inside the body of Mr. Johnson. RP 515, In. 19-24.

Sgt. Moore indicated that Jason Hansch advised that the victim, Cody Johnson, had a girlfriend named Bridget and they ultimately determined it was Bridget Jack-Lee. An attempt to locate was put out for Ms. Jack-Lee since there was a good possibility she might have been there or had information. RP 516, In. 15-21. Ms. Jack-Lee was interviewed by Detective Grant and Sgt. Moore. RP 517, In. 3-7. Ms. Jack-Lee indicated that earlier that day she was with the defendant, Mr. Bertram. She indicated she had contact with Mr. Bertram after Mr. Johnson had been shot. Mr. Bertram

was identified in the courtroom as being the defendant. RP 517, In. 10-17.

Sgt. Moore further testified that he interviewed Mr. Bertram at the sheriff's office. Mr. Bertram voluntarily drove his own vehicle there and was cooperative. They asked Mr. Bertram questions about the day in general. Bertram indicated that he did have contact with Ms. Jack-Lee and had also met with her a week prior. He indicated he was going to attempt to help her get clean from drugs. RP 519, In. 17-25; RP 520, In. 1-5. Mr. Bertram further indicated that he spent a few days with her and had met with her at a park in Wenatchee and convinced her to move in with him to get clean. However, Ms. Jack-Lee left his house on Sunday, June 3. RP 520, In. 18-25. Bertram further indicated to Sgt. Moore that he drove around that night and stopped at a mini-mart on Miller and Chelan Streets in Wenatchee. Moore confirmed that Dana Dilts, who was a friend of Bertram's, picked him up after the interview. RP 521, In 4-21. The deputies kept the car and some other clothing and did some DNA type testing on some of the clothing. RP 521, In 22-25. They swabbed the inside of Mr. Bertram's cheek for DNA trace evidence. RP 522, In. 1-6.

Dana Dilts testified as a State's witness. Ms. Dilts indicated that she knew Jason Bertram and was able to identify him for the record. RP 546, In. 13-21. She indicated that she contacted Mr. Bertram at the sheriff's office and picked him up back in June 2012. RP 547, In. 9-16. She further testified that after Mr. Bertram left the interview at the sheriff's office, Mr. Bertram talked to her about what happened and indicated that he had indeed shot Cody Johnson. RP 547, In. 19-25. Ms. Dilts testified that Mr. Bertram described to her how that occurred. She stated that Mr. Bertram told her he had shot Mr. Johnson three times in the chest and that he had kicked in the door of the trailer and that he was wearing a black hoodie. RP 548, In. 5-11. Mr. Bertram further indicated to Ms. Dilts that he was at the trailer to pick up Ms. Jack-Lee's clothes. RP 548, In. 18-19. He told Ms. Dilts that he took Mr. Johnson's gun and heroin from the trailer and he took them home. RP 550, In. 9-14. Mr. Bertram further indicated to Ms. Dilts that he struck Mr. Johnson with a flashlight in the head. RP 551, In. 7-11. Ms. Dilts testified that she knew that Mr. Bertram had a gun and that Bertram brought it to the trailer that night. RP 551, In. 12-16. Mr. Bertram told her that he had gotten it at the Gorge where he used to work and that it was a stolen weapon, and told Ms. Dilts

that he knew it had been stolen. RP 551, In. 16-24. Ms. Dilts stated that Mr. Bertram also shared with her that he covered Mr. Johnson's body with a coat and told her that he took a gun from the trailer. RP 552, In. 7-18. He further indicated to Ms. Dilts that he threw the gun out in the orchard. RP 552, In. 20-21.

Also testifying was Bridget Jack-Lee. RP 563, In. 1-4. Ms. Jack-Lee indicated that she had been involved in a relationship with Cody Johnson, the victim, for a few months. RP 563, In. 4-9. She indicated she had contact with the defendant, Jasen Bertram, during that period of time. RP 563, In. 13-16. She further indicated that she does have a drug problem. RP 563, In. 25. Her plan was to stay with Mr. Bertram for about 5 days, detoxify, and then go to treatment. RP 564, In. 5-8. Mr. Bertram's home was located on Brown Street in Wenatchee. RP 564, In. 18.

