No. 46633-3-II
(CONSOLIDATED CASE)

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

NATHANIEL WESLEY MILES,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-01704-2
The Honorable Bryan Chushcoff, Judge

OPENING BRIEF OF APPELLANT NATHANIEL WESLEY MILES

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4. The trial court erred when it included jury instruction 19A, which removed the right of self-defense for a defendant acting "in retaliation or in revenge."

5. The jury instructions denied Nathaniel Miles his ability to argue his theory of self-defense and relieved the State of its burden of proving the absence of self-defense.

6. The trial court erred in finding that Nathaniel Miles had the present or future ability to pay discretionary legal financial obligations.

7. The trial court erred when it included jury instruction 9 defining accomplice liability.

8. The trial court's jury instruction 9 defining "accomplice" violated Nathaniel Miles' Fourteenth Amendment right to due process because it failed to make the relevant standard manifestly clear, it allowed conviction based on mere knowledge without proof of criminal intent, and it relieved the state of its burden of proving the elements of accomplice liability.

9. The trial court's improper answer to the jury's question failed to make the relevant legal standard manifestly clear to the average juror, and relieved the state of its burden of proving Nathaniel Miles' guilt as an accomplice, erroneously permitted conviction for murder if the jury believed that Miles knew that he was promoting or facilitating "a" crime, and commented on

the evidence in violation of art. IV, § 16 of the Washington State Constitution.

10. The trial judge erred by seating an alternate juror who had been unconditionally discharged without taking appropriate steps to protect the alternate juror from influence, interference, or publicity which might affect the juror's ability to remain impartial, by failing to admonish her not to discuss the case with anyone and to avoid publicity about the trial, and by seating the alternate juror without conducting *voir dire*, in light of his previous failure to admonish her prior to discharging her.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State fail to prove beyond a reasonable doubt that Nathaniel Miles or an accomplice acted with extreme indifference to human life, where the evidence showed that Miles' accomplice fired directly at the intended victim and that there were no other people put in danger by the accomplice's act? (Assignments of Error 1 & 2)

2. Was the giving of a first aggressor instruction error where the evidence showed that Nathaniel Miles and his friends did nothing more than drive slowly past the victim's car, and that the victim, who had engaged in several earlier drive-by shootings in Miles' neighborhood, picked up a gun and exited his vehicle and possibly fired the first shot? (Assignments of Error 3, 4 & 5)

3. Is the mere act of driving a car into an unfriendly neighborhood, looking for an individual who earlier in the day committed several drive-by shootings, an aggressive act that is likely to provoke a belligerent response, thus making the occupants of the car the first aggressors and removing their right to claim self-defense even if the sought-after individual fires a gun at them first? (Assignments of Error 3, 4 & 5)

4. Did the court's instruction, which removed the right of self-defense for a defendant acting "in retaliation or in revenge," a comment on the evidence where there was conflicting

evidence regarding the intentions of Nathaniel Miles and his friends when they drove to the Hilltop neighborhood looking for the victim, and where the credible evidence presented at trial showed that the victim actually armed himself and fired the first shot? (Assignment of Error 4)

5. Did the trial court fail to comply with RCW 10.01.160(3) when it imposed discretionary legal financial obligations as part of Nathaniel Miles' sentence, where there was no evidence that he has the present or future ability to pay? (Assignment of Error 6)

6. Accomplice liability requires proof that the accused person associated himself with a criminal venture and took some action to help make it successful. Did the court's instructions allow conviction based on mere knowledge, without proof of intent to further a crime? (Assignments of Error 7 & 8)

7. Did the court's improper answer to a jury inquiry allow conviction for murder if jurors believed that Nathaniel Miles knew he was participating in "a" crime other than murder, when conviction as an accomplice requires proof that the accused person knew he was promoting or facilitating the charged crime? (Assignment of Error 9)

8. Did the judge imply that jurors should convict Nathaniel Miles of murder if they found that he was an accomplice to any crime, where a judge may not convey to the jury his or her personal attitude toward the merits of the case.? (Assignment of Error 9)

9. Did the trial judge violate Nathaniel Miles' right to a fair trial by an impartial jury by seating an alternate juror who had been discharged rather than temporarily excused from service, after the court failed to take appropriate steps to protect her from influence, interference, or publicity and without taking steps to make certain she remained impartial? (Assignment of Error 10)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On April 25, 2013, the State charged Nathaniel Wesley Miles and co-defendants Anthony Ralls, Darrell Lee, Terris Miller, and Brian Allen, with first degree murder for the August 28, 1988 shooting death of Bernard Houston. (CP 215-16) The State alleged that the defendants committed premediated murder (RCW 9A.32.030(1)(a)); or in the alternative, the defendants' conduct created a grave risk of death and manifested an extreme indifference to human life (RCW 9A.32.030(1)(b)). (CP 215-16) The State later amended the Information to charge Miles with one count of witness tampering (RCW 9A.72.120). (CP 555-56, 706-07)

Lee, Miller, and Allen subsequently entered into plea bargains and agreed to testify for the State in exchange for reduced charges and shorter sentences. (07/09/14 RP 1091-92, 1093-94; 07/14/14 RP 1291-92, 1428)[1]

Miles moved before trial to dismiss the charges on the grounds that the quarter-century delay in charging was unnecessary and prejudicial. The trial court denied the motion. (CP 224-29, 235-

[1] The transcripts will be referred to by the date of the proceeding contained therein.

