NO. 46768-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEMAR NELSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 10-1-05090-8

BRIEF OF RESPONDENT

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

1. Should defendant's first degree murder conviction be affirmed when the challenged element of premeditation was established by evidence defendant carried a firearm into a fistfight, fired three missed shots, paused, decided to continue, and fired fifteen bullets into his unarmed victim?

2. Was defendant's prearrest failure to describe the shooting as self-defense properly adduced and argued by the State at trial since it constitutionally impeached the testimony defendant gave instead of remaining silent?

3. Should defendant be deemed to have waived his appellate challenge to the discretionary legal financial obligation imposed by failing to object to it at sentencing?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with one count of firearm enhanced premeditated first degree murder December 2, 2010, for a shooting death that occurred on or about December 27, 2008. CP 26; RCW 9A.32.030(1)(a); 9.94A.533. He asserted a defense of "general denial." 10RP 1096. The State proceeded accordingly until the eve of trial when defendant announced a shift to self-defense. 1RP 8-9; 10RP 1096, 1104-

05; CP 25. The Court perceived self-defense to be newly raised "at the last minute" in the course of a case pending trial for three years. 1RP 8-9; 10RP 1096, 1106-07. Trial began September 22, 2014. 1RP 1. Three days later defendant stipulated to killing the victim, James Guillory, with one of eighteen bullets fired from the handgun identified as Exhibit No. 15. The stipulation was entered to avoid defendant's identity as the shooter being established through evidence of a shooting he subsequently committed with the same gun. CP 27; 10RP 1102, 11004-05. Twenty witnesses were called by the State and twenty exhibits were admitted. 4RP 93; 5RP 174; 6RP 308; 7RP 520; 8RP 734; 9RP 903; CP 54-56.

A hearing was held prior to defendant's testimony in which the court permitted him to be impeached by his prearrest failure to characterize the shooting as self-defense before making the claim at trial. 10RP 1078-79, 1082-83, 1086-89, 1109. He challenges evidence adduced pursuant to that ruling on appeal. 1RP 8-9; 10RP 1110; 1096, 1106-07, 1131-33, 1137-38, 1142-43, 1156, 1159.

Defendant's jury was accurately instructed on the law, to include the now challenged element of premeditation. CP 73-74. The State argued the challenged impeachment evidence from the instruction on assessing credibility. 11RP 1171-94, 1217-40. Defendant did not object to those remarks below, yet challenges them on appeal. 11RP 1190-91, 1193. The jury convicted him as charged. CP 80, 82. A standard range sentence was imposed. It included $2,500 of discretionary defense recoupment, likewise

entered without objection but challenged on appeal. CP 87-89; 13RP 1289. A timely notice of appeal was filed. CP 98.

2. Facts

Murder victim, James Guillory, went to a Lakewood nightclub the evening of December 26, 2008, with his friends Ryan Blosser, Jamar Robinson, and Robert Poeltl. 7RP 576-77; Ex.1. Defendant left his loaded .9mm pistol in the car upon arriving at the same nightclub with his friends Grady Brown and Clavin Davis. 10RP 11150-16. Defendant ran into another friend, Joseph Coleman, while waiting in line. 10RP 1116. Both groups drank to the point of intoxication before leaving around 2:00 a.m. *E.g.*, 7RP 578-79; 8RP 864; 10RP 1116, 1118-19.

A mass of people congregated in the parking lot. 7RP 579. Someone punched the victim in the face, knocking him to the ground. 7RP 579. His friend Blosser asked members of a nearby group to identify the assailant. 7RP 579-80. Blosser and Coleman engaged in a fistfight interrupted by police. 7RP 580. They arranged to continue the fight at a friend's house. 7RP 715, 581. Coleman asked defendant and his friends to "have his back" at the fight. At trial, defendant conceded he understands the expression to mean intervene on the requester's behalf, but claimed the request was never made. 8RP 867; 10RP 1121. The latter claim was refuted by defendant's friend, who acknowledged he and defendant agreed to back Coleman up. 8RP 867.

The two groups converged at the appointed residence. 7RP 584, 716-17, 719; 10RP 1123. Defendant exited the car armed with his loaded .9mm pistol. 7RP 577; 8RP 868, 870, 10RP 1115-16, 1123, 1132. The fistfight between Blosser and Coleman resumed. 7RP 588-89. The victim remained on a nearby porch until the fight was underway. 8RP 737; 10RP 1127-28. At some point, he broke a bottle on the porch while tripping. 8RP 753-54; 10RP 1127-28. Multiple witnesses, including defendant, maintained he did not have the bottle in his hand when he left the porch. 6RP 346; 7RP 590; 8RP 752-54; 10RP 1136-37. Their testimony was corroborated by a police investigator who subsequently found such a bottle on the porch. 6RP 457.