Ms. Jack-Lee said she left Mr. Bertram's home on June 3 after being called by Mr. Johnson that he wanted her to come up to Dryden, so she packed a bag and took off. RP 565, In. 1-3. She was picked up by one of Mr. Johnson's friends. RP 565, In. 7. Mr. Bertram was not there, but he did know where Mr. Johnson's place was located. RP 566, In. 7-12; 14-21. Ms. Jack-Lee was able to identify that Mr. Johnson had his silver chrome gun that evening.

RP 567, In. 17-22. She further indicated that the bathroom in Mr. Johnson's trailer was never hooked up with water so the bathroom they used was the bathroom across the street near where the little cabins are, and described it as being a community bathroom with a men's side, a women's side, a shower, toilet, and a sink. RP 568, In. 22-25; RP 569, In. 1-8. Ms. Jack-Lee went to the bathroom across the street and intended to take a shower. RP 570, In. 7-16. But, when she returned toward the trailer, she saw the trailer was shaking and she heard someone in the trailer yelling. RP 570, In. 21-25. She testified she heard someone yelling, "Get the fuck on the ground!" RP 571, In. 1-2. She testified she ran back toward the direction of the bathroom, and was able to remember that the voice she heard yelling in the trailer appeared to be the voice of Jasen Bertram. RP 571, In. 7-14.

Ms. Jack-Lee said that Mr. Bertram then picked her up on the side of the road as she was running down the road. She got into the vehicle with him and he threw something out of the vehicle, but she did not know what it was. RP 572, In. 1-13. Mr. Bertram and Ms. Jack-Lee then drove back to town. They stopped at a store and got some tea at the 76 Station in Wenatchee and then

went back to Mr. Bertram's house. RP 572, In. 23-25; RP 573, In. 6-8.

Ms. Jack-Lee further testified that Mr. Bertram told her what he had done that night. Mr. Bertram indicated to her that he had gone into Mr. Johnson's trailer and had hit Mr. Johnson in the back of the head with some type of "mag light" flashlight but it didn't faze Mr. Johnson, so that's when Mr. Bertram pulled out a gun and told Mr. Johnson to get on the ground. She testified Mr. Bertram said that Cody was begging or asking him, "what did he do, what did he do," and that's when Mr. Bertram shot him. Mr. Bertram then commented that it made him feel good. RP 574, In 1-6.

Ms. Jack-Lee further testified that at one point she did go back to the trailer to see if Mr. Johnson was alive. She testified that she ran back to the trailer and the back door (there were two doors) was halfway open, so she opened it, looked in, and saw Cody's body lying on the ground with his favorite leather jacket over his head and his arm just sticking out. She testified she saw the blood on the wall and immediately took off running again. As far as she could tell, Mr. Bertram was not in the trailer. RP 574, In. 16-25; RP 575, In. 1-2. She testified she started to run toward Wenatchee and that's where she met up with Mr. Bertram. RP 575, In. 8-13.

Ms. Jack-Lee also testified during cross-examination that she had seen heroin in a plastic bag that Cody Johnson had. RP 687, In. 7-8. When Ms. Jack-Lee was with Mr. Bertram after he picked her up and brought her home, he had Ms. Jack-Lee contact her mom. RP 690, In. 21-25. Mr. Bertram told her not to tell her mom anything, just to let her mom know she was okay. RP 691, In. 1-12. Ms. Jack-Lee further testified that she did see that Mr. Bertram did have the heroin that he took from the victim, Cody Johnson. RP 692, In. 6-9.

Also testifying was Dr. Gina Fino. Dr. Fino has been a forensic pathologist for approximately 15 years. RP 260, In. 20-25. Dr. Fino has performed thousands of autopsies and works in many different counties in the state. RP 263, In. 10-20. She testified she received Mr. Johnson, who was a 28-year-old man, with injuries including a gunshot wound to the head, which she identified as being a graze type of wound to the neck and the chin, and another gunshot wound to the chest. RP 268, In. 2-14. Dr. Fino identified a third entrance wound at the back of Mr. Johnson's earlobe and identified soot deposition or stippling. She described soot as being basically burned up gun powder residue. RP 271. She described

the wounds as being generally from the back to the front. RP 274-283; RP 288, In. 20-25.