81, 294-447; 01/31/14 RP 5-35) At the close of the State's case, Miles moved to dismiss the charges, arguing that the State failed to prove Miles acted as an accomplice or that anyone acted with extreme indifference to human life. (07/22/14 RP 2144-52, 2156-57) The trial court denied the motion. (07/22/14 RP 2156-57)

Miles renewed both motions before closing arguments, but the trial court again denied both. (07/29/14 RP 2579-89; CP 666-73) Miles also objected to the trial court's decision to include a "first aggressor" instruction, and to include an instruction proposed by the State telling the jury that "the right of self-defense does not permit action done in retaliation or in revenge." (CP 646-49, 731, 732; Miles' Sup. CP – Plaintiff's Supplemental Proposed Instruction; 07/29/14 RP 2559-60, 2563, 2571-76)

The jury found both Miles and Ralls not guilty of first degree premediated murder, but guilty of first degree murder by engaging in conduct manifesting an extreme indifference to human life. (08/01/14 RP 2821-23; CP 756-60) The jury also found Miles guilty of witness tampering. (CP 761; 08/01/14 RP 2823)

Miles moved for judgment notwithstanding the verdict, arguing that the State failed to disprove self-defense or prove extreme indifference, but the trial court denied the motions. (09/24/14 RP 10-

40; CP 781-89) The court imposed a standard range sentence of 333 months of confinement. (09/24/14 RP 78; CP 772) This appeal timely follows. (CP 790)

B. SUBSTANTIVE FACTS

On August 28, 1988, at about 11:50 at night, police responded to a report of a shooting at 23rd Street and Sheridan Street in Tacoma's Hilltop neighborhood. (07/01/14 RP 141, 146; 07/02/14 RP 274) They found a Jeep Cherokee illegally parked on the wrong side of 23rd facing Sheridan. (07/01/14 RP 150, 166) They also found Bernard Houston lying on the ground by the front bumper of the Jeep, suffering from what would be a fatal gunshot wound to his forehead. (07/01/14 RP 150, 151, 227, 231; 07/02/14 RP 279)

Houston was holding a firearm in his hand. (07/02/14 RP 279-80) The firearm, a .22 caliber revolver, contained five live rounds of ammunition and one spent casing. (07/01/14 RP 155, 161) Inside the Jeep, Detectives found a partially-consumed bottle of alcohol and expended bullet casings from a .38 caliber firearm. (07/07/14 RP 623, 626) Detectives did not find any shell casings on the ground in the area. (07/07/14 RP 633)

Police were notified that there was a second shooting victim waiting at a nearby convenience store. That individual, Michael

Jeter, had been shot in the leg as he ran from the Jeep. (07/01/14 RP 182; 07/07/14 RP 596, 598; 07/07/14 RP 896)

Investigators believed that the shooting was gang-related, as gang activity was significant at that time in the Hilltop and South Tacoma neighborhoods. (07/07/14 RP 631-32) Investigators also learned that a white Chevrolet Monte Carlo was involved in the incident, and suspected the Monte Carlo might be connected to Terris Miller. (07/07/14 RP 651-52) But without any other solid leads or witness statements, the investigation stalled. (07/02/14 RP 282; 07/07/14 RP 636, 650-51, 657)

A new break in the case in August of 2001 again led investigators to suspect Terris Miller was involved. (07/17/14 RP 1881) Detective John Ringer interviewed Miller, and a new suspect, Darrel Lee. (07/17/14 RP 1891-92, 1893-94, 1897) But no charges resulted from these new leads. Then, in September of 2009, a man named Ahmad Dyles contacted the lead Detective, John Ringer, and told him that he had information about an old homicide case. (07/17/14 RP 1899) According to Dyles, Anthony Ralls confessed to shooting Houston on August 28, 1988 in retaliation for shooting at him earlier that day. (07/16/14 RP 1712, 1715, 1716) But still no charges were forthcoming.

For 37 days in 2013, informant Curtis Hudson and Anthony Ralls were housed in the same unit at the Pierce County Jail. (07/15/14 RP 1603; 07/22/14 RP 2114-15) According to Hudson, Ralls told him about the 1988 incident, explaining that the occupants of the Jeep had shot at him earlier in the day, and that he went to Hilltop that night and shot Houston. (07/15/14 RP 1614-15, 1619) Hudson contacted Detective Ringer with this information, and charges were filed a short time later. (07/17/14 RP 1903-04; CP 215-16)

Michael Jeter, Calille McMichael, and Tyra Doucoure were with Bernard Houston in the Jeep at 23rd and Sheridan on the night of August 28, 1988, and testified at trial. (07/02/14 RP 399, 401; 07/08/14 RP 766-67, 873) According to Jeter, he and Houston were friends, made their living dealing drugs, and associated with Hilltop Crips (HTC) gang members. (07/08/14 RP 861, 863) Jeter's street nickname was "Syk" (short for psycho Michael) and Houston's was "Clown." (07/08/14 RP 863-64) The Hilltop area around 23rd and Sheridan was considered HTC territory. (07/08/14 RP 861-62) The rival gang, the Hilltop Bloods (HTB) claimed the eastside of Tacoma as their territory. (07/08/14 RP 862-63)

