No. 46633-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Anthony Ralls,

Appellant.

Pierce County Superior Court Cause No. 13-1-01703-4

The Honorable Judge Bryan Chushcoff

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In late summer of 1988, Anthony Ralls came to Pierce County. RP (7/28/14) 2409-2411, 2413-2415. He was 18, and he came to see his girlfriend, a woman he later married. RP (7/28/14) 2410, 2412-2415. Through her, he met a man named Brian Allen. While in Tacoma, Mr. Ralls spent most of his time with his girlfriend and Allen. RP (7/28/14) 2419-2422.

On August 28, 1988, two local drug dealers named Bernard Houston and Michael Jeter committed several drive-by shootings while driving a Jeep. RP (7/1/14) 136; RP (7/2/14) 395-397; RP (7/8/14) 861, 865; RP (7/9/14) 943, 1033; RP (7/9/14) 1051-1052, 1056-1057; RP (7/10/14) 1160, 1200; RP (7/14/14) 1261, 1267, 1350, 1385, 1393. Houston and Jeter, who went by "Clown" and "Sike"[1] (or "Psycho"), were also believed to be "Crips" gang members.[2] RP (7/2/14) 401-402; RP (7/8/14) 861, 864; RP (7/14/14) 1266; Ex 53, 54.

[1] Also spelled "Syk." RP (7/8/14) 864, 979-980.

[2] Jeter later said he was trying to gain entry into the Crips gang at the time. RP (7/8/14) 861.

The two shot the "oak tree," a corner where young people hung out. RP (7/9/14) 1053; RP (7/14/14) 1261-1263, 1266, 1392. They shot at a car driven by Allen.[3] RP (7/14/14) 1382.

That same day, Houston and Jeter also shot into a house. This third shooting was especially upsetting to all who heard about it, as there was a baby named Brittanya in the home at the time. Brittanya had just been moved from a couch before the shooting, and a bullet struck the couch. RP (7/9/14) 1050; RP (7/14/14) 1263-1264, 1396.

Two cars of young men went to the Hilltop area of Tacoma where Jeter and Houston could be found. RP (7/9/14) 1042-1044; RP (7/14/14) 1268, 1407. They had no specific plan other than to confront Jeter and Houston. RP (7/10/14) 1170-1173, 1228-1229; RP (7/14/14) 1298, 1400; RP (7/15/14) 1469-1470, 1519, 1554-1555. Mr. Ralls was a passenger in one of the cars. RP (7/14/14) 1268-1269, 1301.

The young men drove around, spotted the Jeep and approached it. RP (7/14/14) 1265, 1279.

Houston shot at them. RP (7/1/14) 154-162; RP (7/2/14) 279-280; RP (7/2/14) 410-417, 445-446; RP (7/3/14) 507; RP (7/8/14) 880-903; RP (7/10/14) 1185; RP (7/14/14) 1276-1277, 1411-1412; RP (7/28/14) 2445.

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[3] Allen later claimed Mr. Ralls was in the car with him, but Mr. Ralls said he was not. RP (7/14/14) 1382; RP (7/28/14) 2421; RP (7/29/14) 2506.

There was return fire from the cars. RP (7/2/14) 410-417, 445-446; RP (7/8/14) 880-903, RP (7/14/14) 1276-1277. Houston was hit in the head and died. Jeter ran and was hit in the leg. RP (7/1/14) 136; RP (7/7/14) 598.

Neither Jeter nor anyone else who witnessed the incident knew who had fired shots from the two cars. (7/2/14) 404-420, 445-447; RP (7/8/14) 774-794; RP (7/8/14) 889-892; RP (7/9/14) 965-966.

Years later, in 2001, a new detective was assigned after the original detective retired.[4] RP (3/10/14) 8; RP (7/7/14) 734-735. During his first year on the case, Detective John Ringer spoke to Terris Miller and Darrel Lee. RP (3/10/14) 9-18; RP (7/17/14) 1881-1889, 1893-1897. He had received information linking them both to the shooting. RP (3/10/14) 9, 43; RP (7/17/14) 1870. Before questioning each of them, he reviewed what he knew in great detail. RP (7/14/14) 1327-1329; (7/17/14) 1871, 1882-1889, 1897; RP (7/21/14) 1978-1983, 1989-1990, 2074.

Detective Ringer told Miller the "basics of the crime." RP (7/17/14) 1889. The detective laid out photos of each person he believed was involved, showing who was in which car. RP (7/17/14) 1889. He made a diagram of the scene. RP (7/21/14) 1978-1983.

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[4] This new detective, John Ringer, had retired by the time trial started. RP (7/17/14) 1855-1856.

He did the same with Lee. RP (7/21/14) 1989-1990. In addition, he showed Lee all of the discovery for the case, including what Miller had told him. RP (7/21/14) 1989-1990, 2074.

After listening to Detective Ringer's presentation, they both said they had been present at the shooting. Ex. 53, 54. However, both denied shooting Houston. Ex. 53, 54. Instead, they implicated Allen, Mr. Ralls, and Nathaniel Miles. Ex. 53, 54.

No one was charged until 2011.[5] CP 1-2. At that time, the state charged all five men with first-degree murder.[6] CP 84-85.

Miller accepted a deal from the prosecutor to testify against Ralls, Miles and Allen. RP (3/24/14) 18; RP (6/30/14) 4, 10. He pled guilty to first-degree murder and agreed to testify against his codefendants. RP (3/24/14) 18; RP (6/30/14) 4. In return, the state agreed to allow him to withdraw his plea and plead guilty to a reduced charge.[7] He expected to be sentenced to time served (14 months). RP (7/9/14) 1096.

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[5] The defendants objected to the late charging. They argued that they could not locate some witnesses, some had died in the interim, one of the firearms involved had been destroyed, and that the defense was prejudiced by the unjustified charging delay. RP (1/31/14) 4-58.

[6] The state charged murder with premeditated intent, and murder by extreme indifference. The jury acquitted Mr. Ralls of the premeditated murder. CP 84, 136.

[7] The reduced charge was drive by shooting, which was not a crime in 1988. RP (3/24/14) 18; RP (4/10/14) 4; RP (6/30/14) 4, 10; RP (7/9/14) 1098-1106; RP (7/14/14) 1245-1247, 1291; RCW 9A.36.045; *See* Laws 1989 Ch 271 §109; Laws 1994 Sp. S Ch 7 §511; Laws 1995 Ch 129 §§8, 19 (Initiative Measure No. 159); Laws 1997 Ch 338, §44.

Days later, after trial had started, Lee entered the same agreement. RP (4/10/14) 4; RP (6/30/14) 4, 10; RP (7/14/14) 1293.

On the fifth day of trial, Allen accepted the same deal with the state in exchange for his testimony against Miles and Ralls. RP (7/3/14) 474; RP (7/14/14) 1427-1429.

After Allen pled guilty, Mr. Ralls moved to continue the trial. The motion was denied. RP (7/3/14) 484-485.

At trial, several people testified that the first shot came from the area of the Jeep, not the two other cars. RP (7/2/14) 412-413; RP (7/3/14) 507; RP (7/14/14) 1276-1277, 1411-1412; RP (7/28/14) 2445. Houston was found with a revolver in his hand. RP (7/1/14) 154-162; RP (7/2/14) 279-280. The revolver held five live rounds; a spent casing was found nearby. RP (7/1/14) 161. On the front passenger floorboard, police found another spent casing of a different caliber. RP (7/7/14) 626-627, 637, 720.

Neither Jeter nor any of the bystanders who observed the shooting could say who returned fire and shot Houston. RP (7/2/14) 324-363, 393-427, 436-469, 495-525, 537-584; RP (7/8/14) 758-832. Miller, Lee, and Allen all claimed that Mr. Ralls and Mr. Miles were the ones who shot back.[8] RP (7/9/14) 1042-1043, 1061, 1069-1071, 1075; RP (7/10/14)

[8] The state also presented the testimony of two men who claimed that Mr. Ralls had confessed to them. One was Curtis Hudson, a frequently-used informant seeking to avoid prison despite convictions for drug dealing and gun possession. RP (7/15/14) 1602-1621; RP

1191-1192, 1211-1212; RP (7/14/14) 1269, 1278, 1280-1281, 1310, 1320, 1322, 1364-1366; RP (7/14/14) 1415-1416. They were the only witnesses who made this claim. *See* RP *generally.*

Mr. Ralls testified at trial. He acknowledged that he was present during the encounter. He told the jury he was sitting in the back seat when the gunfight erupted. He admitted that he'd been rolling joints, and said he wasn't paying attention to what the others in the car were saying. RP (7/28/14) 2429-2453; RP (7/29/14) 2545. He said that no one had discussed any plan or desire for retaliation. RP (7/28/14) 2439, 2444-2453; RP (7/29/14) 2505. He also confirmed that the first shot came from the jeep. RP (7/28/14) 2445.

The court agreed to give a non-standard state proposal: "The right of self-defense does not permit action done in retaliation or revenge." CP 112. The instruction was given over defense objection. RP (7/29/14) 2559-2560, 2562.