Also testifying was Kathy Geil, a forensic scientist with the Washington State Patrol Crime Lab, who is a firearm and tool mark examiner. RP 405, In. 22-25. She indicated they had a laboratory request for examination with a list of items to examine and a brief description of what needed to be compared. She was able to identify the firearm that she examined and found the operation of the firearm to be functional. RP 408, In. 13-14. Ms. Geil found that the shells found at the scene of the crime matched the shells that she tested. RP 408, In. 23-25; RP 409, In. 1-14. This testimony confirmed the .40 caliber Glock found at the scene fired the bullets that killed Mr. Johnson.

Also testifying was Kristina Hoffman, who is a forensic scientist at the Washington State Patrol Crime Lab in Marysville, Washington. RP 415, In. 7-9. She testified that she did a DNA test on some items that were sent to her from the Chelan County Sheriff's Office. She said she also had a blood reference card regarding people who were involved in the case. RP 416, In. 1-12. Ms. Hoffman said she found that the DNA profile obtained from the Glock .40 caliber pistol was a mixture of DNA consistent with at

least three contributors, and there was a significant major male contributor who matched the profile of Jasen Bertram. She found Mr. Bertram's DNA on the slide, which is an intimate part of this gun. RP 418, In. 1-25. Ms. Hoffman said she also found the DNA of Mr. Bertram in a camouflage head cover that was found at the scene on top of the Glock firearm. RP 419, In. 13-25. She examined the flashlight and found in the handle of the flashlight there was a mixture consistent with originating from at least two contributors, one of which was a major male contributor whose profile matched that of Cody Johnson, the victim in this case. RP 421, In. 1-7. Furthermore, she indicated that the DNA of Cody Johnson was also found on the .45 caliber handgun. This firearm was found near the flashlight on the side of the road. RP 422, In. 1-4.

Also testifying in this case was Justin Clare, who was working as a graveyard attendant at the Union 76 Station on Miller Street in Wenatchee. RP 428, In. 9-17. Mr. Clare was able to identify that he came in contact with Jasen Bertram that night and he knew Mr. Bertram because his son played baseball and Bertram was the coach. RP 429, In. 11-18. Mr. Clare recalled that he thought Mr. Bertram bought two waters and that there was a

female inside of Mr. Bertram's vehicle. RP 433, In. 17-21. This is consistent with the testimony of Bridget Jack-Lee regarding that evening, and a tape was played showing Mr. Bertram at that location.

Chelan County Coroner Wayne Harris testified. He indicated that the cause of Cody Johnson's death was multiple gunshot wounds to the head and chest. RP 442, In. 7-8. Mr. Harris also testified that he assisted Dr. Fino in the autopsy of Mr. Johnson and took pictures. RP 439, In. 20-25; RP 440, In. 1-12.

Also testifying was Bill Harvey who worked as a manager at Tree Top and had employed Jasen Bertram. RP 497, In. 18-25. Mr. Harvey recalled that Mr. Bertram had called in sick for a few days in early June of 2012 and he had been briefed that he had missed some days. Mr. Bertram had contacted Mr. Harvey's office around June 7th or 8th and indicated that he felt like he might be going to jail. RP 498, In. 10-15. Mr. Bertram was arrested on the Tree Top property when he came to get his paycheck. RP 498, In. 21-25.

Anthony Duffy also testified that he knew Cody Johnson and also Bridget Jack-Lee. RP 500, In. 1-9. Mr. Duffy indicated he met up with Ms. Jack-Lee on June 3 and picked her up on the corner of

Springwater and Brown in Wenatchee. RP 501, In. 1-5. He drove her to Mr. Johnson's trailer on North Dryden Road. RP 501, In. 10-16.