According to Jeter, Houston picked him up that evening in his

Jeep. Houston was alone and was acting strangely. (07/08/14 RP 868, 872) Because Houston's Jeep had a hole in one of its tires, he and Jeter went to a nearby store to purchase something to fix the hole. (07/08/14 RP 869-70) While they were there, they bumped into Jeter's female cousins, McMichael and Doucoure. (07/08/14 RP 870) McMichael and Doucoure insisted on getting into the Jeep so that the four of them could go somewhere to smoke and drink. (07/08/14 RP 872-73) Houston drove them to the corner of 23rd and Sheridan, where they parked and began drinking and smoking marijuana. (07/08/14 RP 873-75)

Jeter testified that he could tell something was wrong with Houston because he continued to act weird. (07/08/14 RP 875-76) According to Jeter, he was in the middle of arguing with the women in the backseat because he wanted them to go home, when he noticed that Houston had gotten out of the car and was climbing over a nearby fence. (07/08/14 RP 887-88) Jeter testified that he then noticed a dark colored car pulled up next to the Jeep, and could see a gun pointing out of the car. (07/08/14 RP 888-89, 892) Jeter noticed several African-American men in the car. (07/08/14 RP 891-92)

The men did not shoot, however, so Jeter and the women got

out of the Jeep. (07/08/14 RP 893) Jeter testified that someone in the car said "What's up, Blood?" (07/08/14 RP 893) Jeter told the women to go home, and they started walking. (07/08/14 RP 896) Then Jeter heard gunshots, so he began running away down 23rd Street, and in the process was shot in the leg. (07/08/14 RP 896-97)

According to Jeter, the men in the dark car did not shoot as he and the women exited the Jeep, or as they stood outside the Jeep. (07/09/14 RP 1011-12) No shots were fired until after he and the women moved away from the Jeep, and Jeter does not know where the first shot came from. (07/09/14 RP 1014, 1018) He testified it was possible that Houston fired the first shot. (07/09/14 RP 1014, 1018) Jeter also testified that, even though he owned "a lot" of guns and .38 caliber casings were found in the back of the Jeep, he did not have a gun with him that evening. (07/08/14 RP 876)

McMichael testified she noticed a white car with no headlights pull up alongside the Jeep as it was parked at 23rd and Sheridan. (07/08/14 RP 767, 774) Nothing happened and no one got out of the car, but Jeter told her to get out of the Jeep, so she exited and walked across the street. (07/08/14 RP 767, 774, 779, 787) She heard Houston say "fuck those slobs," then she heard gunshots so she ran

away and did not look back.[2] (07/08/14 RP 768, 783)

Doucoure testified that she noticed a white car then a gold car drive by slowly as she sat in the Jeep at 23rd and Sheridan. (07/02/14 RP 401, 404, 407) She saw Houston fumbling for a gun, and heard him say "there go them slobs." (07/03/14 RP 506-07, 508-09) She believes that Jeter also had a gun. (07/03/14 RP 553-54)

One of the men told them to get out, so she and McMichael exited the Jeep and walked across the street. (07/02/14 RP 409) She saw the two cars back up, then heard gunfire. (07/02/14 RP 411) She could not tell who fired first, but she could see Houston standing outside the Jeep with his arm raised and saw flashes of gunfire coming from where Houston was standing and from the other car. (07/02/14 RP 412, 413, 414, 446-47)

Co-defendants Terris Miller, Darrell Lee and Brian Allen were with Miles and Ralls on the night of August 28, 1998, and testified on behalf of the State. According to Allen, he and Ralls had gone to the Salishan area of East Tacoma earlier that day to conduct a drug transaction. (07/14/14 RP 1380, 1381) As they were getting into their car to leave, they were shot at by unseen men in a light colored

[2] "Slobs" is a derogatory term for Bloods. (07/08/14 RP 895)

SUV. (07/14/14 RP 1384-85) Allen and Ralls followed the SUV and returned fire, but eventually lost them. (07/14/14 RP1386, 1389) Later, Allen and Ralls met up with acquaintances, who told them about two other similar drive-by shooting incidents that day perpetrated by individuals in a light colored SUV. (07/14/14 RP 1391, 1392-93)

Miller and Lee also learned about the three drive-by shootings from the SUV, one of which occurred at their friend Fred Appleton's home. (07/09/14 RP 1048, 1050, 1051, 1053; 07/14/14 RP 1262-63) One of the bullets narrowly missed hitting Appleton's baby daughter. (07/09/14 RP 1045-46, 1048, 1050)

Witnesses believed, based on the car involved, that Syk (Jeter) and Clown (Houston) were the individuals perpetrating the drive-by shootings that day. (07/09/14 RP 1051, 1052, 1057; 07/14/14 RP 1260-61, 1267, 1393) Miles, Ralls, Allen, Miller, Lee and another man, Joey Courtney, heard about these suspicions, and were upset that they and their friends had been put in danger numerous times that day. (07/09/14 RP 1050, 1058; 07/14/14 RP 1265-66, 1405-06)

According to Allen, the six men decided to go to the Hilltop area to find Houston and Jeter and confront them about their actions.