The defense also objected to the court's instruction on the first-aggressor rule. RP (7/29/14) 2571-2576. That instruction included the following:

(7/16/14) 1659, 1667-1669, 1782-1803, 1823. The other was Ahmad Dyles, also a drug-dealer and self-described "gang-banger" at the time of the incident. RP (7/16/14) 1707-1708. Both claimed that the group wanted retribution for the earlier drive-by shootings. RP (7/15/14) 1616-1620; RP (7/16/14) 1658, 1671-1673, 1715.

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense.... [I]f 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 111.

The prosecution used a PowerPoint during closing arguments. The first and third slides included the following language:

> ***RIGHT OF SELF-DEFENSE DOES NOT IMPLY RIGHT OF REVENGE OR RETALIATION**
> State's Closing Argument, Supp. CP.[9]

The majority of the slides outlined events prior to the shooting. State's Closing Argument, Supp. CP.

The prosecutor addressed retaliation and revenge several times throughout closing. He described the defense case as "at best... revenge, retaliation." RP (7/29/14) 2596.[10] He quoted the "retaliation" instruction when showing jurors his first slide.[11] RP (7/29/14) 2599.

He again quoted the "retaliation" instruction while discussing the first-aggressor concept. RP (7/29/14) 2607. Later, he reiterated "[t]hey are

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[9] Unlike the other information on the slide, these words were written in all-caps. State's Closing Argument, Supp. CP.

[10] He also told jurors that Tacoma is not "the wild west," where feuding parties "engage in shootouts, revenge, go back and shoot the other side now because you've been hit..." RP (7/29/14) 2596.

[11] He also provided his own interpretation: "You just cannot, under the law...after the threat is gone, calculate to go take care of it later." RP (7/29/14) 2599.

not legally permitted to retaliate." RP (7/29/08) 2608. He returned to the subject during rebuttal closing: "This whole concept of this delay in time, you can't do it for retaliation, that has been beat into you by now. This is not imminent." RP (7/30/14) 2766.

Several times he used the word "retaliate" when summarizing testimony. At one point he said "Everyone was talking, [Miller] says, about retaliating..." RP (7/29/14) 2618. He reiterated this later: "Everyone talking about retaliating because getting tired of shootings [sic]. No specific plan other than to go back and shoot at them guys." RP (7/30/14) 2767.

At another point he summarized an informant's claim that "[Ralls] said, he and Allen and others went to the Hilltop to retaliate." RP (7/29/14) 2628. He also repeated this claim in rebuttal closing: "Ralls said, he, Allen, and others went to the Hilltop to retaliate." RP (7/30/14) 2768.

He claimed that no witnesses had testified about self-defense, but that "[e]very person, in contrast, has said retaliation, which, as I have said, is not self-defense. You cannot do that." RP (7/29/14) 2629.

Following the state's closing, counsel reminded the court of her prior objection to the instruction and then told the judge that "the State misused the instruction." RP (7/30/14) 2639. When asked to explain, she said that

> The State made it the theme of its case. In doing so, by saying the right of self-defense does not permit action in retaliation or revenge in the context of the other self-defense instruction other instructions basically used it out of context.
> RP (7/30/14) 2639.

She also pointed out that the other instructions already covered killings done solely for retaliation or revenge. She criticized the prosecutor for improperly arguing that the instruction prohibited Mr. Ralls and his companions from arguing self-defense even if Houston were the aggressor. RP (7/30/14) 2639-2640.

The state also argued that the mere act of traveling to the Hilltop neighborhood was an act of aggression and negated any self-defense claim. RP (7/29/14) 2608-2611.

At the end of the closing arguments, the trial judge "thanked and excused" the alternate jurors. RP (7/30/14) 2776. The record does not reflect that the court instructed the alternates to continue to avoid the media or information that may taint deliberations should they be recalled, or gave them any other warnings or directions, including the admonishment not to discuss the case until the deliberations were completed. RP (7/30/14) 2776.

On the next day, Juror No. 4 did not show up. Before deliberations started, he had voiced his concern about the schedule. At that time, both

defendants asked the judge to keep Juror No. 4 on the jury rather than replacing him with an alternate. RP (7/30/14) 2744-2746.

When Juror No. 4 failed to appear (after calling in to reiterate he couldn't come), defense counsel asked the court to recess and allow the jury to resume deliberations on Monday. RP (7/31/14) 2783-2785. The judge, who had already summoned an alternate, announced his plan to replace Juror No. 4 with an alternate. The court made no attempt to contact Juror No. 4. Over defense objection, the judge seated Juror No. 13 as a replacement for Juror No. 4. The judge did not ask the alternate if she'd heard anything about the case after she'd been excused. Nor did the judge ask if she'd discussed the case with anyone. RP (7/31/14) 2783-2788.

After hours of deliberations, the jurors sent out a note. Clerk's Trial Minutes, Supp. CP. The note was captioned "Jury Question During Deliberations." It included the following two lines of handwritten text:

> If we determine a defendant is an accomplice, are they liable for the same crime?
>
> We are having confusion distinguishing between instructions #3 and #4.
> Jury Question, Supp. CP.

The defense repeatedly asked the court to refer jurors back to the instructions. RP (8/1/14) 2794-2795, 2805, 2808. Defense counsel pointed

out that the jury's confusion was unclear: "we are just guessing—randomly guessing as to what they may be thinking." RP (8/1/14) 2805. When the court acknowledged "that it's difficult to always know what the jury is really upset about," defense counsel interrupted to ask "What if we're wrong?" RP (8/1/14) 2805.

Both the court and the prosecutor believed the correct legal answer to be "Yes." RP (8/1/14) 2794, 2809, 2800, 2801, 2806, 2809. The judge proposed a response, to which the defense objected. RP (8/1/14) 2796-2809. Counsel pointed out that the proposed language might add confusion, in part because "it doesn't distinguish between 'a crime' and 'the crime.'" RP (8/1/14) 2802, 2803. The defense also pointed out that the court was "emphasizing only [one] portion in that entire instruction" (the instruction on accomplice liability). RP (8/1/14) 2803.

After the court refused to refer jurors back to the instructions as a whole, the defense asked the court to read the whole instruction on accomplice liability, rather than to emphasize one particular part.[12] RP (8/1/14) 2803-2804, 2807-2808.

[12] In the end, the defense warned the judge regarding his planned course of action: "I think that you modify instructions and you give answers to juries about instructions at your peril. I think providing any further definitions or direction on these instructions is dangerous." RP (8/1/14) 2809.

After hearing from counsel, and over defense objection, the court gave the following answer:

> Instruction #3 instructs you that each defendant's charge is to be assessed by you independently and so your verdict on one count as to one defendant should not control your verdict on any other count or as to the other defendant.
>
> Instruction #9 instructs that a person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime. Instruction #9 further defines when a person is an accomplice.
>
> Jury Question, Supp. CP; RP (8/1/14) 2793-2809.

Approximately one hour later, the jury convicted Mr. Ralls of murder by extreme indifference.[13] CP 39; Clerk's Trial Minutes, Supp. CP.

At sentencing, the court sentenced Mr. Ralls to 333 months in prison. CP 190. The court also imposed legal financial obligations totaling $2800.[14] The court directed the Department of Corrections to set a repayment plan. CP 189. Additional language in the form indicated:

> COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.
>
> INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090.

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[13] The jury rejected a charge of premeditated murder and a number of lesser included charges.

[14] These included $500.00 as a crime victim assessment, $100.00 as a DNA database fee, $2000.00 for court-appointed attorney fees, and a $200.00 filing fee. CP 188.

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.
CP 189.

Mr. Ralls timely appealed. CP 197-210.

ARGUMENT

I. THE COURT'S NONSTANDARD "RETALIATION" INSTRUCTION MISSTATED THE LAW, RELIEVED THE STATE OF ITS BURDEN, AND COMMENTED ON THE EVIDENCE.

Houston randomly shot at people throughout the day of his death. RP (7/9/14) 1051-1052, 1056-1057; RP (7/10/14) 1160, 1200; RP (7/14/14) 1261, 1267, 1350, 1385, 1393. He shot up a house, nearly hitting an infant. RP (7/9/14) 1050. He shot at the oak tree where local youth gathered. RP (7/9/14) 1053; RP (7/14/14) 1392. He shot at a car driven by Allen. RP (7/14/14) 1382. He shot first when he encountered the group that included Mr. Ralls, and was killed by return fire during that encounter. RP (7/2/14) 410-417, 445-446; RP (7/8/14) 880-903, RP (7/14/14) 1276-1277.

This qualified as "some evidence" of self-defense. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). It entitled Mr. Ralls to proper instructions on self-defense.[15]

[15] Jury instructions on self-defense must more than adequately convey the law. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Self-defense instructions must make the relevant legal standard manifestly apparent to the average juror. *Id.; see also State v. McCreven*, 170

The trial court deviated from the standard self-defense instruction set. CP 112; *cf* WPIC 16.02, 16.04-16.08. The court's nonstandard instruction was legally incorrect. It also amounted to a comment on the evidence, because it suggested that the judge believed the state's theory and it overemphasized the prosecutor's position.