The then unarmed victim aggressively approached defendant's group. 6RP 350, 7RP 725; 8RP 740-41; 10RP 1130. Defendant drew his semiautomatic .9mm pistol, rotated it to the side, and fired three shots— none of which struck the victim. 6RP 350; 10RP 1133, 1138. Defendant paused, enabling him to assess their effect. 6RP 350-351; 10RP 1150. He resumed firing at his then retreating victim while advancing toward him. 6RP 351-54; 8RP 750. The victim eventually fell to the ground where he "wiggl[ed]" about as defendant stood over him firing the remaining bullets into his body. 6RP 354; 10RP 1133. Casings recovered from the scene confirm the victim was struck by fifteen of the eighteen bullets defendant fired. 6RP 471; 8RP 824; Ex.5.

The medical examiner was unable to determine which of those bullets killed the victim as five would have been fatal. 8RP 826-830; Ex. 39. One tore through the victim's chest cavity, striking his heart. 8RP 826. Two penetrated his chest on their way to critically injure his liver and spleen. 8RP 827-28. Another passed through his stomach on an upward trajectory causing it to tear a large blood vessel and the right kidney before lodging in his chest. 8RP 827-28, 830. The angle was consistent with testimony the victim was lying below defendant when the shot was fired. 6RP 354; 8RP 831-32. Four bullets struck the victim in the back, one of which inflicted another critical injury to his heart. 8RP 829. The remaining bullets struck the victim's arms and wrists. 8RP 832-36.

The holes left by the bullets were visible to the friend who knelt beside the victim, encouraging him to breathe as the victim started spitting up blood, inhaled deeply and died. 7RP 603-04; 8RP 838. Defendant fled with his friends. 10RP 1139, 1141-42. He never explained to those friends, the police or anyone that he perceived the shooting to be necessary to protect himself until he described it as self-defense at trial, where he admitted to having prior convictions for attempted forgery and fraud. 5RP 285-86; 10RP 1141-43, 1163.

C. ARGUMENT.

1. DEFENDANT'S FIRST DEGREE MURDER CONVICTION SHOULD BE AFFIRMED BECAUSE THE CHALLENGED ELEMENT OF PREMEDITATION WAS ESTABLISHED BY PROOF DEFENDANT CARRIED A FIREARM INTO A FISTFIGHT, FIRED THREE MISSED SHOTS, PAUSED TO DELIBERATE, DECIDED TO CONTINUE, AND FIRED FIFTEEN BULLETS INTO HIS UNARMED VICTIM.

A person is guilty of murder in the first degree when with premeditated intent to cause the death of another person, he causes the death of such person. RCW 9A.32.030(1)(a). Premeditation can be established by evidence the defendant decided to cause the victim's death after some period of reflection, however short. ***State v. Monaghan***, 166 Wn. App. 521, 535-36, 270 P.3d 616 (2012)(citing RCW 9A.32.020(a); ***State v. Gregory***, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006)); ***State v. Pirtle***, 127 Wn.2d 628, 644, 904 P.2d 245 (1995); ***State v. Ortiz***, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). Defendant's jury was accurately instructed on this requisite period of reflection:

> Premeditation means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

CP 66; ***State v. Clark***, 143 Wn.2d 731, 770-71, 24 P.3d 1006 (2001)(approving WPIC 26.01.01).

a. Defendant's premeditated intent to kill was proved through the planned presence of a gun, deliberation and the number of lethal injuries inflicted when all inferences are properly drawn in support of the jury's verdict.

"An inference of premeditation can be established by a range of proven facts, including the planned presence of a weapon at the scene, evidence of reflection or deliberation, and the infliction of multiple wounds. ***State v. Ra***, 144 Wn. App. 688, 703, 175 P.3d 609 (2008)(premeditation where defendant brought a loaded gun to the scene, provoked confrontation, then fired multiple shots); ***State v. Ollens***, 107 Wn.2d 848, 853-54, 733 P.2d 984 (1987)(evidence of premeditation where defendant procured a weapon and used it in different ways to inflict multiple injuries).

Evidence is sufficient to support a premeditated murder conviction if it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt when viewed in a light most favorable to the State. *See* ***State v. Notaro***, 161 Wn. App. 654, 670-71, 255 P.3d 744 (2011). Circumstantial and direct evidence are equally reliable. ***State v. Thomas***, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficiency admits the truth of the State's evidence with all reasonable

inferences capable of being drawn therefrom. *Id.* "[C]redibility determinations ... cannot be reviewed....." ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Evidence a defendant planned the presence of a weapon used to kill is enough to send the issue of premeditation to the jury. ***State v. Bingham***, 105 Wn.2d 820, 827, 719 P.2d 109 (1986). Defendant's jury received such evidence through proof defendant armed himself with a loaded .9mm pistol in anticipation of intervening on his friend's behalf at a prearranged fistfight. 7RP 577; 8RP 867-68; 10RP 1115-16, 1121, 1123, 1132. The jury was entitled to infer defendant did so intending to respond with deadly force if provoked, for if he did not intend as much he could have simply left the gun in the car as he had earlier when engaged in peaceful pursuits. *Id.*; see *e.g.*, ***State v. Massey***, 60 Wn. App. 131, 145, 803 P.2d 340 (1990)(sufficient evidence of premeditation where defendant brought a gun to the place where the victim was killed).