(07/14/14 1402, 1405-06) Allen's hope was that they could resolve the issue and convince Houston and Jeter to stop. (07/14/14 RP 1405-06) According to Lee and Miller, they discussed retaliating by shooting back at Houston and Jeter. (07/09/14 RP 1060, 1058; 07/14/14 RP 1265-66) But there was not a specific plan to kill anyone. (07/10/14 RP 1170; 07/14/14 RP 1357-58)

Allen drove a brown Oldsmobile Cutlass, with Ralls in the front passenger seat and Lee in the back. (07/09/14 RP 1043-44; 07/14/14 RP 1268-69, 1400) Miles drove a white Monte Carlo, with Miller in the front passenger seat and Courtney in the back. (07/09/14 RP 1043, 1063; 07/14/14 RP 1268, 1400) They went to the Hilltop area and eventually spotted the Jeep parked at 23rd and Sheridan. (07/09/14 RP 1063; 07/14/14 RP 1273, 1410)

According to Lee, the two cars approached the Jeep and stopped. (07/14/14 RP 1274-75) As Allen and Ralls opened their car doors and started to step out, a shot was fired from the Jeep. (07/14/14 RP 1275-76) Allen ducked, but Ralls lifted his arm and returned fire. (07/14/14 RP 1277, 1278) Allen also saw Miles get out of his car, and heard shots being fired away from the Jeep, down 23rd Street. (07/14/14 RP 1280-81)

According to Allen, as the car approached the Jeep, Allen

heard a gunshot and felt a bullet "whiz" by his head. (07/14/14 RP 1411, 1413) Allen ducked, put his car in reverse and backed up. (07/14/14 RP 1415) Then Ralls got out of the car and Allen could see him standing on the street holding a gun. (07/14/14 RP 1416-17) Allen could hear gunshots all around him as he yelled for Ralls to get back in the car. (07/14/14 RP 1416-17)

According to Miller, when Allen's car pulled up to the Jeep, he saw Houston standing on the street and saw flashes coming from the passenger side of Allen's car. (07/09/14 RP 1063, 1066) He did not recall seeing Houston shoot his weapon. (07/09/14 RP 1068) Miller also saw Miles get out of his car and shoot towards Jeter as he ran away. (07/09/14 RP 1068, 1071) Miller also testified that he received a letter from Miles after charges were filed in 2013, and that Miles told him to testify in a way that was not truthful. (07/09/14 RP 1082, 1084, 1088-89, 1091; Exh. 27)

Ralls testified on his own behalf. He testified that he did not have a firearm that day, that he did not drive to Hilltop on the night of August 28, that there had been no discussion of what might happen there, and that the first shots were fired from the area of the Jeep. (07/28/14 RP 2423, 2437-38, 2439, 2444, 2445)

IV. ARGUMENT & AUTHORITIES

A. THE STATE FAILED TO PROVE THAT MILES OR AN ACCOMPLICE ACTED WITH EXTREME INDIFFERENCE TO HUMAN LIFE BECAUSE NO LIVES WERE PUT AT RISK OTHER THAN THE LIFE OF THE SINGLE INTENDED VICTIM.

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

In this case, the State charged Miles with first degree murder under two alternative means: (1) premeditated murder; and (2) extreme indifference to human life. RCW 9A.32.030(1)(a) & (b).[3] (CP 706-07) The evidence indicated that Ralls fired the shot that killed Houston, and there was no evidence that Miles fired his weapon toward the Jeep, so the State instructed the jury that it could find Miles guilty as an accomplice to Houston's killing. (07/09/14 RP 1071; 07/14/14 RP 1280-81; 07/15/14 RP 1619-20; CP 721, 745) The jury found Miles and Ralls not guilty of premeditated murder, thus rejecting the idea that the men ever formed and acted upon an intent to kill Houston. (CP 756; 08/01/14 RP 2821-22)

The jury instead convicted Miles and Ralls of the extreme indifference alternative, which provides:

> (1) A person is guilty of murder in the first degree when:
> . . . .
> (b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person[.]

RCW 9A.32.030(1)(b). First degree murder by extreme indifference requires proof that the defendant "(1) acted with extreme indifference, an aggravated form of recklessness, which (2) created

[3] The State did not charge any crime associated with the shooting of Jeter.

a grave risk of death to others, and (3) caused the death of a person." State v. Yarbrough, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009); RCW 9A.32.030(1)(b). First degree murder requires a very high degree of risk, which "elevates the level of recklessness to an extreme level, thus 'manifesting an extreme indifference to human life.'" State v. Dunbar, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991) (quoting RCW 9A.32.030(1)(b)).

However, "[u]nder this alternative, the State must show that the defendant acted recklessly and with extreme indifference to human life in 'general [ ],' as opposed to simply endangering the life of a 'particular' victim or victims." State v. Pettus, 89 Wn. App. 688, 694, 951 P.2d 284 (1998) (quoting State v. Berge, 25 Wn. App. 433, 437, 607 P.2d 1247 (1980)). The defendant must also know that his or her conduct is endangering more than one life. See State v. Barstad, 93 Wn. App. 553, 568, 970 P.2d 324 (1999).

For example, in Berge, the defendant shot and killed the victim as he slept alone in Berge's living room. The court reversed his conviction for first degree murder by extreme indifference, stating:

> As other statutory provisions cover acts directed at a particular individual or individuals, we shall assume that the legislature intended RCW 9A.32.030(1)(b) to provide for those situations indicating a recklessness and extreme indifference to human life generally. The

> record reveals that Berge's violent attack was specifically directed at a particular victim.