A. A person in imminent danger of being killed by an assailant may use reasonable force in self-defense, even if he also had other thoughts or feelings about the assailant.[16]

Under Washington law, homicide is justifiable "when there is reasonable ground to apprehend a design on the part of the person slain… to do some great personal injury… and there is imminent danger of such design being accomplished." RCW 9A.16.050.[17] In this case, numerous witnesses testified that Houston fired the first shot. RP (7/1/14) 154-162; RP (7/2/14) 279-280, 410-417, 445-446; RP (7/3/14) 507; RP (7/8/14) 880-903, RP (7/14/14) 1276-1277, 1411-1412; RP (7/28/14) 2445. This entitled Mr. Ralls and his companions to use deadly force against Houston. RCW 9A.16.050.

Wn. App. 444, 462, 284 P.3d 793 (2012) *review denied,* 176 Wn.2d 1015, 297 P.3d 708 (2013).

[16] An exception arises when the defendant's intentional *acts* are reasonably likely to provoke a belligerent response. *See* WPIC 16.04.

[17] The sole exception arises when the slayer's intentional *act* provoked the conflict. In such circumstances, an aggressor instruction may be appropriate. *See State v. Stark*, 158 Wn. App. 952, 244 P.3d 433 (2010). The court gave an aggressor instruction in this case. CP 111.

Even if the slayer has other thoughts or feelings, a homicide is justifiable if it qualifies as self-defense .[18] RCW 9A.16.050; WPIC 16.02, 16.04-16.08. Thus, for example, a woman who reasonably defends herself against domestic violence is not guilty of assault just because she also felt angry while defending against her husband's attack.

Actions that qualify as self-defense require acquittal. So long as all the components of self-defense are present, a shooting done with multiple motives is justified under the law. RCW 9A.16.050. A person may lawfully use force against an assailant, even if doing so happens to coincide with a desire for revenge or an interest in retaliating for earlier wrongs.

Here, Houston shot first at the group that included Mr. Ralls. RP (7/1/14) 154-162; RP (7/2/14) 279-280, 410-417, 445-446; RP (7/3/14) 507; RP (7/8/14) 880-903, RP (7/14/14) 1276-1277, 1411-1412; RP (7/28/14) 2445.

Under these circumstances, anyone would "reasonably believe[ ] that the person slain… intended to inflict death or great personal injury," and that there was "imminent danger of such harm being accomplished." CP 107.

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[18] Of course, the actor is stripped of the right to use force when those thoughts are feelings are expressed through intentional actions reasonably likely to provoke a belligerent response. CP 111.

Houston's actions justified the use of deadly force. This is so even if some in the group also desired revenge or were pleased at the opportunity to retaliate.

The court's "retaliation" instruction misstated the law. It stripped Mr. Ralls and his companions of the right to use self-defense even if the state failed to disprove the elements of self-defense beyond a reasonable doubt.

The error is presumed prejudicial, and the burden is on the state to prove harmlessness beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Here, the state cannot prove beyond a reasonable doubt "that the jury verdict would have been the same absent the error." *Id.* (internal quotation marks and citations omitted). This is especially true given the prosecutor's heavy reliance on the instruction in closing. RP (7/29/14) 2595-2632; RP (7/30/14) 2747-2776.

Mr. Ralls's conviction must be reversed and the case remanded for a new trial with proper instructions. *Id.*

B. The court's "retaliation" instruction commented on the evidence.[19]

The state's theory of the case focused on revenge and retaliation as one motive for the shooting. The prosecutor repeatedly elicited evidence

[19] Judges may not "charge juries with respect to matters of fact." Art. IV, § 16. A judge can neither convey a personal attitude nor instruct jurors that factual matters have been established as a matter of law. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

that the group went looking for Houston to retaliate for the earlier shootings.[20] RP (7/9/14) 1051, 1059-1061, 1210-1212; RP (7/14/14) 1265-1266, 1323, 1350, 1354-1356, 1399-1401, 1532, 1535, 1538, 1715. In closing, the prosecutor hammered on this theme. State's Closing Argument, Supp. CP; RP (7/29/14) 2596, 2599, 2607, 2608, 2618, 2628, 2629; RP (7/30/14) 2766-2768.

The judge appeared to endorse the prosecutor's theme by specifically instructing on revenge and retaliation. CP 112. The judge did not include similar language endorsing any aspect of the defense theory.

Instruction No. 19A emphasized the prosecution's theory of the case. It injected "retaliation or revenge" into what was otherwise a neutral set of instructions.[21] CP 112. This language significantly tilted the careful balance struck by the pattern instructions, shifting the instructions so that they favored the prosecution's position.

Thus, the jury heard about revenge and retaliation from the judge *and* the prosecutor. CP 112; RP (7/29/14) 2595-2632; RP (7/30/14) 2747-

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[20]This evidence was contradicted by testimony that the group searched for him to confront him, but did not intend to shoot him. RP (7/10/14) 1170-1173, 1228-1229; RP (7/14/14) 1298, 1400; RP (7/15/14) 1469-1470, 1519, 1554-1555; RP (7/28/14) 2439, 2444-2453; RP (7/29/14) 2505.

[21] The "retaliation or revenge" language appears to be drawn from *State v. Studd*, 137 Wn.2d 533, 550, 973 P.2d 1049 (1999). The *Studd* court rejected the defendant's argument that the language overemphasized the state's case. Presumably, the court reviewed the challenged language in the context of the trial court's other instructions, only two of which were reproduced in the opinion. *Id., at* 539-541.

2776. They did not receive special instructions about lack of involvement, ignorance of others' intentions, or the other matters favored by the defense.

A statement is a judicial comment if the court's attitude can be inferred.[22] *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006), *as corrected* (Feb. 14, 2007). Because the judge specifically mentioned revenge and retaliation, the jury may have inferred that the judge favored the prosecution's version of events.

An improper judicial comment need not be expressly made; it is sufficient if it is implied. *Id.* Here, jurors may have ascribed to the judge an endorsement of the state's primary theme – that Mr. Ralls and his companions retaliated against Houston to avenge the earlier shootings.

A comment on the evidence "invades a fundamental right." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Judicial comments are presumed prejudicial and are only harmless if the record "affirmatively

[22] In addition, instructions may not be "so repetitious and overlapping that they emphatically favor one party." *Ford v. Chaplin*, 61 Wn. App. 896, 900, 812 P.2d 532 (1991). This is so even if the repetitive instructions are a correct statement of the law. *Cornejo v. State*, 57 Wn. App. 314, 321, 788 P.2d 554 (1990). Such instructions can "unfairly turn the jury's attention away from" one party's position, overstating the other side's evidence "to such a degree as to make it 'palpably unfair.'" *Id.* (quoting *Samuelson v. Freeman*, 75 Wn.2d 894, 897, 454 P.2d 406 (1969)). Reversal is required where "the instructions on a particular point [are] so repetitious as to generate an 'extreme emphasis' that 'grossly' favors one party over the other." *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 38, 864 P.2d 921 (1993) (citations omitted). The retaliation instruction emphatically favored the state. It echoed the aggressor instruction, and also emphasized those aspects of the self-defense instructions that favored conviction. Because of this, it unfairly turned the jury's attention away from Mr. Ralls's position.

shows no prejudice could have resulted." *Levy*, 156 Wn.2d at 725. This is a higher standard than that normally applied to constitutional errors. *Id.*

Here, there is a strong likelihood of prejudice. Self-defense was a significant part of the trial, and the retaliation instruction distorted the jury's view of the issue. The record does not "affirmatively show that no prejudice could have resulted" from the improper instruction. *Id.*

The nonstandard retaliation instruction amounted to a comment on the evidence in this case. *Jackman*, 156 Wn.2d at 736, 744. It violated art. IV, § 16, and is presumed prejudicial. *Id.* The record "does not affirmatively show that no prejudice could have resulted." *Id.* This is especially true given the prosecutor's heavy reliance on the improper instruction. State's Closing Argument, Supp. CP; RP (7/29/14) 2595-2632; RP (7/30/14) 2747-2776.

Mr. Ralls's conviction must be reversed. *Id.*

C. The prosecutor relied heavily on the improper "retaliation" instruction in closing.

Aside from the defendants' names, the first words on the first slide of the prosecutor's closing presentation were

> ***RIGHT OF SELF-DEFENSE DOES NOT IMPLY RIGHT OF REVENGE OR RETALIATION**
> State's Closing Argument, Supp. CP.

The third slide displayed the same language in the same format:

***RIGHT OF SELF-DEFENSE DOES NOT IMPLY RIGHT OF REVENGE OR RETALIATION**
State's Closing Argument, Supp. CP.[23]

Most of the slides outlined events prior to the shooting. On these slides, the prosecutor summarized and quoted evidence implying that the shooting occurred in retaliation or revenge. State's Closing Argument, Supp. CP.