A pause between shots evincing reflection before a decision to kill is also adequate proof of premeditation. ***Ra***, 144 Wn. App. at 703-704 (2008) (premeditation where defendant paused between missed shots and one lethally aimed). Similar to ***Ra***, the evidence shows defendant fired three missed shots before pausing, and then proceeding to fire fifteen more into the unarmed victim—five of which struck with deadly accuracy. 6RP 350-54, 371; 10RP 1133, 1138, 1150. The jury was free to infer the first three shots inadvertently missed due to defendant's haphazard horizontal

aiming technique of rotating the pistol to its side instead of correctly firing it with the front sight vertically aligned. *E.g.* 10RP 1133, 1138. Defendant's act of pausing could in turn have been interpreted as him taking time to assess the unanticipated failure to hit his mark, before deciding he needed to move closer to make the kill shot. It is also plausible the jury interpreted the three misses as warning shots that did not require an encore, or one consisting of fifteen additional shots.

Whatever caused the first three shots to miss, the first shot after the pause manifested defendant's resolution to lethally finish or launch his attack by advancing upon his then retreating victim while firing bullet after bullet into his body as he fell. *See* ***State v. Gibson***, 47 Wn. App. 309, 312, 734 P.2d 32 (1987)(time lapse between attacks); ***State v. Sargent***, 40 Wn. App. 340, 353, 698 P.2d 598 (1985)(interval between blows). Premeditated intent persisted, or could be found to have formed, when defendant stood over the victim and continued to fire as his victim defenselessly wiggled about on the ground. *E.g.*, 6RP 351-54; 8RP 831-32; 10RP 1133. This multi-stage shooting is far more comparable to a deliberate execution of an unarmed rival than a spontaneous overreaction to a perceived threat.

Premeditated intent to kill was further corroborated by the tight pattern of lethally inflicted wounds as "[e]vidence of multiple acts of violence supports an inference of premeditation." Ex.39; ***State v. Hoffman***, 116 Wn.2d 51, 85, 804 P.2d 577 (1991). Like the assailant in

State v. Woldegioris, 53 Wn. App. 92, 43-94, 765 P.2d 920 (1988), defendant manifested premeditation by successively inflicting several deadly injuries during a multi-stage shooting marked by shots independently fired from different locations. This evidence further supported an inference defendant was deliberately endeavoring to increase the effectiveness of his aim by advancing upon a retreating victim who was ultimately driven to the ground under the fifteen-shot barrage. *E.g.* 6RP 354; 8RP 750, 826-30, 826-36; *see also* ***Ollens***, 107 Wn.2d at 853; ***Ortiz***, 119 Wn.2d at 312-13; ***Ra***, 114 Wn. App. at 621-93; 6RP 351-54; 8RP 826-32; 11RP 1164. Eight of which were aimed at parts of the body generally known to house vital organs. ER 201(d).

Evidence of defendant's premeditated intent is more compelling than the evidence of it in ***Ra*** where it was manifested by a shooter who fired multiple shots, but only struck the victim once. *Id.* at 693; *e.g.*, ***State v. Rehak***, 67 Wn. App. 157, 164, 834 P.2d 651 (1992)(victim shot three times, two after falling); ***Sargent***, 40 Wn. App. at 353 (two blows while victim lying down). Like ***Ollens***, the wounds defendant inflicted were separated by time and distance manifesting not only premeditation, but a persistent decision to kill, so his conviction should be affirmed.

b. Defendant also mistakenly asserts dismissal instead of remand for entry of judgment and sentence on the lesser included offense of second degree murder would be the appropriate remedy if his untenable challenge to the jury's verdict prevailed.

An appellate court should remand for entry of judgment and sentence on a lesser included offense when it is supported by evidence deemed insufficient to support the conviction for a greater offense. *See* ***State v. Atterton***, 81 Wn. App. 470, 473, 915 P.2d 525 (1996). Federal courts have ordered this remedy where three factors are present: (1) the lesser offense is included in the overturned greater offense; (2) the jury was instructed it could find the lesser offense and advised of its elements; and (3) the government sought the entry of judgment for the lesser offense on appeal. ***United States v. Dinkane***, 17 F.3d 1192, 1198 (9th Cir. 1994); ***State v. Vasquez-Chan***, 978 F.2d 546, 554 (9th Cir.1992).