Jason Hansch also testified in this case. RP 804, In. 4-5. Mr. Hansch indicated that he did call 911 on June 4. He said that Cody Johnson was his friend and he did see him in the trailer and he appeared to be deceased. RP 804.

The defendant, Jasen Bertram, took the stand and testified that he was employed as a Tree Top mechanic for just under two years and he did know Bridget Jack-Lee. RP 706, In. 9-21. Mr. Bertram testified that he actually spent the night that Thursday and Friday night with Ms. Jack-Lee at his house. RP 723, In. 1-13. He indicated that in fact he was looking for Bridget after she left on June 3 and that he did arm himself and decided to go to the Dryden area where Cody Johnson lived. RP 736, In. 6-17. Mr. Bertram indicated that he knew where the trailer was because he and Bridget had tried to round up some of her clothes there a few days earlier, but there was no response at the trailer when they knocked on the door. RP 736, In. 22-25. Mr. Bertram had the gun—the Glock—and he indicated that he found the gun at the

Gorge while working as a bartender approximately the summer of 2010. RP 737, ln. 7-19.

Mr. Bertram indicated that when he drove to Mr. Johnson's trailer, he parked on the right side of the Dryden Road. He said there is a driveway right at the corner where Olalla Canyon starts. He said he walked over to the trailer and he could see Bridget sitting up at the end of the trailer throwing up. RP 741, ln. 17-20. Mr. Bertram indicated he confronted Mr. Johnson when he came to the door of the trailer. RP 744. He indicated that Mr. Johnson hit him. RP 746, ln 15. Then Bertram hit Johnson with the flashlight he held in his left hand. Mr. Bertram testified that he hit Mr. Johnson with the flashlight in the back of the head. RP 747, ln. 3-4. He further indicated that he shot Mr. Johnson and pulled the trigger three times. RP 748, ln. 14-19. Mr. Bertram indicated he had no idea whether Mr. Johnson was dead. RP 750, ln. 9. Mr. Bertram indicated he took a gun from Mr. Johnson, recalling it had been on the floor of the trailer. RP 750, ln. 24-25; RP 751, ln. 1-8. Bertram testified that he carried his relatively small Glock in his back pocket but that he put Johnson's Springfield in his coat pocket. RP 752, ln 18 to RP 753, ln 4. Mr. Bertram said he hid

from a car driving past because he didn't want to be seen because he had shot somebody. RP 752, In. 9-13.

Mr. Bertram said he went back to his truck and drove down the road, and then drove back and saw Bridget running down the middle of the road dressed as before and told her to get into the truck. RP 753, In. 6-17.

Mr. Bertram indicated he has a growing operation for his medical marijuana, and that evening he and Bridget smoked marijuana. RP 759, 7-19. Mr. Bertram further indicated that Bridget hadn't done anything wrong but he didn't want her talking about it to another person unless she talked with a lawyer first. RP 762, In. 1-7. He again confirmed that he told Ms. Jack-Lee that he told her he was the one who shot Mr. Johnson. RP 762, In. 14-18.

Mr. Bertram further testified that when he went to the trailer he was wearing blue jeans, tennis shoes, and a black shirt. RP 764, In. 1-6. He also confirmed that he had a mask with him. RP 764, In. 10-14. He further confirmed that in fact he put down the Glock that he had shot Mr. Johnson with and then put the mask on top of it. RP 765, In. 2-13. Mr. Bertram indicated that he did not call the police either before or after he shot Mr. Johnson. RP 766, In. 14-23. He further indicated that he found the gun at the Gorge

and never turned it in. RP 768, In. 8-11. Mr. Bertram further testified that he didn't know whether Mr. Johnson was dead, but also indicated that he didn't try to stop Mr. Johnson from bleeding and did nothing to help Mr. Johnson. RP 769, In. 4-20.

Mr. Bertram also testified that he was asked to get out of the trailer by Mr. Johnson. RP 733, In. 7-15. But, Mr. Bertram did not leave. RP 733, In. 22-25. Mr. Bertram also acknowledged that he didn't hit Mr. Johnson in the forehead, he hit the back of his head. RP 775, In. 9-14.