The prosecutor quoted the retaliation instruction and addressed the issue of revenge repeatedly throughout closing and in his rebuttal closing. RP (7/29/14) 2596, 2599, 2607, 2608, 2618, 2628, 2629; RP (7/30/14) 2766, 2767, 2768. Defense counsel clearly felt that the improper instruction was prejudicial to Mr. Ralls. She reminded the court of her objection to the instruction, and argued that the state misused the instruction by making it "the theme of its case." RP (7/30/14) 2639.

She reiterated other instructions already disallowed a killing done for retaliation or revenge. She objected to the prosecutor's improper argument that Mr. Ralls could not argue self-defense even if Houston were the aggressor. RP (7/30/14) 2639-2640.

The instruction's importance is demonstrated by the prosecutor's repeated references to it. *See State v. Clausing*, 147 Wn.2d 620, 629, 56 P.3d 550 (2002). Here, the prosecutor highlighted the "retaliation" theme

[23] Once again, the all-caps lettering distinguished this line from the rest of the page.

in closing, and this enhanced the prejudice created by the improper instruction. State's Closing Argument, Supp. CP; RP (7/29/14) 2596, 2599, 2607, 2608, 2618, 2628, 2629; RP (7/30/14) 2766-2768. The instruction supported the state's argument, and the argument dovetailed with the instruction.

The court's improper instruction prejudiced Mr. Ralls. The state cannot show harmlessness beyond a reasonable doubt. *Brown*, 147 Wn.2d at 341. Nor does the record "affirmatively show that no prejudice could have resulted" from the improper instruction. *Levy*, 156 Wn.2d at 725.

Mr. Ralls's conviction must be reversed. *Id.*

D. The standard instruction set is legally correct and requires conviction where a killing is done solely for the purpose of revenge or retaliation.

According to the state, Mr. Ralls and his companions sought out Houston to retaliate for the earlier shootings.[24] RP (7/15/14) 1616-1620; RP (7/16/14) 1658, 1671-1673, 1715; RP (7/29/14) 2595-2632; RP (7/31/14) 2747-2776. The standard self-defense instruction set would have allowed the state to argue its theory of the case. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 16.02 (3d Ed); WPIC 16.04; WPIC 16.07.

[24] Evidence on this point was conflicting. At least some testimony suggested that the group intended only to verbally confront Houston about the earlier shootings. RP (7/14/14) 1520; RP (7/28/14) 2439, 2444-2453; RP (7/29/14) 2505.

The pattern instructions always require conviction when the state proves the accused person killed another solely in retaliation for an earlier offense. They should have sufficed in this case.

A person whose sole purpose is to seek revenge would not "reasonably believe[ ] that the person slain…intended to inflict death or great personal injury." WPIC 16.02 (certain bracketed material deleted); CP 107. Nor would a person focused solely on revenge "reasonably believe[] that there was imminent danger" of death or great personal injury." WPIC 16.02; CP 107.

By definition, the slayer who acts solely out of a desire for revenge does not "employ[ ] such force and means as a reasonably prudent person would use under the same or similar conditions…" WPIC 16.02; CP 107. In addition, a person whose sole purpose is revenge cannot believe "in good faith and on reasonable grounds that he or another is in actual danger of great personal injury." WPIC 16.07 (certain bracketed material deleted); CP 109.

Finally, the standard aggressor instruction will negate self-defense for anyone who provokes a fight for the sole purpose of obtaining revenge. A person who kills for revenge will be stripped of the right to use force by committing "an intentional act reasonably likely to provoke a belligerent

response." WPIC 16.04. The court gave an aggressor instruction in this case. CP 111.

Under the standard instructions, jurors would have had no choice but to convict if they believed that Mr. Ralls's group shot Houston solely in retaliation for Houston's earlier crimes. The standard aggressor instruction would also have required jurors to convict if they believed the group intentionally provoked Houston into shooting them, and thereby created the need to act in self-defense. CP 111. Nothing about this case required additional instructions.

Mr. Ralls did not claim that he had a legal right to use force in retaliation for the earlier assaults. He did not advance any legal theory that would have permitted acquittal if he sought revenge.

The standard instructions "accurately state the law, are not misleading, and allow both sides to argue their theory of the case." *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 117, 323 P.3d 1036 (2014). The trial court should have instructed jurors using only the pattern instructions. Instead, the court acceded to the prosecutor's request to make the instructions favor the state. CP 112.

In doing so, the court allowed conviction based on an instruction that is legally incorrect and that amounted to a comment on the evidence. These errors require reversal of Mr. Ralls's conviction.

II. THE COURT SHOULD NOT HAVE GIVEN A FIRST-AGGRESSOR INSTRUCTION BASED ON EVIDENCE THAT MR. RALLS AND HIS COMPANIONS DROVE ON PUBLIC STREETS TO HOUSTON'S LOCATION.

Where there is some evidence showing the lawful use of force, the state must disprove self-defense beyond a reasonable doubt. *Kyllo*, 166 Wn.2d at 862. Here, the court's instructions improperly stripped Mr. Ralls of his right to argue self-defense.

Houston went on a shooting spree throughout the day, and shot at Mr. Ralls and his companions when they drove near his jeep. RP (7/1/14) 154-162; RP (7/2/14) 279-280, 412-413; RP (7/3/14) 507; RP (7/14/14) 1276-1277, 1411-1412; RP (7/28/14) 2445. According to the prosecution, the defendants provoked Houston by driving to his location. RP (7/29/14) 2595-2632; RP (7/30/14) 2747-2776. Based on this "provocation," the court gave an aggressor instruction suggesting that Mr. Ralls had no right to use self-defense even though Houston shot first.

The instruction was improper and prejudicial. Lawful conduct does not strip a person of the right to self-defense. This is especially true where the attacker's belligerent response is unreasonable or illegal.

A. Mr. Ralls was not the aggressor because he did not perform an *unlawful* aggressive act.

The "aggressor doctrine" derives from the common-law rule that a person who provokes a fight may not claim self-defense. *See, e.g., State v.*

McCann, 16 Wash. 249, 47 P. 443 (1896). The common law has always required evidence of an unlawful (or "lawless") aggressive act.[25]

When first published, the pattern aggressor instruction required the jury to determine whether the defendant created the need to act in self-defense "by any *unlawful* act." Former WPIC 16.04 (1977) (emphasis added). However, the Court of Appeals found this language unconstitutionally vague unless "directed to specific unlawful intentional conduct." *State v. Thompson*, 47 Wn. App. 1, 8, 733 P.2d 584 (1987) (citing *State v. Arthur*, 42 Wn. App. 120, 708 P.2d 1230 (1985)).[26]

Although juries no longer determine the lawfulness of allegedly aggressive acts, the state must still show that the defendant engaged in unlawful aggressive conduct. *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999). In *Riley,* the Supreme Court held that "words alone do not constitute sufficient provocation" for an aggressor instruction. *Id.,* at 911. Its explanation rested, in part, on the "unlawful" force requirement inherent in the aggressor rule:

> the reason one generally cannot claim self-defense when one is an aggressor is because "the aggressor's victim, defending himself

[25] *See, e.g., State v. Turpin*, 158 Wash. 103, 290 P. 824 (1930); *State v. Thomas*, 63 Wn.2d 59, 385 P.2d 532 (1963), *overruled on other grounds by State v. Rogers,* 83 Wn.2d 553, 520 P.2d 159 (1974); *State v. Upton*, 16 Wn. App. 195, 556 P.2d 239 (1976); *State v. Bailey*, 22 Wn. App. 646, 591 P.2d 1212 (1979).

[26] In *Arthur,* jurors may have believed that the defendant was the aggressor because he was involved in an automobile accident. *Id.,* at 123-124. The Court of Appeals found that this was "not rational, reasonable, or fair." *Id.*

> against the aggressor, is using lawful, not unlawful, force; and the force defended against must be unlawful force, for self-defense."

Id. (quoting 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 5.7, at 657–58 (1986) (footnotes omitted by court)).[27]

Now, instead of having the jury determine unlawfulness, the court must make the determination prior to instructing jurors on the aggressor doctrine. Courts have allocated similar threshold determinations to judges in other contexts. For example, the validity of a no contact order is an issue for the judge to determine, rather than an element on which the jury must be instructed. *State v. Miller*, 156 Wn.2d 23, 30, 123 P.3d 827 (2005) (addressing a charge of violating a no-contact order).[28]

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[27] This is confirmed by subsequent cases. Some have prohibited application of the aggressor doctrine based on lawful but provoking words or actions. *See State v. Hardy*, 44 Wn. App. 477, 484, 722 P.2d 872 (1986) ("the jury, by treating the name-calling as an unlawful act, [may have] improperly denied Hardy her claim of self-defense"); *State v. Brower*, 43 Wn. App. 893, 902, 721 P.2d 12 (1986) ("Here, there is no indication Mr. Brower was involved in any wrongful or unlawful conduct which might have precipitated the incident); *State v. Douglas*, 128 Wn. App. 555, 563-564, 116 P.3d 1012 (2005) ("The record [did] not show that Douglas was the aggressor or that he was involved in any wrongful or unlawful conduct.")