Defendant only challenges the proof of premeditation. App.Br. p.1. If that untenable challenge prevailed, remand for entry of judgment and sentence on second degree murder would be the correct remedy. Intentional second degree murder under RCW 9A.32.050(1)(a) is a lesser included offense of the premeditated first degree murder underlying defendant's conviction. RCW 9A.32.030(1)(a); ***State v. Mullins***, 158 Wn. App. 360, 371, 241 P.3d 456 (2010). The element of premeditation is the only difference between them. ***Bingham***, 105 Wn.2d at 823. At least

intent was firmly established through defendant's admitted act of firing fifteen bullets into the victim, for "proof ... a defendant fired a weapon at a victim is ... sufficient to justify a finding of intent to kill." *See **Hoffman,*** 116 Wn.2d at 84-85; 10RP 1133, 1138-30, 1150-51; CP 27. By convicting defendant of first degree murder the accurately instructed jury necessarily rejected the claim his admittedly intentional act of shooting was self-defense. CP 68 (Inst. 8—justifiable homicide), 70 (Inst. 10—ability to act on appearance), 71 (Inst.11—no duty to retreat). It is presumed those instructions were followed. *See **State v. Willis***, 67 Wn.2d 681, 685-86, 409 P.2d 669 (1966). The second factor of proper instructions on the lesser offense of second degree murder is also present. CP 73 (Inst. 13); 74 (Inst. 14), 75 (Inst. 15). As is the third since the State respectfully requests entry of judgment and sentence for that lesser offense if this Court finds undiscovered merit in defendant's claim.

2. DEFENDANT'S PREARREST FAILURE TO DESCRIBE THE SHOOTING AS SELF-DEFENSE WAS PROPERLY ADDUCED AND ARGUED BY THE STATE AT TRIAL BECAUSE IT CONSTITUTIONALLY IMPEACHED THE TESTIMONY DEFENDANT DECIDED TO GIVE INSTEAD OF RELYING ON HIS RIGHT TO REMAIN SILENT.

"[N]o constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest ...." ***State v. Burke***, 163 Wn.2d 204, 217, 181 P.3d 1 (2008)(citing ***Jenkins v.***

Anderson, 447 U.S. 231, 240, 100 S. Ct. 2124 (2007)). "[I]nquiry into prior silence [i]s proper because 'the immunity from giving testimony is one which the defendant may waive by offering himself as a witness .... When he takes the stand in his own behalf, he does so as any other witness, and within the limits of appropriate rules may be cross-examined." ***Jenkins,*** 477 U.S. at 235. Such a defendant "has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim the Fifth Amendment gives him not only this choice, but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make the Fifth Amendment not only a humane safeguard against ... coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. There is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility. The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." ***Brown v. United States***, 356 U.S. 148, 155-56, 78 S. Ct. 622 (1958)(citing ***Walder v. United States***, 347 U.S. 62, 65, 74 S. Ct. 354 (1954)).

Defendant asserted self-defense the day after his case was called for trial. CP 25; 10RP 1RP 8-9; 1097-98. The Court perceived self-defense to be newly raised "at the last minute" in the course of a case pending trial for three years. 1RP 8-9; 10RP 1096, 1106-07. Defendant conceded the previous assertion of "general denial" was a "strategic decision" motivated by a belief the "case would go away" until the State met unanticipated success in securing witnesses needed to prove his identity as the shooter. 10RP 1096, 1098, 1102, 1104-05; CP 27. Defendant also responded by stipulating to his identity as the shooter to avoid the State proving it with evidence he shot two other people with the same gun six months after killing Guillory. CP 27; 10RP 1102, 11004-05. In a hearing held prior to the testimony defendant gave to support his self-defense claim, the court ruled it could be impeached with his failure to similarly describe or report the shooting before his arrest. 10RP 1078-79, 1082-83, 1086-89, 1109.

a. The evidence of defendant's prearrest silence was properly admitted and used to impeach the testimony he gave in support of his belated self-defense claim.

Appellate courts will only reverse a trial court's decision to admit evidence when it is an abuse of discretion, which requires it to have been exercised on untenable grounds or for untenable reasons. ***State v. Foxhoven***, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The same is true of prearrest silence unless it was unconstitutionally used as substantive

evidence of guilt. ***State v. Thomas***, 142 Wn. App. 589, 595, 174 P.3d 1264 (2008)(citing ***State v. Lewis***, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). "No constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest ...." ***Burke***, 163 Wn.2d at 217. Proper impeachment discredits a defendant's testimony. *Id.*

Defendant responded to the ruling on the admissibility of his prearrest silence by preemptively explaining it during direct examination:

COUNSEL:	Did you say anything to anybody in the car?
DEFENDANT:	Not necessarily. I remember saying I was telling the guy to back up a couple of times over and over. Other than that, no.
...	
COUNSEL:	[] What did you do next?
DEFENDANT:	Nothing.
COUNSEL:	Did you call the police?
DEFENDANT:	No, I didn't.
COUNSEL:	Why didn't you?
DEFENDANT:	I don't know. Afraid, scared. I don't know. Sometimes, fear, you know. We don't do things that we expect everybody else to do. I didn't know how I handled it.
COUNSEL:	You had the opportunity to call the following day. Did you call the following day?
DEFENDANT:	No.
COUNSEL:	Still shocked, afraid....

10RP 1142-43. On appeal, defendant claims the State impermissibly responded to this testimony by asking these two follow-up questions:

STATE :	You did absolutely nothing in regard to calling the police, telling these guys in the car that you shot in self-defense, none of that?
DEFENDANT:	Correct.
STATE:	This is when you are saying that [?]
DEFENDANT:	Correct.