At the close of the trial, the jury found the defendant, Jasen Bertram, guilty of the lesser included offense of Murder in the Second Degree with the firearm enhancement, Robbery in the First Degree, and Possession of a Stolen Firearm. CP 210-214. The court sentenced Mr. Bertram to a standard range sentence including consecutive enhancements of 324 months confinement. The defendant then appealed his conviction.

III. ARGUMENT

A. IT WAS PROPER FOR THE TRIAL COURT TO INCLUDE INSTRUCTION 21, THE AGGRESSOR INSTRUCTION, WPIC 16.04, AND THE TRIAL COURT USED THE PROPER LANGUAGE FOR THAT INSTRUCTION.

The court's Instruction 21 was supported by sufficient evidence in the record. Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense, an aggressor instruction is appropriate. State v. Riley, 137 Wn.2d 904, 910, 976 P.2d 624 (1999); State v. Hughes, 106 Wn.2d 176, 191-92, 721 P.2d 902 (1986). When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The testimony and evidence in this record strongly supports a finding that the defendant was the aggressor.

In general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at the time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. Riley, at 909; State v. Craig, 82 Wn.2d 777, 783, 514 P.2d 151 (1973). An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight. Riley, at 910. If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction. Riley, at 910; State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992).

Based upon the record in this case, a reasonable conclusion is that the defendant never needed to go to Mr. Johnson's trailer, and once there, never needed to go inside. Defendant's own testimony was that upon arrival at the trailer, he saw Bridget Jack-Lee outside the trailer vomiting. RP 741. He could have taken her back to Wenatchee then. Instead, the defendant took matters into his own hands.

Forensic evidence showed the victim received all of his wounds while facing away from the defendant. The wound from

the flashlight bludgeoning was on the back of Mr. Johnson's head and the three bullet wounds sustained by Mr. Johnson all entered the rear of his neck or head, indicating the victim was facing away from the defendant. RP 260-385; RP 274-283; RP 288, ln 20-25. Evidence regarding the blood trail at the scene was consistent with Mr. Johnson kneeling at the time he was shot. RP 253-54. A victim who is shot while kneeling and facing away from the shooter reasonably suggests the shooter could be the aggressor. Defendant himself testified that after answering the door, Mr. Johnson turned away from the defendant and moved to the back of the trailer then to the left and could not be seen, which the defendant testified made him unsure. RP 745, ln 9-18. Yet, the defendant entered further into the trailer instead of retreating or exiting. RP 745, ln 14-15. Defendant Bertram admitted using a weapon first, the flashlight. RP 747, ln 3-4. Then there is the testimony of Bridget Jack-Lee that she heard a voice she believed to be the defendant's yelling a command from inside the trailer to get on the ground. RP 571, ln. 7-14.

This is just some of the evidence that supports the giving of the aggressor instruction; the record is replete. The murder weapon, a .40 caliber Glock, and the camouflage mask found at

the murder scene each contained the defendant's DNA, and were found with the mask lying on top of the gun, indicating that the defendant was masked until after he put the murder weapon down. RP 255, In 13-17.

Clearly, the record supports the court's giving of WPIC 16.04, the aggressor instruction. Factually, this case involves much more than words as evidence of provocation.

The form of the aggressor instruction given by the court was correct. Defendant claims the court erred when it declined to modify the standard Washington Pattern Jury Instruction, Criminal, 16.04 as requested by defense counsel. At trial, defense counsel requested the sentence, "However, words alone are not sufficient provocation to cause another person to respond belligerently," be added to the end of the aggressor instruction.