25 Wn. App. at 437.

Similarly, in State v. Anderson, the defendant was convicted of first degree murder by extreme indifference. 94 Wn.2d 176, 616 P.2d 612 (1980). Rejecting the prosecutor's argument that a recent amendment to the statute allowed conviction for first degree murder in cases where a defendant showed extreme indifference to only the life of the victim, the court held:

> The State's position would result in a disharmonious construction of RCW 9A.32. Second-degree murder would be effectively eliminated. Every "intent to cause the death" (RCW 9A.32.030(1)(a), (b)), would be an "extreme indifference to human life" and conduct which "creates a grave risk of death", i.e., first-degree murder.

94 Wn.2d at 190-91(first citation omitted). The Court held that, as applied within the first degree murder statute, "extreme indifference to human life" means a disregard of human life in general, not simply a disregard for the victim's life.

Conversely, in Pettus, the court held that the State could charge the defendant under the extreme indifference alternative when he shot from a moving vehicle at another moving vehicle containing just one person, but only because the shooting took place in a residential neighborhood in the middle of the day near a school

playground, and there was direct testimony from a number of witnesses that they were placed at risk during the incident. 89 Wn. App. at 692-94. Similarly, in State v. Pastrana, the defendant shot at another vehicle on a crowded freeway. 94 Wn. App. 463, 972 P.2d 557 (1999). The court found that, even though Pastrana was directing his fire toward one specific individual, there was sufficient proof of extreme indifference because he killed an unintended victim and jeopardized the life of several other drivers and passengers on the freeway. 94 Wn. App.at 473.

In this case, the evidence showed that no shots were fired while the Jeep's occupants were exiting the vehicle, and no shots were fired toward the Jeep until after Jeter, McMichael and Doucoure had moved well away from the Jeep.[4] There is no evidence that anyone other than Houston was in the vicinity of the Jeep when Ralls fired his weapon, or that Ralls fired his weapon anywhere other than at the Jeep.[5]

Ralls' conduct was dangerous only to Houston. Reversal is required where the evidence shows that the defendant's conduct

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[4] 07/02/14 RP 409; 07/08/14 RP 767; 07/09/14 RP 1012-13; 07/14/14 1419-20.

[5] Even if Miles' conduct of shooting towards Jeter is considered, that still does not provide evidence of extreme indifference to human life. Miles' actions were directed towards one person, and only Jeter's safety was at risk because Houston and the two women were not near Jeter at the time.

was dangerous to the life of a single victim. Pettus, 89 Wn. App. at 694 (citing Berge, 25 Wn. App. at 437); Anderson, 94 Wn.2d 176. Accordingly, Miles' conviction for first degree murder must be reversed.

B. THE TRIAL COURT COMMITTED PREJUDICIAL AND REVERSIBLE ERROR WHEN IT INCLUDED INSTRUCTIONS TELLING THE JURY THAT MILES COULD NOT CLAIM HE WAS ACTING IN SELF-DEFENSE IF HE WAS THE "FIRST AGGRESSOR" OR WAS ACTING "IN RETALIATION OR IN REVENGE."

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). It is prejudicial error to submit an issue to the jury that is not warranted by the evidence. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

Where a defendant presents evidence that he reasonably believed the victim was about to harm him or another person and he acted in self-defense, the State must prove the absence of self-defense beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 496, 656 P.2d 1064 (1983); State v. Rodriguez, 121 Wn. App. 180, 185, 87 P.3d 1201 (2004); State v. Douglas, 128 Wn. App. 555,

563, 116 P.3d 1012 (2005).

A defendant who initially provokes a victim to act with force cannot claim self-defense. State v. Riley, 137 Wn.2d 904, 910, 976 P.2d 624 (1999). Accordingly, if there is credible evidence the defendant provoked the altercation and essentially created the need to act in self-defense, a first aggressor instruction is appropriate. Riley, 137 Wn.2d at 910.

However, because the State has the burden of disproving the defendant's self-defense claim beyond a reasonable doubt, "courts should use care in giving an aggressor instruction." Riley, 137 Wn.2d at 910 n. 2. "'[F]ew situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction.'" Riley, 137 Wn.2d at 910 n. 2 (quoting State v. Arthur, 42 Wn. App. 120, 125 n. 1, 708 P.2d 1230 (1985)). Accordingly, first aggressor instructions should be used sparingly because the other self-defense instructions will generally be sufficient to allow the theory of the case to be argued. Riley, 137 Wn.2d at 910 n.2; State v. Douglas, 128 Wn. App. at 563.

Over defense objection, the trial court gave the following "first aggressor" instruction:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant or an accomplice was the aggressor, and that the defendant's or an accomplice's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

(CP 731 (Jury Instruction 19); 07/29/14 RP 2571-76)[6] It was error to give the instruction in this case because it is not supported by substantial evidence in the record, it did not allow Miles to argue his theory of the case, and it relieved the State of its burden of disproving that Miles and Ralls acted in self-defense.