10RP 1159; App.Br.p.16.

Each question was proper impeachment that explicitly responded to defendant's testimony in accordance with the trial court's ruling. The first question clarified the scope of defendant's already admitted prearrest silence among friends as well as his unnatural failure to report a shooting he allegedly perceived to be justified. The second question put the self-defense claim in its accurate temporal context by clarifying that it was first expressed during defendant's testimony. Neither elicited information about defendant's response to arrest or post arrest police questioning. And clarifying the scope and timing of a defendant's admissions is quite different from implying silence is substantive proof of guilt.

Defendant's state of mind during the shooting was the principal issue at trial. He testified to firing fifteen bullets into the victim preoccupied by concerns for his own safety. The veracity of that testimony was appropriately challenged by clarifying the scope of his admitted failure to behave in accordance with that belief. As in ***Jenkins***, 447 U.S. at 232-34, the impeachment was only accomplished to the extent the jury embraced the implied premise that one who actually kills another in self-

defense would naturally explain the perceived necessity for doing so to friends who witnessed it, and police lest it be misconstrued as murder. *See* ***Jenkins***, 447 U.S. at 238-39; ***Allen v. United States***, 603 A.2d 1219, 1222 (1992). The jury was free to reject the premise, or accept it but find defendant adequately explained his deviation from the norm.

The propriety of the challenged use of prearrest silence is equally evident in its difference from an impermissible substantive use that frames silence as a tacit admission of guilt. *See* ***Burke***, 163 Wn.2d at 217 (citing ***Lewis***, 130 Wn.2d at 706-07); BLACK'S LAW DICTIONARY, 1429 (6th ed. 1990); ***Chiasson v. Zapata Gulf Marine Corp.***, 988 F.2d 513, 517 (5th Cir.1993). An instructive example of silence substantively used appears in ***State v. Easter***, 130 Wn.2d 228, 233-34, 240-41, 922 P.2d 1285 (1996), where testimony adduced in the State's case implied defendant's silence revealed his guilty conscience. In stark contrast, the impeachment rightly permitted in this case accords with the "[c]ommon law tradition[n] [of] allow[ing] witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted"—like failing to contemporaneously explain the act of killing someone in self-defense to the people present at the time. *See* ***Jenkins***, 447 U.S. at 239 (citing 3A J. Wigmore, Evidence § 1042, p. 1056 (Chadbourn rev. 1970)); ***Fletcher v. Weir***, 455 U.S. 603, 606, 102 S. Ct. 1309 (1982)). The challenged evidence was properly elicited.

b. Prearrest silence was also properly used to impeach defendant's testimony in the prosecutor's challenged closing remarks.

A defendant bears the burden of establishing both the impropriety of the prosecutor's argument and its prejudicial effect. ***State v. Brett***, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing ***State v. Furman***, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993)); *see also* ***Hoffman***, 116 Wn.2d at 93-95. Challenged "arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given." ***State v. Russell***, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (citing ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990); ***State v. Green***, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986); ***State v. Warren***, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008)).

The State's closing argument recalled the jury to the chain of events leading to the shooting while exposing the implausibility of the testimony defendant gave in support of his self-defense claim by comparing it to other evidence with citation to the instructions. 11RP 1179-90. The prosecutor took care to differentiate his comments about defendant's lack of credibility from the State's burden to prove the case:

> Anyone can claim self-defense after the fact. Look at the case. The cloak of presumed innocent, et cetera, applies and should apply. I am not commenting that that should not apply. It's absolutely the State's burden to prove a case. Just because a defendant raises a claim of self-defense doesn't mean it is valid. It is not after the fact I can say, okay, I thought this guy was going to do this, that, and the other.

> You are the ones who decide, one, is that true? It is not. It's just not. It can't be. He wasn't afraid of anything.

11RP 1190. Defendant challenges the unobjected to remarks that followed:

> Look at what he <u>did</u> afterward. Rationalize this case, use your common sense in deciding this case, and you will discover of course that he raised self-defense because that's all he could do.

11RP 1190 (emphasis added); App.Br. p. 17. The argument transitioned to recalling the jury to evidence inconsistent with self-defense. It concluded with another remark challenged for the first time on appeal:

> Any person—I don't care who you are, any person—if you act in self-defense, whether you are scared or not, you are worried, you are talking, you are especially talking to the two guys in the car. None of them. It is cold-blooded murder.

11RP 1190-91. The argument next explained how the facts proved premeditated first degree murder instead of second degree murder. 11RP 1191-92. And it closed with a summary of the State's proof:

> The defendant is guilty of Murder in the First Degree based on the number of shots, based on the location of the shots, based on defendant's <u>demeanor</u> before and after the killing. The State is asking you to find the defendant guilty.