Other decisions have upheld use of the aggressor instruction based on the defendant's unlawful conduct, even where the unlawfulness determination was left to the jury. *Thompson*, 47 Wn. App. at 8 (noting that former WPIC 16.04 "is vague and overbroad unless directed to specific unlawful intentional conduct"); *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986) ("the evidence of unlawful conduct was clear").

[28] *See also State v. Chambers*, 157 Wn. App. 465, 477, 237 P.3d 352 (2010) (court determines whether a prior conviction qualifies as a predicate offense that will elevate a crime to a felony); *State v. Boss*, 167 Wash. 2d 710, 719, 223 P.3d 506, 511 (2009) (court decides the lawfulness of a prior custody order in case involving custodial interference charge); *State v. Gonzalez-Lopez*, 132 Wn. App. 622, 635, 132 P.3d 1128 (2006) (court decides the classification of the underlying offense in a bail jumping case).

Courts review *de novo* whether sufficient evidence justifies a first aggressor instruction in a self-defense case. *Stark*, 158 Wn. App. at 959. Here, the state produced no evidence that Mr. Ralls and his companions engaged in any *unlawful* aggressive act before Houston shot at them.[29]

Instead, the state relied solely on the defendants' *lawful* acts. In seeking the instruction, the prosecutor argued that the defendants provoked Houston simply by their presence on Hilltop. RP (7/29/14) 2607-2608. According to the state, once Houston and Jeter finished their drive-by shootings and returned to Hilltop, the defendants became the aggressors by going to that area of town:

> 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? …No. Because of this passage in time, he is now defending himself.
> RP (7/29/14) 2607-2608.

The prosecutor went on to assert that "As soon as [Houston] shot, or the time period of the shot, or before the shot, these individuals [the defendants] that came there were the aggressors." RP (7/29/14) 2608. He also urged the jury to find Mr. Ralls the aggressor because Houston and his companions reacted as though expecting trouble when the two cars arrived. RP (7/29/14) 2608.

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[29] In ruling on the issue, the court found it reasonable to infer "that there was a first aggressor here." RP (7/29/14) 2576. The court did not specify the aggressive act.

The first aggressor doctrine cannot apply to someone who lawfully drives on a public street. Under the state's reading of the law, any lawful behavior could subject a person to attack and extinguish the right to use self-defense.

Approaching a drug dealer to say "Leave my neighborhood" is an intentional act reasonably likely to produce a belligerent response. Setting up a lemonade stand next to a competitor is an intentional act reasonably likely to produce a belligerent response. Hosting numerous late-night parties after neighbors complain is an intentional act reasonably likely to produce a belligerent response. None of these actions are unlawful, but all come within a literal reading of the aggressor instruction. The state's position prohibits each of these actors from using force to resist an attack.

An improper aggressor instruction strips an accused person of a valid self-defense claim and thus relieves the state of its burden to prove the absence of self-defense.*Stark*, 158 Wn. App. at 961. Here, the improper instruction allowed the prosecutor to argue that Mr. Ralls's lawful conduct eliminated his self-defense claim.

This violated his Fourteenth Amendment right to due process. *State v. Slaughter*, 143 Wn. App. 936, 942, 186 P.3d 1084 (2008). The state cannot show that the error is harmless beyond a reasonable doubt. *State v. Quaale*, 182 Wn.2d 191, 202, 340 P.3d 213 (2014).

The conviction must be reversed and the case remanded for a new trial. *Id.*

B. Mr. Ralls was not the aggressor because Houston's belligerent response was illegal and unreasonable.

The court instructed jurors to apply the first-aggressor rule based on "any intentional act reasonably likely to provoke a belligerent response…" CP 111. Under the circumstances of this case, the instruction was flawed: it failed to fully and properly set forth the aggressor rule's objective standard. Specifically, the instruction did not require jurors to evaluate the reasonableness or legality of any belligerent response.

The common law aggressor doctrine cannot be premised on unreasonable or illegal belligerence, no matter how foreseeable. If it were, it would grant those who are known to be bellicose, combative, and thin-skinned the right to attack others with impunity.[30]

For example, a letter carrier who approaches the house of a person known to hate postal workers would be guilty of an "intentional act reasonably likely to provoke a belligerent response." Similarly, efforts to calm someone who is having an angry public meltdown might be "reasonably likely to provoke a belligerent response."

[30] This is especially true if the "unlawfulness" requirement is eliminated.

The aggressor instruction becomes a problem where the defendant knows something about the other party. Delivering mail to most people is a positive action; delivering mail to a person known to harbor animosity against postal workers would be "reasonably likely to provoke a belligerent response" from that person.

Here, the jury may have concluded that traveling to Hilltop was "reasonably likely" to provoke a response from Houston and Jeter, because they belonged to a rival group.[31] In essence, the instruction retroactively stripped Mr. Ralls of his right to travel to parts of Tacoma without fear of being killed.

Instruction No. 19 did not properly convey the aggressor rule's objective standard. It stripped Mr. Ralls of his right to use self-defense based on his knowledge that legally traveling to certain parts of Tacoma would provoke others, including Houston and Jeter.

The conviction must be reversed, and the case remanded for a new trial. If an aggressor instruction is used at any retrial, it must include language making clear the objective standard. The aggressor rule does not

[31] The conflict was not a gang rivalry, strictly speaking, since one of Mr. Ralls's companions belonged to the same gang as Houston and Jeter. RP (7/10/14) 1199.

apply when an intentional act is "reasonably likely" to provoke unreasonable or illegal belligerence.[32]

C. The improper first-aggressor instruction prejudiced Mr. Ralls because it stripped him of his legitimate self-defense claim.

Washington courts disfavor aggressor instructions. *Stark*, 158 Wn. App. at 960. Such instructions are rarely necessary to permit the parties to argue their theories of the case, and have the potential to relieve the state of its burden self-defense cases. *Id.*

An unsupported aggressor instruction creates constitutional error, requiring reversal unless the state proves harmlessness beyond a reasonable doubt. *Id.* at 961. The state cannot do so.

The state relied heavily on the aggressor instruction to argue that Mr. Ralls had no self-defense claim. RP (7/29/14) 2595-2632; RP (7/30/14) 2747-2776. The instruction relieved the state of its burden to disprove self-defense. *Stark*, 158 Wn. App. at 961.

The court violated Mr. Ralls right to due process by improperly instructing the jury on the aggressor doctrine. *Id.* Mr. Ralls's conviction must be reversed and the case remanded for a new trial. *Id.*

[32] One possible formulation might refer to an act "reasonably likely to provoke a belligerent response from a reasonable person."

III. THE COURT'S IMPROPER INSTRUCTIONS ALLOWED THE JURY TO CONVICT MR. RALLS AS AN ACCOMPLICE BASED ON MERE KNOWLEDGE RATHER THAN INTENT TO COMMIT A CRIME.

Mr. Ralls denied having a gun or shooting Houston. RP (7/28/14) 2423, 2439, 2445-2453. Other testimony at trial suggested that he knew his companions planned to verbally confront Houston and Jeter. RP (7/15/14) 1616-1620; RP (7/16/14) 1658, 1671-1673, 1715. Under the court's instructions, the jury could have convicted him based on this evidence, even if he opposed shooting Houston or hoped to stop the crime.

Jury instructions must make the relevant legal standard manifestly clear to the average juror. *Kyllo*, 166 Wn.2d at 864.[33] The instructions here misled the jury regarding the state's burden to prove Mr. Ralls's intent.[34] In fact, the instructions permitted conviction even if Mr. Ralls hoped to discourage his acquaintances from shooting Houston.

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[33] The Court of Appeals reviews jury instructions *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

[34] The error is manifest and affected Mr. Ralls's constitutional rights to due process and to a jury trial. U.S. Const. Amends. VI and XIV; Wash. Const. art. I, § 21 and 22. Accordingly, it may be reviewed for the first time on appeal. RAP 2.5(a)(3); *State v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010).

A. The statute defining "accomplice" requires the court to instruct on the state's burden to prove intent, an element of accomplice liability.

To prove accomplice liability, the prosecution must establish both "knowledge"[35] and "intent." In this case, the court's instructions were not manifestly clear because they did not require proof of intent. Instead, they allowed the jury to convict Mr. Ralls even if he opposed the alleged plan to shoot Houston.

The "intent" element derives from the statutory phrase "aids or agrees to aid." RCW 9A.08.020(3)(a)(ii). In order to convict Mr. Ralls as an accomplice, the prosecution bore the burden of proving that he "associate[d] himself with the venture and [took] some action to help make it successful." *State v. Truong*, 168 Wn. App. 529, 539, 277 P.3d 74 (2012) (emphasis added). In other words, the prosecution was required to prove that Mr. Ralls intended that the crime be committed.