First, the evidence in the record does not support the State's theory that Miles and the other men were the first aggressors. It is undisputed that Miles' and Ralls' cars approached the Jeep and slowed or stopped next to it.[7] The Jeep's passengers, Jeter, McMichael and Doucoure, all testified that nothing happened and no shots were fired as they exited the car and began to walk away.[8]

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[6] The appellate court reviews *de novo* whether sufficient evidence justified a first aggressor instruction. State v. Stark, 158 Wn. App. 952, 959, 244 P.3d 433 (2010). Jury instructions are also reviewed *de novo*, within the context of the jury instructions as a whole. State v. Pirtle, 127 Wash.2d 628, 656, 904 P.2d 245 (1995).

[7] 07/02/14 RP 404, 407; 07/08/14 RP 767, 774; 07/14/14 1274-75.

[8] 07/02/14 RP 409; 07/08/14 RP 767; 07/09/14 RP 1012-13.

McMichael and Doucoure testified that Houston made a derogatory comment about "slobs" as he armed himself with a firearm.[9] Jeter testified that Houston was out of and away from the Jeep before any shots were fired.[10] Doucoure testified that she saw Houston standing outside of the Jeep pointing a firearm and firing at the other two cars.[11] First responders found Houston on the ground with a gun still in his hand.[12] And Lee and Allen both testified that Houston fired the first shot.[13]

There was simply no credible evidence that Miles or Ralls or their friends engaged in an aggressive or provocative act that justified the use of deadly force against them. The evidence shows instead that Houston shot at Miles and Ralls first, or at the very least shows that Houston was out of his car and armed with a firearm before the first shots were fired. The evidence shows that Houston, not Miles and Ralls, was the first aggressor here.

Perhaps recognizing this evidentiary problem, the State argued that Miles and his friends provoked the altercation, and lost the right to claim self-defense, by driving into rival gang territory

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[9] 07/03/14 RP 506-07, 508-09; 07/08/14 RP 783.
[10] 07/08/14 RP 887-88.
[11] 07/02/14 RP 412-14, 446-47.
[12] 07/02/14 RP 279-80.
[13] 07/14/14 RP 1275-76, 1411, 1413.

looking for Houston and Jeter. (07/29/14 RP 2607-08) But a first aggressor instruction requires some evidence of an *intentional* and *provocative* act, which a "'jury could reasonably assume would provoke a belligerent response by the victim.'" State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989) (quoting State v. Arthur, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985)). Driving through a rival's neighborhood, on a public street, where a defendant has every right to be, simply cannot be viewed as an intentionally provocative act that warrants a violent response and that removes the defendant's right to defend himself against the use of deadly force. And Houston did not have the right to react with deadly force to the mere presence of Miles' and Houston's vehicles in the Hilltop neighborhood.

Accordingly, the facts in this case do not support the use of the first aggressor instruction. And, without supporting evidence to justify giving the aggressor instruction, the court prevented Miles from fully asserting his self-defense theory. *See* State v. Stark, 158 Wn. App. 952, 960-61, 244 P.3d 433 (2010); Riley, 137 Wn.2d at 910 n. 2. The error is constitutional and cannot be deemed harmless unless it is harmless beyond a reasonable doubt. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998).

The error was compounded by the court's decision, again over defense objection, to give the State's proposed "revenge-retaliation" instruction, which read:

> The right of self-defense does not permit action done in retaliation or in revenge.

(CP 732 (Jury Instruction 19A); 07/29/14 RP 2559-63)

The State created this instruction by pulling language from State v. Janes, 121 Wn.2d 220, 240, 850 P.2d 495 (1993). (Miles' Sup. CP – Plaintiff's Supplemental Proposed Instruction; 07/29/14 RP 2563) However, "[t]he law is well established that the fact that certain language is used in an appellate court decision does not mean that it can be properly incorporated into a jury instruction." State v. Alexander, 7 Wn. App. 329, 335, 499 P.2d 263 (1972); *see also* Turner v. City of Tacoma, 72 Wn.2d 1029, 1034, 435 P.2d 927 (1967). Moreover, this language was taken out of context, from a case that is easily distinguishable from Miles' case.

In Janes, there was evidence that the victim had physically and emotionally abused the defendant, his stepson, for over 10 years 121 Wn.2d at 223. One afternoon, the defendant laid in wait for his stepfather, then shot and killed him. 121 Wn.2d at 224-25. On appeal, the Court addressed (1) whether or not expert testimony

regarding the "battered child syndrome" is admissible in appropriate cases to aid in the proof of self-defense, and (2) given the history of abuse and other circumstances, whether there was sufficient evidence that the defendant was in imminent danger of grievous bodily harm so as to warrant a self-defense instruction. 121 Wn.2d at 232-41.

The revenge-retaliation language used in the jury instruction in this case was pulled from the portion of the Janes opinion where the court was discussing the objective aspect of the reasonable person standard of self-defense:

> "The objective aspect also keeps self-defense firmly rooted in the narrow concept of necessity. No matter how sound the justification, revenge can never serve as an excuse for murder. "[T]he right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge." People v. Dillon, 24 Ill. 2d 122, 125, 180 N.E.2d 503 (1962).

Janes, 121 Wn.2d at 240. The Janes Court went on to hold, however, that the trial court should have considered the defendant's history with his stepfather before denying the defense request for a self-defense instruction. The Court noted that "the trial court may have given undue consideration to the length of time between the alleged threat and the homicide; the justifiable homicide statute requires imminence, not immediacy." Janes, 121 Wn. 2d at 242.