11RP 1193 (emphasis added). This argument is also first challenged on appeal. *Id.*

In rebuttal, the State embraced defendant's summary of the procedural protections attending a jury trial while differentiating them

from the jury's ability to apply common sense to the evidence. 11RP 1224. Facts refuting self-defense were argued from the instructions, to include the one explaining the jury's role in deciding credibility:

> Defense counsel put up ... Instruction No. 2 ..., which ... talks about the burden of proof ... [and] give[s] a definition of beyond a reasonable doubt.... This instruction tells you that you assess the evidence, and then you discuss whether the elements ... whether you have a reasonable doubt as to whether the charge, the elements, have been proved or not.
>
> Instruction 1, in contrast, discusses how you view the evidence. It expressly says that you are the sole judges of the credibility of each witness. <u>You decide who is telling the truth. You decide the reasonableness of the testimony and what people are saying</u>.

11RP 1225-28 (emphasis added). Inconsistencies between defendant's testimony and the corroborated testimony of other witnesses were explored. 11RP 1228-30. Defendant's claimed memory failures were addressed in terms of the instruction identifying memory as potentially indicative of credibility. 11RP 1230-33, 1237. Here, his claimed inability to recall critical post-shooting events was described as inconsistent with how the mind would typically record such a memorable event. 11RP 1230-33. The rebuttal concluded by recalling the jury to the elements of first degree murder and the State's burden of proof. 11RP 1237-40.

i. Defendant failed to prove the challenged remarks misused his prearrest silence.

Prosecutors are afforded wide latitude to draw, and express, reasonable inferences and deductions from the evidence during closing argument, including inferences as to the credibility of witnesses. ***State v. Gregory***, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006); ***State v. Militate***, 80 Wn. App. 237, 250, 908 P.2d 374 (1995) (citing ***Hoffman***, 116 Wn.2d at 94-95); ***State v. Munguia***, 107 Wn. App. 328, 337, 26 P.3d 1017 (2001). Prosecutors may argue inferences as to why the jury would want to believe one witness over another. ***Brett***, 126 Wn.2d at 175. The burden of proof does not insulate a defendant's exculpatory theory from attack; "[o]n the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." ***State v. Contreras***, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

"A prosecutor is entitled ... to point out improbabilities or a lack of evidentiary support for the defense's theory of the case." ***State v. Killingsworth***, 166 Wn. App. 290-92, 269 P.3d 1064, *review denied*, 174 Wn.2d 1007, 278 P.3d 1112 (2012)(citing ***Russell***, 125 Wn.2d at 87; ***State v. Boehning***, 127 Wn. App. 511, 519, 111 P.3d 899 (2005)). This includes pointing out how a prearrest failure to report a killing is inconsistent with self-defense. ***Jenkins***, 447 U.S. at 234-35, 238.

Addressing the challenged remarks in order, defendant incorrectly claims this remark was a comment on silence:

> Look at what he <u>did</u> afterward. Rationalize this case, use your common sense in deciding this case, and you will discover of course that he raised self-defense because that's all he could do.

11RP 1190 (emphasis added); App.Br. p. 17. This remark explicitly refers to what defendant *did* after the shooting, *not to what he failed to say about the shooting*; thus, it does not obviously, if at all, refer to prearrest silence, let alone suggest it to be an admission of guilt. The remark was also introduced with care taken to differentiate the credibility being addressed from proof the crime. *Supra* (citing 11RP 1190). Qualifications of this nature are used to confine sensitive evidence to its proper purpose. If one strays from the plain meaning of the word used to assume an implicit reference to prearrest silence, the remark remains proper impeachment of defendant's testimony. *See* ***Jenkins***, 447 U.S. at 234-35, 238.

Defendant makes the same conclusory criticism of this remark:

> Any person—I don't care who you are, any person—if you act in self-defense, whether you are scared or not, you are worried, <u>you are talking</u>, you are <u>especially talking to the two guys in the car</u>. None of them. It is cold-blooded murder.

11RP 1190-91 (emphasis added). Unlike the preceding argument, this remark actually refers to prearrest silence, but does so in terms of the implausibility of defendant's testimony he and his friends silently drove

away from the place he fired eighteen bullets at the victim. Further support for this interpretation can be found in how the prosecutor returned to the subject in rebuttal:

> Again, when you look at this instruction, it talks about the witness's ability to observe accurately. The quality of their memory while testifying. ... [h]e was asked, well, what did you say when you got in the car? And he, in essence, said nothing. What do you remember saying? Nothing. What do you remember after that? I'm asking, what do you remember after that? Nothing. What did you do later? What did you do the next day? Did you go to work? All of these kind of things. Nothing. Crystal clear memory up to that point. This can't be the type of incident where you would not remember, as I said earlier, what happened later, because what is your mind doing to you when you know, meaning the defendant, he just fired 18 shots at a person pointblank? What is the mind doing now? Murder, right? What do I do? How do you deal with that? That's not an every-day occurrence. You would remember. What were you thinking? What were you feeling? What were you doing? Nothing.

11RP 1231-32. The entire argument is quintessential impeachment aimed at discrediting defendant's specifically referenced testimony by recalling the jury to how it was undermined during cross-examination. Both arguments speak in terms of defendant's believability. Neither treat silence as a tacit admission of guilt.