At least two Washington State Supreme Court opinions demonstrate that the defendant's proffered version of the instruction is not correct. In State v. Riley, *supra*, the Supreme Court stated that, "Although language in some older cases suggests that words alone may justify the conclusion that the speaker is an aggressor, we hold that words alone do not constitute sufficient provocation. Therefore, the giving of an aggressor

instruction where words alone are the asserted provocation would be error completely aside from any First Amendment issue.” Riley, at 910-11. In State v. Wingate, the Court explained that Washington Pattern Jury Instructions: Criminal 16.04, was approved by it in State v. Riley as the instruction which properly directs the jury to determine whether the defendant's acts precipitated a confrontation with the victim. State v. Wingate, 155 Wn.2d 817, 821, 122 P.3d 908 (2005). Neither of those cases stands for the proposition that the sentence, “However, words alone are not sufficient provocation to cause another person to respond belligerently,” should be added onto the end of WPIC 16.04. Rather, they rule as to the type of evidence necessary to justify the giving of WPIC 16.04, specifically that it can't be only verbal. Both of those cases approved the form of the aggressor instruction used by the court in this case. An assertion that the holding in Riley means otherwise is not correct.

B. THE STATE DISPROVED SELF-DEFENSE BEYOND A REASONABLE DOUBT AND THE EVIDENCE WAS SUFFICIENT TO SUPPORT MURDER IN THE SECOND DEGREE.

The instructions allowed the defendant to present self-defense. Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. State v. Aguirre, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010); Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (quoting Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)); see also State v. Riley, *supra*. Even if an instruction may be misleading, it will not be reversed unless prejudice is shown by the complaining party. Keller, at 249. If, on the other hand, a jury instruction correctly states the law, the trial court's decision to give the instruction will not be disturbed absent an abuse of discretion. Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002).

The jury instructions in this case included self-defense and allowed the defendant to argue his theory of the case. The aggressor instruction was amply supported by evidence in the

record and correctly stated the law. Therefore, the court's decision to give the aggressor instruction cannot be disturbed absent an abuse of discretion. Discretion is abused only when it is exercised in a manifestly unreasonable manner or on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Given the level of evidence that the defendant was the first aggressor in this case, there was no abuse of discretion.

The State disproved self-defense beyond a reasonable doubt. Defendant does not challenge the adequacy of the self-defense instructions, just the first aggressor instruction. Defendant does not articulate facts that support the notion that the state was relieved from disproving self-defense beyond a reasonable doubt. An aggressor instruction is appropriate if, as here, there is conflicting evidence about whether the defendant's conduct precipitated violence. Because the State and the defense had a different theory about what occurred, each side was entitled to have the jury instructed on its theory of the case, provided there was evidence to support the theory. The court's instructions thoroughly instructed the jury on self-defense in addition to giving the aggressor instruction. Depending upon which evidence the jury found credible, it could have accepted Bertram's claim that he

acted in self-defense. Apparently, the jury instead rejected the defendant's theory. An aggressor instruction was appropriate in this case because it was supported by ample evidence, thus it cannot be said that it relieved the State of its burden to disprove self-defense beyond a reasonable doubt. State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992); State v. Williams, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

The evidence is sufficient to support the defendant's Murder in the Second Degree conviction; however, the defendant also raises sufficiency as an issue. In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State, deciding whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Mines, 163 Wn.2d 387, 391, 179 P.3d 835 (2008). Only if the court finds no rational trier of fact could have found guilt beyond a reasonable doubt will the conviction be overturned for insufficiency of the evidence. State v. Ward, 148 Wn.2d 803, 815, 64 P.3d 640 (2003). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from it. State v. Drum, 168 Wn. 2d 23, 35, 225 P. 3d 237 (2010).

In State v. Allen, the court reviewed the sufficiency of evidence of premeditation in Allen's first degree murder conviction. State v. Allen, 159 Wn.2d 1, 7-8, 147 P.3d 581, (2006). The court ruled sufficient evidence of premeditation may be found where the weapon used was not readily available, where multiple wounds were inflicted, or where the victim was struck from behind. Id., citing State v. Gentry, 125 Wn.2d 570, 599, 888 P.2d 1105 (1995). Also, strangulation marks and a fractured skull may be viewed as "multiple wounds." Allen, Id.