It is clear from reading the Janes case that the State's revenge-retaliation instruction was dicta taken out of context, and should not have been included in this case. The instruction improperly simplified the concept of self-defense, and the concept of when it is permissible for a person who was threatened or harmed in the past and who fears future harm to claim self-defense. The instruction was legally incorrect and misleading.

The revenge-retaliation instruction was also an improper comment on the evidence. Art. IV, § 16 of the Washington State Constitution, states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Art. IV, § 16 therefore prohibits a judge from conveying to the jury his or her personal attitudes regarding the merits of the case. State v. Foster, 91 Wn.2d 466, 481, 589 P.2d 789 (1979).

"'All remarks and observations as to facts before the jury are positively prohibited.'" State v. Francisco, 148 Wn. App. 168, 179, 199 P.3d 478 (2009) (quoting State v. Bogner, 62 Wn.2d 247, 252, 382 P.2d 254 (1963)). It is improper even where the court's personal feelings concerning an element of the offense are merely implied. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970); State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Thus, any

remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076, 1082 (2006).

In this case, Lee and Miller, who had entered into plea bargains for reduced charges and shorter sentences, testified that the group had decided to go to Hilltop to retaliate and shoot back at Houston and Jeter. (07/09/14 RP 1058, 1060; 07/14/14 RP 1265-66) But Allen testified that the men merely wanted to find Houston and Jeter and confront them about why they were shooting at people on the eastside of Tacoma and to convince them to stop, but the plan was not to shoot at Houston and Jeter. (07/14/14 RP 1402, 1405-06) And Ralls also testified there was no discussion of retaliation or revenge. (07/28/14 RP 2439; 07/29/14 RP 2525-26)

By giving the revenge-retaliation instruction, the jury was essentially told who to believe, and told to assume that the men went to Hilltop for the sole purpose of retaliation and revenge. This was exactly what the State was arguing to the jury:

> Very simply, that is what this case is. Nothing more. It is a case, at best, for [the] defense, revenge, retaliation. . . . Certainly, there is no defense to this case whatsoever. Self-defense does not apply to these defendants.

(07/29/14 RP 2596-97) The instruction therefore commented on the evidence and reinforced the State's position on how the jury should view the evidence. The instruction had the effect of telling the jury that it need not even consider whether the State proved the absence of self-defense, because Miles had no right to even claim self-defense.

The error in giving these two instructions was not harmless. The prosecutor repeatedly relied on the two instructions to argue that Miles was not entitled to assert a claim of self-defense. (07/29/14 RP 2596-97, 2699, 2607) For example, the prosecutor told the jury:

> If you believe that Mr. Houston shot at them earlier, now he is back on the Hilltop sitting in that car, and here comes the people that he shot at, knowing that, uh-oh, now it is their turn to come at me. Does he [have] to take it at that point? Does he purely have to under a legal standard, I can't claim self-defense; I have to take it. No. Because of this passage in time, he is now defending himself. Factually, we have that a shot, obviously – he fired a shot or it seems that he fired a shot because there is one missing from the rounds that were in his revolver. The other side, obviously, was prepared . . . . these individuals that came there were the aggressors. . . . It's about to go down. Get away, run away, pull your gun out from under -- fumble around and get your gun. Get ready. Here it comes. It's because of the aggression from the other side.

(07/29/14 RP 2607-08) The prosecutor essentially told the jury that because Miles and Ralls drove into the Hilltop neighborhood with

thoughts of revenge, they could not fire back and defend themselves when Houston fired on them.

These instructions, coupled with the prosecutor's argument, improperly told the jury that Ralls and Miles were acting out of revenge or retaliation, and that as a consequence, they lost all claim to self-defense as soon as their cars entered the Hilltop neighborhood. The instructions improperly deprived Miles of his right to argue to the jury that his group was defending themselves because Houston fired first, and it entirely relieved the State of its burden of proving beyond a reasonable doubt that the homicide was not justifiable self-defense. Miles is therefore entitled to a new trial.[14]

C. THE RECORD FAILS TO ESTABLISH THAT THE TRIAL COURT ACTUALLY TOOK INTO ACCOUNT MILES' FINANCIAL CIRCUMSTANCES BEFORE IMPOSING DISCRETIONARY LFOS.

The trial court ordered Miles to pay legal costs in the amount of $2,800.00, which included discretionary costs of $2,000.00 for appointed counsel and defense costs. (08/29/14 RP 78; CP 770)

The Judgment and Sentence includes the following

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[14] Co-Appellant Ralls also challenges these two instructions in his Opening Brief (See Ralls' Appellant's Opening Brief, Issues 1 & 2 at pages 16-34). RAP 10.1(g)(2) allows a party in a consolidated case to "adopt by reference any part of the brief of another" party. Pursuant to RAP 10.1(g), Miles adopts and incorporates Ralls' arguments and authorities on this issue.

boilerplate language:

> 2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

(CP 769) But there was no discussion on the record regarding Miles' ability to pay.

RCW 10.01.160 gives a sentencing court authority to impose legal financial obligations on a convicted offender, and includes the following provision:

> [t]he court **shall not** order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court **shall** take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160 (3) (emphasis added). The word "shall" means the requirement is mandatory. State v. Claypool, 111 Wn. App. 473, 475-76, 45 P.3d 609 (2002). The judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay, and the record must reflect this inquiry. State v. Blazina, 182

Wn.2d 827, 837-38, 344 P.3d 680 (2015). Hence, the trial court was without authority to impose LFOs as a condition of Miles' sentence if it did not first take into account his financial resources and the individual burdens of payment.