This is consistent with the long-established rule that "[o]ne does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about,

[35] The burden to prove knowledge is explicit in the statutory definition of the word accomplice. The statute reads (in relevant part) as follows: "A person is an accomplice of another person in the commission of a crime if… *[w]ith knowledge* that it will promote or facilitate the commission of the crime, he or she…*[a]ids or agrees to aid* such other person in planning or committing it." RCW 9A.08.020(3)(a) (emphasis added).

and seeks by his action to make it succeed." *State v. J-R Distributors, Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973).[36]

The intent requirement is also reflected in the accomplice definition's other prong. Under that provision, accomplice liability attaches when a person "[s]olicits, commands, encourages, or requests" another person to commit the charged crime. RCW 9A.08.020(3)(a)(i). Each of these verbs implicitly requires proof of intent: person who "solicits, commands, encourages, or requests" necessarily intends that the crime be committed.[37]

An intent element is also required to avoid constitutional problems. *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011) (citing *State v. Coleman*, 155 Wn. App. 951, 960-961, 231 P.3d 212 (2010)). The *Coleman* and *Ferguson* courts both implicitly found that the intent element saves the accomplice liability statute from being unconstitutionally overbroad.[38]

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[36] *See also State v. Gallagher*, 112 Wn. App. 601, 614, 51 P.3d 100 (2002) ("if Gallagher associated with the criminal venture and participated in it expecting success, he could be found guilty as an accomplice.")

[37] Under rare circumstances, a person might claim that she or he intentionally encouraged others to commit a crime while hoping they would not. Those facts are not presented here.

[38] The *Coleman* court described the mental state required for conviction under RCW 9A.08.020(3)(a)(ii) as "the *mens rea* to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime." *Coleman*, 155 Wn. App. at 960-961. This, the court said, "avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime." *Id.* The *Ferguson* court quoted these passages

Mr. Ralls's conviction must be reversed because the court's instructions failed to make the intent requirement manifestly clear to the average juror. *Kyllo*, 166 Wn.2d at 864. Instead of requiring the state to prove criminal intent, the court's instructions allowed conviction if Mr. Ralls spoke or acted "with knowledge" that his words or actions would promote or facilitate the crime, regardless of his intent. CP 101.

B. The court's instructions did not make manifestly clear the state's obligation to prove Mr. Ralls's criminal intent.

Reversal is required whenever jury instructions "have the effect of relieving the state of the burden of proof… on the critical question of intent." *Francis v. Franklin,* 471 U.S. 307, 326, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). Here, the court's instructions relieved the state of its burden to prove criminal intent.

Nowhere does any form of the word "intent" appear in Instruction No. 9. Nor does the instruction contain explicit language describing related concepts such as "mental state," "objective," "purpose" or "goal." CP 101. Instead, to convey the intent requirement, the court relied on the

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from *Coleman* and found that RCW 9A.08.020(3)(a)(ii) criminalizes "advocacy *directed at*… imminent lawless action." *Ferguson*, 164 Wn. App. at 376.

Whether described as "the *mens rea* to aid or agree to aid" or as something "directed at" obtaining a particular result, the statutory language requires proof that the accused person acted with intent. Without an intent element, the statute would be unconstitutional under *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969). *Ferguson*, 164 Wn. App. at 376; *Coleman,* 155 Wn. App. at 960-961.

statutory language: "aids or agrees to aid." CP 101. This language is insufficient for instructional purposes.

Instructions must be manifestly clear because jurors cannot rely on the rules of interpretation familiar to lawyers and judges. *State v. Harris*, 122 Wn. App. 547, 553-554, 90 P.3d 1133 (2004). Thus, "the standard for clarity in jury instructions is higher than that for a statute because although courts may use statutory construction, juries lack these same interpretive tools." *Id.*

In other words, statutory language will not necessarily provide a standard that is manifestly clear to the average juror. *Id.; Kyllo*, 166 Wn.2d at 864.

As set forth in the statute, the phrase "aids or agrees to aid" implies a particular intent—a desire to have the crime succeed. *See Truong*, 168 Wn. App. at 539. But the phrase "aids or agrees to aid" does not make the standard "manifestly apparent,"[39] because it does not explicitly identify "intent" as necessary to conviction as an accomplice.

Other language magnified this lack of clarity. The court defined "aid" to include "words, acts, encouragement, support, or presence." CP 101. The court's instruction would require conviction even if Mr. Ralls

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[39] *Kyllo*, 166 Wn.2d at 864.

intended to prevent the shooting, if he knew that his words (i.e. proposing a verbal confrontation) or actions (getting in the car) would embolden the shooter.[40]

Instruction No. 9 did not focus the jury's attention on Mr. Ralls's intent. It directed jurors to convict if Mr. Ralls knew that his actions would promote the crime, regardless of the evidence (or lack of evidence) of his intent.

Instructions may not relieve the state of proving the mental state required for accomplice liability. *State v. Cronin*, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). Such errors require reversal unless harmless beyond a reasonable doubt. *Brown*, 147 Wn.2d at 341.[41]

The evidence of Mr. Ralls's intent was weak and conflicting.[42] Furthermore, the court's improper supplemental instruction misstated the law of accomplice liability and commented on the evidence, as discussed elsewhere in this brief. Under these circumstances, the state cannot show beyond a reasonable doubt that the error was harmless. *Id.*

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[40] The instruction's "ready to assist" language does not solve the problem. CP 101. A person who encourages a crime may be convicted as an accomplice even if she or he is not "ready to assist" when present at the scene.

[41] The burden is on the state to show harmlessness. *Id.*

[42] His own testimony suggested that he was ignorant of the others' plans to find Houston and Jeter. RP (7/28/14) 2439. At least some evidence suggested that he went along with a plan to verbally confront Houston and Jeter (for firing shots and endangering people earlier in the day). RP (7/28/14) 2435-2451. Other testimony suggested that he joined a plan to shoot at Houston and Jeter. However, the jury rejected the idea that he was an accomplice to premeditated or intentional murder. CP 136-138.

The conviction must be reversed and the case remanded for a new trial with proper instructions. *Id.*

IV. THE COURT MISSTATED THE LAW AND COMMENTED ON THE EVIDENCE THROUGH ITS ANSWER TO THE JURY'S QUESTION ABOUT ACCOMPLICE LIABILITY.

The jury submitted an inquiry that was ambiguous in two ways.[43] Jury Question, Supp. CP. The trial court failed to recognize either ambiguity, even though the defense noted the lack of clarity. RP (7/31/14) 2795, 2798.

First, the inquiry as a whole could be treated as two distinct requests for clarification: (1) whether an accomplice is "liable for the same crime" and (2) how to "distinguish[ ] between instructions #3 and 9." Jury Question, Supp. CP. The trial judge didn't acknowledge this interpretation, and instead treated the two-part inquiry as a single question.

Second, the jury may have meant "the same crime" to mean the same crime as a codefendant, or it might have meant the same crime as the shooter (who was not a codefendant). The court did not note this ambiguity. Jury Question, Supp. CP.

The court's failure to understand the ambiguities in the question created problems with the answer. *Cf. United States v. McDaniel*, 545 F.2d

[43] The defense noted the ambiguity on the record, and suggested the court instruct jurors to read their instructions as a whole. RP (7/31/14) 2795, 2798.

642, 644 (9th Cir. 1976). When read as a response to the jury's question, the court's supplemental instruction relieved the state of its burden to prove Mr. Ralls's mental state—that is, whether he knew the general nature of the crime intended by the principle.

This violated Mr. Ralls's due process right to a fair trial.[44] It also amounted to a comment on the evidence.

A. The court's answer misstated the law and relieved the state of its burden to prove the elements required for conviction.

When faced with a question from a deliberating jury, a trial court commits reversible error by giving an answer that is "misleading, unresponsive, or legally incorrect." *United States v. Anekwu*, 695 F.3d 967, 986 (9th Cir. 2012) (internal quotation marks and citations omitted). Here, the court's answer was misleading, unresponsive, and legally incorrect. Jury Question, Supp. CP.

An accomplice may only be held liable for a particular crime if she or he had "general knowledge" of that specific crime.[45] *State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000), *as amended on denial of reconsideration* (Mar. 2, 2001); *Cronin*, 142 Wn.2d at 579. The jury could

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[44] U.S. Const. Amend. XIV.

[45] The defendant need not have specific knowledge of each element of the principal's crime. *Roberts*, 142 Wn.2d at 513. Thus an accomplice who helps plan a second-degree robbery may be held liable for first-degree robbery, even if unaware that the principal was armed. *State v. Davis*, 101 Wn.2d 654, 655, 682 P.2d 883 (1984).

only find Mr. Ralls guilty of murder (of any degree) if it believed he had general knowledge that the shooter intended to commit murder.

Whether Mr. Ralls was "liable for the same crime" as the shooter turned (in part) on his general knowledge of the shooter's plan. CP 101. Here, the jury asked if Mr. Ralls was "liable for the same crime." The court's answer reiterated that "a person is legally accountable for the conduct of another person when he or she is an accomplice…" Jury Question, Supp. CP.

A reasonable juror could read that language as a "yes" answer:[46] that an accomplice *is* "liable for the same crime," regardless of the accomplice's actual knowledge. Jury Question, Supp. CP. Such a juror would vote to convict if Mr. Ralls had knowledge that his companions planned to commit "a" crime, even if the state failed to prove Mr. Ralls knew his companions planned to shoot anyone or otherwise create a grave risk of death through conduct showing extreme indifference to life. CP 124.