In this matter, the jury convicted the defendant of Murder in the Second Degree. As in Allen, supra, the record contains evidence of multiple wounds to the victim and evidence the victim was struck from behind. In Allen, supra, such evidence supported premeditation, thus that same evidence is more than sufficient to support intentional murder. Further, Defendant Bertram intentionally brought a firearm with him. RP 740, In 18-20. To prevail, the defendant must show that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Allen, Id.; State v. Finch, 137 Wn.2d 792, 835, 975 P.2d 967 (1999); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Defendant Bertram cannot demonstrate that no rational trier of fact could have found the essential elements of Murder in the Second Degree beyond a reasonable doubt. Additional evidence of intentional homicide is contained in the defendant's testimony. For example, he testified that he conversed with Bridget Jack-Lee outside upon arrival at the victim's trailer. RP 741-42. He could have left with her then without entering the trailer where the victim was, but instead he went into the trailer. RP 745, In 15. Defendant's version of what occurred in the trailer is not credible. According to the defendant, he decided to enter further into the trailer because the victim had disappeared from view. RP 745, In 17-18. Instead, the defendant could have left.

Defendant admits wearing dark clothes and also a mask that he had purchased only about a week prior to the incident to the victim's trailer. RP 764-65. Defendant admits the victim asked him to leave the trailer twice but the defendant did not exit. RP 746, In 13; RP 747, In 24.

Also, the defendant tries to describe a scene where he shot the victim in his front. RP 748-49; RP 773-74. That testimony contradicts the testimony of Dr. Gina Fino that all gunshot wounds and the bludgeoning head wound were sustained on the back of

the victim. RP 260-385, see RP 271, 279, 280, 281, 282, 288, 291. Also, the defendant acknowledged that if he were later found with the .40 caliber Glock he used to kill Mr. Johnson, he would be linked to that scene. RP 779, In 22 to RP 780, In 5. Defendant told Bridget Jack-Lee that the victim begged for his life and that it felt good to shoot Mr. Johnson. RP 573, In 23 to RP 574, In 6.

The record in this matter is replete with testimony and evidence which more than sufficiently disproves self-defense beyond a reasonable doubt and supports Murder in the Second Degree; it was clearly reasonable for the jury to convict the defendant.

C. EVIDENCE WAS SUFFICIENT TO SUPPORT ROBBERY IN THE FIRST DEGREE AND POSSESSION OF STOLEN FIREARM CONVICTIONS.

The test for determining the sufficiency of evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the

evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980); *see State v. Mines*, 163 Wn.2d 387, 391, 179 P.3d 835 (2008); State v. Homan, 330 P.3d 182, 186, 330 P.3d 182; 2014.

In addition to the defendant's own testimony, evidence of the Robbery in the First Degree and Possession of a Stolen Firearm counts are contained in the testimony of Dana Dilts. Defendant admitted to her that he knew both the .40 Glock murder weapon and the .45 Springfield were stolen guns. RP 550, In 6-16; RP 551, In 19-24. In his testimony, Defendant Bertram admits putting the victim's gun in his front pocket and leaving the trailer with it. RP 752, In 25 to RP 753, In 1-4; RP 778, In 3-9. The record shows he took items in addition to the Springfield .45 from the victim's trailer. The backpack located in Mr. Cleek's yard, a few houses away from the defendant's Wenatchee home, also contained two firearms matching generally the descriptions of firearms found on a list in the victim's trailer. RP 236, In 15-18; RP 459, In 1-4. Only if the

court finds no rational trier of fact could have found guilt beyond a reasonable doubt will the conviction be overturned for insufficiency of the evidence. State v. Ward, 148 Wn.2d 803, 815, 64 P.3d 640 (2003), State v. Finch, 137 Wn.2d 792, 835, 975 P.2d 967 (1999); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In this case, 12 rational triers of fact did find Defendant Bertram guilty of Robbery in the First Degree and Possession of a Stolen Firearm.

D. THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL.

The Statement of Additional Grounds asserts ineffective assistance of counsel. Defendant fails to include any information confirming that defense counsel committed the omissions the defendant claims; the State is confident evidence to the contrary exists. Further, even if the defendant could confirm certain alleged omissions, he fails to show just how they fall outside the wide range of professional competent assistance and fails to show how they resulted in prejudice. Personal Restraint of Cross, 180 Wn.2d 664, 729, 327 P.3d 660 (2014). Defense counsel cross-examined each witness extensively at trial and also presented an expert witness, Dr. Butts, whose testimony critiqued Dr. Fino's work. RP 602-649.

There is no basis for the defendant's claim of ineffective assistance of counsel.

E. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION FOR A MISTRIAL.

A second assertion in the Statement of Additional Grounds claims the court should have granted the defendant's motion for a mistrial. A trial court's decision to deny or grant a motion for mistrial is a matter addressed to the sound discretion of the trial court, reviewed for abuse of discretion. State v. Tigano, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992). A trial court abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable. State v. Barnes, 85 Wn. App. 638, 669, 932 P.2d 669, *review denied*, 133 Wn.2d 1021 (1997). Litigants are entitled to a fair trial, not a perfect one, for there are no perfect trials. In re Pers. Restraint of Elmore, 162 Wn.2d 236, 172 P.3d 335 (2007). Courts grant a new trial only where juror misconduct has prejudiced the defendant. State v. Earl, 142 Wn. App. 768, 774, 177 P.3d 132, *review denied*, 164 Wn.2d 1027 (2008); *see also* CrR 7.5(a) (new trial warranted

only where a "substantial right of the defendant was materially affected").

In this case, one juror asked the bailiff to state the occupation of one of the State's witnesses, and another juror asked the bailiff to tell what book another State's witness was using while testifying. The bailiff did not answer either question. RP 385-88; RP 432-33. The court admonished the jury. RP 400-04; RP 434-35.

The nature of the juror behavior here does not rise to the level of prejudicial misconduct. For example, no extrinsic evidence was obtained and there is no evidence of premature deliberation. It could not have affected the jury's deliberations or verdict. The Court properly denied the motion for a mistrial.

F. THERE WAS NO CUMULATIVE ERROR.

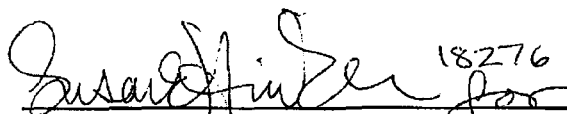
The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Defendant has fallen far short of demonstrating any error in the conduct of this trial and was not deprived of a fair trial.

IV. CONCLUSION

The court properly instructed the jury regarding the first aggressor issue and used the correct language in Instruction 21. The defendant was not limited in his ability to present self-defense to the jury and the State disproved self-defense beyond a reasonable doubt. There was sufficient evidence to find the defendant guilty beyond a reasonable doubt of the crimes of Murder in the Second Degree, Robbery in the First Degree, and Possession of a Stolen Firearm. There was no ineffective assistance of counsel. The trial court properly denied the defendant's motion for a mistrial and there was no cumulative error. The State respectfully requests these convictions be affirmed.

DATED this 10th day of October, 2014.

Respectfully submitted,


Douglas J. Shae WSBA #17942
Chelan County Prosecuting Attorney

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JASEN L. BERTRAM,

Defendant/Appellant.

No. 31694-7-III
Superior Court No. 12-1-00230-5

DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 10th day of October, 2014, I electronically transmitted to:

Renee S. Townsley
Clerk/Administrator
Court of Appeals, Div. III
500 N. Cedar Street
Spokane, WA 99201

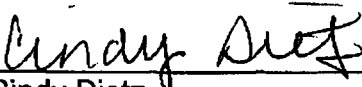
AND deposited in the United States Mail properly stamped and addressed envelopes directed to:

Kenneth H. Kato
Attorney at Law
1020 N. Washington Street
Spokane, WA 99201-2237

Jasen L. Bertram #365853
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

1 said electronic transmission and envelopes containing true and correct copies of Brief of
2 Respondent.

3 Signed at Wenatchee, Washington, this 10th day of October, 2014.

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5 _____
6 Cindy Dietz
7 Legal Administrative Supervisor
8 Chelan County Prosecuting Attorney's Office

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