Defendant's last challenge is directed to how the prosecutor summarized the evidence without mentioning silence:

> The defendant is guilty of Murder in the First Degree based on the number of shots, based on the location of the shots, <u>based on defendant's demeanor</u> before and after the killing. The State is asking you to find the defendant' guilty.

11RP 1193(emphasis added). Recalling the jury to defendant's "demeanor" is not a reference to silence, let alone improper treatment of silence as substantive evidence of guilt. This is because a generic reference to demeanor cannot be construed as commenting on silence as substantive evidence. ***State v. Barry***, 183 Wn.2d 297, 307-08, 352 P.3d 161 (2015); ***United States v. Velarde-Gomez***, 269 F.3d 1023, 1030-31 (9th Cir.2001); accord ***Barry***, 183 Wn.2d at 308; ***State v. Mauro***, 159 Ariz. 186, 766 P.2d 59, 70–71 (1988). In cases where a statement is challenged as impliedly making substantive use of silence, meaning is determined through an examination of the statement's context. ***Barry***, 183 Wn.2d at 308.

The challenged reference to demeanor was plainly directed at conduct other than silence. 11RP 1191. It followed argument that began by transitioning away from impeachment to explain how defendant's premeditated act of killing the victim was distinguishable from second degree murder. 11RP 1190-93. This comparison focused on the manner of the shooting, which had already been addressed in detail. In this context, relevant demeanor, other than silence, was first introduced at the outset of the closing argument. 11RP 1181. Defendant was described as confidently heading into the fight "with his eyes opened, knowing what was going to happen," assured he could meet any challenge with the firearm he carried. 11RP 1181, 1188. His act of firing eighteen bullets at the victim in response to being challenged to a fistfight was addressed as it was again just before the challenged remark. 11RP 1189, 1192-93. And the first

treatment of that conduct included defendant's post shooting *act* of fleeing the scene. 11RP 1189.

ii. Defendant cannot show flagrant and ill-intentioned misconduct incapable of being cured with an instruction.

If the defendant failed to make a proper objection, he or she must prove the prosecutor's argument was so flagrant and ill-intentioned resulting prejudice could not have been cured by a proper instruction. ***State v. McChristian***, 158 Wn. App. 392, 400, 241 P.3d 468 (2010) (citing ***State v. Reed***, 102 Wn.2d 140, 145, 684 P.2d 699 (1984)). Improper argument is flagrant when it communicates a "remarkable misstatement of the law" by expressing an obvious, extremely, flauntingly, or purposely conspicuous error. *See* ***Warren***, 165 Wn.2d at 28; ***State v. Emery***, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY 862-63 (2002)). "Ill-intentioned" argument evinces a malicious disregard for a defendant's right to due process. *See generally* ***Warren***, 165 Wn.2d at 29 (prosecutor sought to undermine the burden of proof with argument previously determined to be "entirely inappropriate"); WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1126 (2002).

Defendant challenges three unobjected to remarks in the prosecutor's closing argument which he must now prove to be incurably

flagrant and ill-intentioned misconduct. He cannot. Only one of the challenged remarks mentioned prearrest silence. 11RP 1190-91. It most clearly commented on the implausibility of defendant's testimony that nothing was discussed in the car as he and his friends fled from the shooting when it would have been a natural time to discuss the incident. *Id.* The import cannot be fairly characterized as conspicuous error made in malicious disregard for the law given the law authorizing that type of impeachment. *E.g.*, ***Jenkins***, 447 U.S. at 238-39; ***Burke***, 163 Wn.2d at 217; ***Lewis***, 130 Wn.2d at 707; ***Thomas***, 142 Wn. App. at 595.

The other two challenged remarks refer to what defendant "did" and the state of his "demeanor" at the time, which is not a comment on silence. 11RP 1190, 1193. Defendant's relevant conduct was presumptively admissible. ER 401-02. So too was any relevant aspect of his demeanor. ***Barry***, 183 Wn.2d at 308. To the extent the reference to what he "did" could be construed as capturing things he failed to say, the point made by it too closely approximates permissible impeachment to cross the high threshold for reversible error attending the applicable standard of review. If the prosecutor's reference to "demeanor" were likewise construed as an oblique comment on silence, the ambiguity inherent in the obliqueness would have done much to mask the impermissible connotation and made it particularly susceptible to being cured by an instruction limiting prearrest silence to the issue of defendant's

credibility. *See* ***State v. Brown***, 113 Wn.2d 520, 529, 782 P.2d 1013 (1989); ***Willis***, 67 Wn.2d at 685-86.

iii. All three remarks were harmless if error.

An erroneous use of prearrest silence as substantive evidence is harmless if the untained evidence overwhelmingly supports the verdict. ***Easter***, 130 Wn.2d at 242; ***State v. Guloy***, 104 Wn.2d 412, 425, 704 P.2d 1182 (1985). In this case the references to prearrest silence were directed at discrediting defendant's theory of self-defense. They are harmless if error because the defense was overwhelming defeated by other evidence. Self-defense requires:

> (1) the slayer reasonably believed ... the person slain intended to inflict death or great personal injury;
> (2) the slayer reasonably believed ... there was imminent danger of such harm being accomplished; and
> (3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident.