Jury instructions must make the relevant standard "manifestly apparent" to the average juror. *Kyllo,* 166 Wn.2d at 864. Instead of making

[46] Both the prosecutor and the judge incorrectly thought the legally correct answer to the jury's first question was "yes." RP (8/1/14) 2794-2809. Neither recognized that the actual crime committed by Mr. Ralls depended on his knowledge: if he "agreed to aid" his companions in committing some lesser offense—felony harassment, simple assault, or even assault with a deadly weapon—he would be guilty of only that offense. *Cronin*, 142 Wn.2d at 580.

the law "manifestly apparent," the court's answer misstated the law and prejudiced Mr. Ralls.

The court's answer excused the jury from wrestling with the thorny question of Mr. Ralls's precise mental state. Instead of clarifying the law, the court's answer injected into the jury's deliberations a problem similar to that resolved by the *Cronin* court.[47]

For example, under the court's supplemental instruction, jurors could convict for murder if they believed Mr. Ralls knew only that his group planned to assault Houston and Jeter without lethal force. Despite his misunderstanding, jurors would find Mr. Ralls "liable for the same crime" they believed committed by the shooter.[48] Jury Question, Supp. CP.

The court's answer omitted a key element of accomplice liability. A reasonable juror could read the court's answer and decide that it meant "Yes." In fact, both the judge and the prosecutor incorrectly believed that an affirmative answer would be correct. ." RP (8/1/14) 2794, 2809, 2800, 2801, 2806, 2809. But "Yes" is not the correct answer, since an

[47] In *Cronin*, the instruction allowed conviction if the defendant acted with knowledge that his conduct would promote or facilitate "a crime." The Supreme Court reversed, finding the instruction "legally deficient." *Id.*, at 579.

[48] This is so regardless of their verdicts on any other count or any other defendant.

accomplice is not "liable for the same crime" unless he acts with the proper mental state.

As a response to the jury's question, the supplemental instruction suggested that an accomplice *is* liable for "the same crime" as the principal, even if the accomplice believed that the principal intended a lesser crime. It misstated the law and relieved the state of its burden.

When the jury "makes explicit its difficulties," the court should "clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350 (1946). In light of the jury question's ambiguity, the court's supplemental instruction did not clear away the jury's difficulties "with concrete accuracy." *Id.*

Instead, it relieved the state of its burden to prove the elements required for a finding of guilt. It allowed jurors to convict Mr. Ralls as an accomplice to murder even if he knew only that his companions intended to commit "a" crime that did not amount to murder. This violated his right to due process. *Roberts*, 142 Wn.2d at 513; *Cronin*, 142 Wn.2d at 579. His conviction must be reversed and the case remanded for a new trial.

B. The court's answer commented on the evidence.

A judge may not convey to the jury his or her personal attitude toward the merits of the case. *Jackman*, 156 Wn.2d at 744. Here, the judge implied that if Mr. Ralls qualified as an accomplice, the jury should

convict him of murder by extreme indifference rather than some lesser crime.

The jury's question suggested that consensus had been reached that Mr. Ralls was an accomplice to *some* crime.[49] Jury Question, Supp. CP. When read properly, the accomplice liability instruction focused the jury's attention on Mr. Ralls's knowledge that his actions would "promote or facilitate the commission of *the* crime" and on whether he "aid[ed] or agree[d] to aid… in planning or committing *the* crime." CP 101.

Had the judge simply asked jurors to reread the instructions—as suggested by the defense[50]—the jury might well have realized that Mr. Ralls's knowledge was the key to whether or not he was guilty of "the same crime" as the shooter (or, for that matter, "the same crime" as codefendant Miles).[51]

The court did not do this. Instead, the court reiterated one portion of the instruction, in a manner that could be read as a "yes" answer, that

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[49] *Cf. State v. Pilling*, 53 Wash. 464, 467-68, 102 P. 230 (1909) (jury question suggested that jurors had reached consensus on two elements; judge's answer regarding third element amounted to improper conclusive presumption).

[50] RP (8/1/14) 2794.

[51] Apparently, neither the judge nor the prosecutor recognized that the jury's question might have meant either "the same crime" as the shooter or "the same crime" as codefendant Miles. The prosecutor's argument and the judge's oral comments suggest that they both understood the question to refer to "the shooter." RP (8/1/14) 2794, 2809, 2800, 2801, 2806, 2809. However, the judge's written answer suggested that he understood the question to refer to "the same crime" as codefendant Miles, since Instruction No. 3 referred to "each defendant." Jury Question, Supp. CP.

Mr. Ralls's participation in and knowledge of *a* crime would make him "liable for the same crime."

The jury could not convict Mr. Ralls of murder by extreme indifference if he acted *without* knowledge of a plan to engage in conduct creating a grave risk of death and manifesting extreme indifference to human life. From the court's answer to their question, jurors could infer the judge's belief that Mr. Ralls *would* be guilty of murder if the jury found he was an accomplice to any crime.[52]

This violated Wash. Const. art. IV, § 16, and is presumed prejudicial. *Jackman*, 156 Wn.2d at 744.

The record "does not affirmatively show that no prejudice could have resulted." *Id.* Mr. Ralls's conviction must be reversed, and the case remanded for a new trial.

C. The invalid supplemental instruction prejudiced Mr. Ralls.

In a criminal trial, "the judge's last word is apt to be the decisive word." *Bollenbach*, 326 U.S. at 612. The last word from the judge in this case was a supplemental instruction that could reasonably be interpreted to require conviction even absent proof of Mr. Ralls's precise mental state. Jury Question, Supp. CP.

[52] That this was the judge's belief in fact is evidenced from his assertion that the correct answer to the question was "yes." RP (8/1/14) 2794, 2809, 2800, 2801, 2806, 2809.

Such "last word" errors, given during deliberations, are not cured by the remainder of the court's instructions. *Id.*

Nor did the answer cure the problem when considered only as a response to the jury's second question (regarding Instructions Nos. 3 and 9).[53] Regardless of any codefendant verdicts, jurors could "independently"[54] and "separately"[55] evaluate the evidence in Mr. Ralls's case, "independently" and "separately" find—as to Mr. Ralls's case—that the shooter committed murder by extreme indifference, and follow the court's supplemental instruction to hold Mr. Ralls "liable for the same crime." Jury Question, Supp. CP. Neither Instruction No. 3 nor the court's reference to it solved the problem created by the ambiguity.[56]

The error was especially prejudicial in this case because guilt turned on the difficult question of Mr. Ralls's knowledge. This required jurors to make very close determinations: did Mr. Ralls know his companions planned to engage in "reckless conduct," but not that they

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[53] Instruction No. 3 required the jury to consider charges and defendants separately. CP 95. The court referred the jury to Instruction No. 3 and explained that it required them to decide the defendants' cases independently. Jury Question, Supp. CP.

[54] As in the court's answer to the jury question.

[55] As in Instruction No. 3. CP 95.

[56] The jury's question about liability for "the same crime" was more likely to mean "the same crime" as the shooter than "the same crime as" codefendant Miles. Either way, this second ambiguity in the jury's inquiry shows even more strongly the problem with the court's answer.

might create a "grave risk of death" or act "with extreme indifference to human life"? CP 124, 127.

Even in the abstract, it is difficult to distinguish between conduct that is merely "reckless" and conduct that creates a "grave risk of death." CP 124, 127. Making the distinction in the context of a criminal case multiplies the difficulty: jurors must not only conceptualize the difference between the two standards, they must also consider conflicting evidence in light of that difference.

The court's answer removed this task from the jury's consideration. The supplemental instruction allowed jurors to reach their verdicts within one hour of receiving it.[57] Clerk's Trial Minutes, Supp. CP.

When asked if an accomplice "is liable for the same crime," the court improperly answered "yes" by reminding jurors that "a person is legally accountable for the conduct of another person when he or she is an accomplice..." Jury Question, Supp. CP.

A conviction for murder "ought not to rest on an equivocal direction to the jury on a basic issue." *Bollenbach* 326 U.S. at 613. The

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[57] The jury deliberated between 6 and 7 ½ hours before receiving the court's supplemental instruction. Two ambiguities make it impossible to determine exactly how long the reconstituted jury deliberated. First, there is no record of the exact time the reconstituted jury started deliberating. A brief hearing commenced at 9:46 a.m. on July 31, and the jury started work shortly thereafter. Second, it is not clear whether the jury halted deliberations when they asked their question at 10:30 a.m. on August 1, or whether they continued discussing the case until they received their answer from the court at 11:53 a.m. Clerk's Trial Minutes, Supp. CP.

jury's verdict in this case rested on an improper answer to an ambiguous jury question. This was the judge's "last word," and was "apt to be the decisive word." *Id.,* at 612.

Mr. Ralls's conviction must be reversed and the case remanded for a new trial.

V. THE TRIAL JUDGE VIOLATED MR. RALLS'S 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.

The trial judge unconditionally discharged the alternate jurors at the start of deliberations. He did not admonish the alternates to remain free from improper influence, or to refrain from discussing the case. When one of the deliberating jurors did not show up, the judge seated an alternate juror over defense objection. The judge did not conduct a brief *voir dire* to ensure that the alternate remained impartial. RP (7/30/14) 2776; RP (7/31/14) 2787-2788.