While formal findings supporting the trial court's decision to impose LFOs under RCW 10.01.160(3) are not required, the record must minimally establish the sentencing judge did in fact consider the defendant's individual financial circumstances and made an individualized determination that he has the ability, or likely future ability, to pay. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992); State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011). If the record does not show this occurred, the trial court's LFO order is not in compliance with RCW 10.01.160(3) and, thus, exceeds the trial court's authority.

Recently, in Blazina, our State Supreme Court decided to address a challenge to the trial court's imposition of LFOs, notwithstanding the defendant's failure to object below, because of "[n]ational and local cries for reform of broken LFO systems" and the overwhelming evidence that the current LFO system disproportionately and unfairly impacts indigent and poor offenders.

182 Wn.2d at 835.[15] The Blazina court also noted that "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs." 182 Wn.2d at 839. Here, Miles was found indigent for both trial and on appeal. (CP 805-07; Miles' Sup CP – Notice of Appearance)

The record does not establish the trial court actually took into account Miles' financial resources and the nature of the payment burden or made an individualized determination regarding his ability to pay. And the trial court made no further inquiry into Miles' financial resources, debts, or employability. There was no specific evidence before the trial court regarding Miles' past employment or his future educational opportunities or employment prospects.

In sum, the record fails to establish the trial court actually took into account Miles' financial circumstances before imposing LFOs, and therefore did not comply with the authorizing statute. Consequently, this Court should vacate that portion of the Judgment and Sentence.

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[15] The Blazina Court "exercise its RAP 2.5(a) discretion" to reach the merits of the issue, despite the lack of objection at sentencing. 182 Wn.2d at 835. RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. This Court may also reach the merits of this issue under RAP 2.5(a) despite Miles' failure to object to the imposition of discretionary costs below.

D. THE TRIAL COURT'S IMPROPER ACCOMPLICE INSTRUCTION ALLOWED THE JURY TO CONVICT MILES AS AN ACCOMPLICE BASED ON MERE KNOWLEDGE RATHER THAN INTENT TO COMMIT A CRIME.

Pursuant to RAP 10.1(g)(2), Miles hereby incorporates by reference the arguments and authorities presented under Issue 3 at pages 35-41 of co-appellant Ralls' Opening Brief. The same accomplice liability instruction was given in Miles' case. (CP 21) The claimed error and prejudice discussed in co-appellant Ralls' brief therefore applies equally to Miles.

E. THE TRIAL COURT MISSTATED THE LAW AND COMMENTED ON THE EVIDENCE THROUGH ITS ANSWER TO THE JURY'S QUESTION REGARDING ACCOMPLICE LIABILITY.

Pursuant to RAP 10.1(g)(2), Miles hereby incorporates by reference the arguments and authorities presented under Issue 4 at pages 41-50 of co-appellant Ralls' Opening Brief. The claimed error and prejudice discussed in co-appellant Ralls' brief applies equally to Miles.

F. THE TRIAL JUDGE VIOLATED MILES' RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN IT SEATED AN ALTERNATE JUROR, WHO HAD BEEN UNCONDITIONALLY EXCUSED, WITHOUT ENSURING THAT SHE REMAINED IMPARTIAL AND UNTAINTED BY OUTSIDE INFLUENCE.

Pursuant to RAP 10.1(g)(2), Miles hereby incorporates by reference the arguments and authorities presented under Issue 5 at

pages 50-53 of co-appellant Ralls' Opening Brief. The claimed error and prejudice discussed in co-appellant Ralls' brief applies equally to Miles.

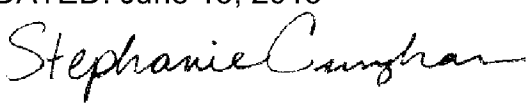
V. CONCLUSION

A conviction for first degree murder by extreme indifference requires proof that the defendant's actions put more than just the intended victim's life in danger. But in this case, there were no lives put at risk other than the life of Houston, the single intended victim. The State therefore failed to prove that Miles or an accomplice acted with extreme indifference to human life, and Miles' murder conviction must be reversed and dismissed with prejudice.

In the alternative, it was error to give the first aggressor and revenge-retaliation instructions because they were not supported by the facts or the law. Through these instructions and closing arguments, the State essentially told the jury that a defendant who drives through "enemy territory" has engaged in an aggressive act and has provoked a violent response, and that a defendant's mere presence in the vicinity of his rival removes the defendant's right of self-defense. According to the instructions and the State's argument, nothing that happened after Miles arrived made any difference, and even if Houston fired first, Miles and Ralls had no right to defend

themselves. Miles was therefore deprived of his right to claim self-defense, and the State was improperly relieved of its burden of proving that the homicide was unjustified. This error, and the remaining errors argued in co-Appellant Ralls' brief, require that Miles' conviction be reversed and his case remanded for a new trial.

DATED: June 15, 2015



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CERTIFICATE OF MAILING

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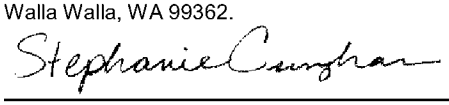

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