CP 65 (Inst. 8) (WPIC 16.02); ***State v. Walden***, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997); ***State v. Janes***, 121 Wn.2d 220, 238-39, 850 P.2d 495 (1993).

There was no evidence the victim "intended to inflict death or great personal injury" by challenging defendant or others to a fistfight amid the

other fistfight underway nearby. By all accounts the victim was unarmed. 6RP 346; 7RP 590; 8RP 752-54; 10RP 1136-37. His coordination was visibly compromised. 7RP 578-79; 8RP 753-54; 10RP 1127-28. Meanwhile defendant knew his loaded .9mm pistol was capable neutralizing any threat posed by the unarmed victim, as was irrefutably demonstrated. Even if one unjustifiably assumes defendant irrationally overestimated the victim's ability to harm him in spite of the superior force defendant was capable of bringing to bear, acting in self-defense based on an honest but unreasonable perception of a threat does not lessen criminal liability. ***State v. Hughes***, 106 Wn.2d 176, 188-89, 721 P.2d 902 (1986). Defendant admitted to responding to an unarmed challenger by firing eighteen bullets, pausing between the three that missed the victim and the fifteen that found their mark. CP 27; 10RP 1133, 1138, 1150. Other evidence reinforced the obvious inference defendant's response was clearly too excessive to support a self-defense verdict even if his expressed reason for shooting was accepted as true. Not the least of which was the corroborated testimony that defendant stood over the victim while firing the remaining ammunition into him as he "wiggl[ed]" about on the ground. 6RP 351-54, 471; 8RP 750, 824, 831-32; 10RP 1091-92; Ex. 5. The trial court also rightly deemed any prejudicial effect attending the challenged impeachment to be mitigated by unchallenged testimony neither of defendant's friends ever reported the shooting as self-defense.

8RP 871; 10RP 1091-92. Any error to be found in the State's treatment of defendant's prearrest silence was harmless if error.

3. DEFENDANT SHOULD BE DEEMED TO HAVE WAIVED HIS APPELLATE CHALLENGE TO THE DISCRETIONARY LFO IMPOSED THROUGH HIS FAILURE TO OBJECT TO IT AT SENTENCING.

Defendants sentenced after May 21, 2013, are on notice that failing to object to the imposition of discretionary LFOs at sentencing waives a related claim of error on appeal. ***State v. Lyle***, 188 Wn. App. 848, 850, 355 P.3d 327 (2015)(citing ***State v. Blazina***, 174 Wn. App. 906, 911, 301 P.3d 492 (2013)). The legislature divested the courts of discretion to consider ability to pay when imposing mandatory LFOs. ***State v. Lundy***, 176 Wn. App. 96, 102, 303 P.3d 755 (2013).

Only the $2,500 imposed for legal defense recoupment was discretionary. CP 87; RCW 7.68.035(1)(a) (CVPA); RCW 43.43.7541 (DNA); RCW 36.18.020(2)(h) (filing fee). Defendant's failure to object to that condition at sentencing should preclude him from challenging it on appeal. RAP 2.5(a); ***Lyle***, 188 Wn. App. at 850. Defendant nevertheless seeks discretionary relief under RAP 2.5(a) pursuant to ***State v. Blazina***, 182 Wn.2d 827, 344 P.3d 680 (2015). But the systemic concerns which motivated the ***Blazina*** court to consider an unpreserved challenge to discretionary LFOs were adequately addressed by the decision in that

case. There is no need to readdress them in defendant's case. There is likewise no reason to believe the challenged LFO was unfairly imposed.

Unlike his victim, defendant remains an employable able-bodied man. By working in the security or construction industry he accumulated enough discretionary income to afford a night out on the town and the loaded .9mm pistol he used to kill Guillory. *E.g.*, 10RP 1113, 1158. Defendant's failure to object leaves the record devoid of any reason to suppose it inequitable to require him to reimburse the community a fraction of the cost it expended on his behalf. Should the obligation actually prove a manifest hardship upon his release, it can be adjusted at "anytime." RCW 10.61.160(4); ***State v. Smits***, 152 Wn. App. 514, 523, 216 P.3d 1097 (2009).

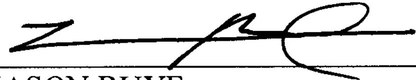
D. CONCLUSION.

Defendant's conviction and sentence should be affirmed. There is ample evidence of premeditation to support his first degree murder conviction. The testimony he gave in support of his self-defense claim was constitutionally impeached with his failure to similarly describe the

shooting prior to arrest. And he waived his challenge to the discretionary LFO imposed at sentencing by failing to object below.

RESPECTFULLY SUBMITTED THIS: DECEMBER 7, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
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SPENCER BABBITT
Rule 9

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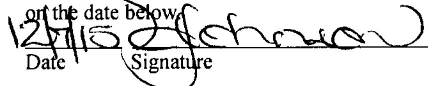

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