This infringed Mr. Ralls's Fourteenth Amendment right to due process and his right to a jury trial under the state and federal constitutions. It also violated CrR 6.5, which protects those constitutional rights.

When a regular juror is discharged, the trial judge may only recall alternates who "are temporarily excused but not discharged." CrR 6.5.

Here, the judge discharged the alternates at the close of the case. He did not temporarily excuse them from service. RP (7/30/14) 2776. In light of this, the alternates were not eligible to deliberate on Mr. Ralls's jury. CrR 6.5.

When jurors are temporarily excused (rather than discharged), the judge "shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror's ability to remain impartial." CrR 6.5. Here, the judge "thanked and excused the alternates." RP (7/30/14) 2776.[58] There is no indication that he admonished the alternates to refrain from discussing the case or to avoid publicity.[59] RP (7/30/14) 2776; Clerk's Trial Minutes, Supp. CP. Thus, the judge did not take the "appropriate steps" required under CrR 6.5.

Before seating an alternate, the judge "may conduct brief *voir dire*" to determine the alternate juror's continuing impartiality.[60] CrR 6.5. Here, even though the trial judge failed to take "appropriate steps" to

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[58] Curiously, the verbatim transcript does not quote the judge verbatim. RP (7/30/14) 2776.

[59] A pattern instruction outlines the admonitions a judge must direct at an alternate juror who is temporarily excused rather than discharged. WPIC 4.69.

[60] Where the judge has taken "appropriate steps" to protect jurors from outside influence, the failure to conduct *voir dire* is not error. *State v. Dye*, 170 Wn. App. 340, 349, 283 P.3d 1130 (2012) affirmed on other grounds, 178 Wn.2d 541, 309 P.3d 1192 (2013); *State v. Chirinos*, 161 Wn. App. 844, 848, 255 P.3d 809 (2011). But see *State v. Stanley*, 120 Wn. App. 312, 318, 85 P.3d 395 (2004) (noting error, but declining to consider whether such failure requires reversal).

protect the alternates from improper influence, he did not *voir dire* the alternate prior to seating her. RP (7/31/14) 2787-2788.

During trial, the judge admonished jurors not to discuss the case with each other or with anyone else. *See, e.g.* RP (7/22/14) 2181; RP (7/23/14) 2282; RP (7/28/14) 2473; RP (7/29/14) 2632. The judge took no such precaution with the alternates, however. Instead, he thanked them and excused them. RP (7/30/14) 2776. By discharging them unconditionally, the judge disqualified them from returning to serve on the jury. CrR 6.5. He should not then have recalled one of the discharged alternates and seated her on the jury.

This is especially true because he failed to "take appropriate steps" to protect the alternates from outside influence. CrR 6.5. The problem was compounded by his failure to conduct brief *voir dire* to ensure that the alternate juror had refrained from discussions about the case and had avoided publicity. CrR 6.5.

Without consulting with either party, the judge summoned an alternate juror whom he'd previously discharged. Over objection, he announced his decision to seat the alternate in place of a regular juror who had a planned vacation. He did not provide either party the opportunity to question the alternate. RP (7/31/14) 2783-2785.

CrR 6.5 "clearly contemplate[s] a formal proceeding." *State v. Ashcraft*, 71 Wn. App. 444, 462, 859 P.2d 60 (1993). The matters addressed by CrR 6.5 "relate directly to a defendant's constitutional right to a fair trial before an impartial jury." *Id.,* at 462-63.[61]

By failing to comply with CrR 6.5, the trial judge violated Mr. Ralls's constitutional right to a fair trial by an impartial jury. *Id.;* U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 3, 21, 22. The conviction must be reversed and the case remanded for a new trial. *Id.*

VI. THE COURT ERRED BY ORDERING MR. RALLS TO PAY $2800 IN LEGAL FINANCIAL OBLIGATIONS ABSENT ANY PARTICULARIZED INQUIRY INTO HIS ABILITY TO PAY.

Mr. Ralls was found indigent at both the beginning and end of trial. Notice of Appearance, Supp. CP; CP 211-212. Still, the court ordered him to pay $2800 in legal financial obligations (LFOs). CP 188.

The court appeared to rely on boilerplate language in the Judgment and Sentence stating, essentially, that every offender has the ability to pay LFOs. CP 187. But the court did not conduct any particularized inquiry into Mr. Ralls's financial situation at sentencing or at any other time. RP

[61] Accordingly, violation of the rule can be raised for the first time on appeal as a manifest error affecting a constitutional right. *Id.* n. 7 (citing RAP 2.5(a)(3)). If defense counsel's objections were insufficient to preserve all the issues raised here, then the errors must be reviewed under RAP 2.5(a)(3).

(8/29/14) 40-80. The court erred by ordering Mr. Ralls to pay LFOs absent any indication that he had the means to do so.

The legislature has mandated that "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3); *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680, 685 (March 12, 2015) (emphasis added by court).

This imperative language prohibits a trial court form ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

The court must consider personal factors such as incarceration and the person's other debts, including restitution. *Id.*

Here, the court failed to conduct any meaningful inquiry into Mr. Ralls's ability to pay LFOs. RP (8/29/14) 40-80. The court did not consider his financial status in any way. Indeed, the court also found Mr. Ralls indigent at both the beginning and the end of trial. Notice of Appearance, Supp. CP; CP 211-212.

In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's

ability to pay LFOs"). Because he is indigent, the court should have presumed that Mr. Ralls was unable to pay LFOs instead of simply ordering them without any inquiry.

The court erred by ordering Mr. Ralls to pay $2800 in LFOs absent any showing that he had the means to do so. *Blazina*, 344 P.3d at 685. The order must be vacated and the case remanded for a new sentencing hearing. *Id.*

CONCLUSION

The court's instructions misstated the law, commented on the evidence, and relieved the state of its burden to disprove self-defense. The court's accomplice instruction relieved the state of its burden to prove accomplice liability.

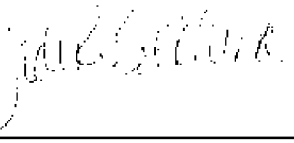
In addition, the court improperly answered a jury inquiry with a comment on the evidence that relieved the state of its burden to prove that Mr. Ralls acted with knowledge that he was helping commit "the" crime of murder. The court's erroneous answer encouraged conviction if jurors believed Mr. Ralls knew he was assisting in commission of "a" crime.

Finally, the court violated Mr. Ralls's right to a fair trial by an impartial jury when it seated an alternate juror without ensuring that she remained impartial and untainted by outside influence.

These errors require reversal of Mr. Ralls's conviction and remand for a new trial with proper instructions. If the conviction is not reversed, the Court of Appeals should vacate the order imposing legal financial obligations and remand the case for a hearing to determine Mr. Ralls's ability to pay.

Respectfully submitted on June 12, 2015,

BACKLUND AND MISTRY



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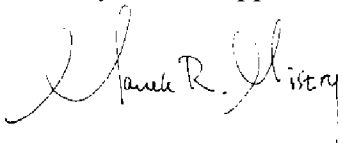

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Anthony Ralls, DOC #964751
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

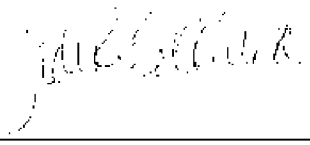
and to

Stephanie Cunningham, attorney for co-defendant
SCCAttorney@yahoo.com

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 12, 2015.



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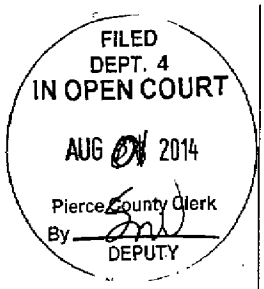
APPENDICES

INSTRUCTION NO. 19

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.

INSTRUCTION NO. 19A

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



8/26/2014 2647

IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,
Plaintiff,
vs.
MILES, NATHANIEL WESLEY,
RALLS, ANTHONY EUGENE,,
Defendant(s).

Cause No: 13-1-01704-2
13-1-01703-4 ✓

JURY QUESTION DURING DELIBERATIONS

QUESTION: If we determine a defendant is an accomplice, are they liable for the same crime?

we are having confusion distinguishing between intructions # 3 and # 9.

8-1-2014

M St. Germain
PRESIDING JUROR/DATE

RESPONSE: SEE ATTACHED.

DATED this 1 day of August 2014.

Bryan Chushcoff
BRYAN CHUSHCOFF, JUDGE

RESPONSE TO QUESTION:

Instruction #3 instructs you that each defendant's charge is to be assessed by you independently and so your verdict on one count as to one defendant should not control your verdict on any other count or as to the other defendant.

Instruction #9 instructs that a person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime. Instruction #9 further defines when a person is an accomplice.

Dated: August 1, 2014 at 11:50 a.m.

Bryan Chushcoff

BACKLUND & MISTRY

June 12, 2015 - 3:45 PM

Transmittal Letter

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Court of Appeals Case Number: 46633-3

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- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
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