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STATE OF WASHINGTON  
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Court of Appeals No. 51571-7-II

97875-1

SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
Respondent,

v.

TROY E. BOTTEMILLER,  
Appellant.

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**PETITION FOR REVIEW**

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**I. Identity of Petitioner**

Petitioner Troy Bottemiller asks this Court to accept review of the Court of Appeals Decision designated in Part II of this Petition.

**II. Court of Appeals Decision**

Mr. Bottemiller seeks review of the decision filed by Division II of the Court of Appeals on October 22, 2019.

A copy of the Order is in the Appendix at pages A-1 through A-9.

**III. Issues Presented for Review**

1. Does RCW 9A.16.110(3) conflict with RCW 9A.16.110(1) and, if so, how should this conflict be resolved?
2. Does RCW 9A.16.110(3) conflict with 9A.04.020(1)(b) and, if so, how should this conflict be resolved?

**IV. Statement of the Case**

**Factual and Procedural Background**

In 2008, Mr. Bottemiller was a senior in high school.<sup>1</sup> Mr. Bottemiller had his wisdom teeth pulled and became addicted to opiates as a result of the pain pills prescribed for the operation.<sup>2</sup> Mr. Bottemiller's addiction progressed from Percocet, to Oxycontin, and finally, by 2010, to smoking and then injecting heroin.<sup>3</sup> Mr. Bottemiller began selling heroin

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<sup>1</sup> RP 24 (June 29, 2017, afternoon session). Several portions of the transcript are not numbered continuously with the main report of proceedings. Reference to these sections will be made by giving the RP citation followed by the date of the proceeding.

<sup>2</sup> RP 22-24 (June 29, 2017, afternoon session).

<sup>3</sup> RP 24 (June 29, 2017, afternoon session).

and meth, mostly heroin, to fund his drug habit and pay for hotels to live in.<sup>4</sup>

From 2010 to 2016, Troy Bottemiller, Sabrina Westfall, and Lucas Gritzke were acquaintances.<sup>5</sup> Mr. Bottemiller met Lucas Gritzke while they were in high school.<sup>6</sup> The men were more acquaintances than friends.<sup>7</sup> Ms. Westfall was Mr. Gritzke's girlfriend from December of 2010 to November of 2015 when Mr. Gritzke broke off the relationship.<sup>8</sup> Mr. Bottemiller was Ms. Westfall's good friend.<sup>9</sup> Ms. Westfall and Mr. Bottemiller would hang out together and get closer when Mr. Gritzke was in jail but remained just friends.<sup>10</sup> Mr. Gritzke argued with Ms. Westfall about her relationship with Mr. Bottemiller but eventually understood that Mr. Bottemiller was just a friend to Ms. Westfall.<sup>11</sup> While in jail Mr. Gritzke got mad at Mr. Bottemiller for hanging out with Ms. Westfall and threatened Mr. Bottemiller.<sup>12</sup> Mr. Bottemiller, Ms. Westfall, and Mr. Gritzke would hang out and do drugs together, but there were lots of times Mr. Bottemiller did not do drugs.<sup>13</sup> Ms. Westfall and Mr. Gritzke dealt

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<sup>4</sup> RP 24-25 (June 29, 2017, afternoon session).

<sup>5</sup> RP 702-703, 716

<sup>6</sup> RP 27 (June 29, 2017, afternoon session).

<sup>7</sup> RP 27 (June 29, 2017, afternoon session).

<sup>8</sup> RP 702.

<sup>9</sup> RP 703, 716.

<sup>10</sup> RP 703-704, 716.

<sup>11</sup> RP 717.

<sup>12</sup> RP 733-734.

<sup>13</sup> RP 718-719.

drugs together.<sup>14</sup>

In early January of 2012, Ms. Westfall was unemployed and needed \$250 to take a class to become an insurance agent but \$250 was all the money she had.<sup>15</sup> Mr. Botteiller promised to give the money to Ms. Westfall but never did.<sup>16</sup> Mr. Gritzke confronted Mr. Bottemiller about his failure to give Ms. Westfall the money and challenged Mr. Bottemiller to a fight.<sup>17</sup> Mr. Gritzke challenged Mr. Bottemiller to a fight in a parking lot in Federal Way, but Mr. Bottemiller did not wish to fight and went home.<sup>18</sup> Later that night, Mr. Bottemiller called Mr. Gritzke who told Mr. Bottemiller to come to his house to fight.<sup>19</sup> Despite Mr. Gritzke having a broken hand with a cast on it, Mr. Gritzke threw the last punch and was not injured in the fight.<sup>20</sup> Mr. Gritzke threw one punch and broke Mr. Bottemiller's nose.<sup>21</sup> Mr. Gritzke hit Mr. Bottemiller with his cast and continued to attack Mr. Bottemiller once Mr. Bottemiller was on the ground.<sup>22</sup>

Mr. Bottemiller suffered serious injuries as a result of that

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<sup>14</sup> RP 232-233.  
<sup>15</sup> RP 720.  
<sup>16</sup> RP 720-721.  
<sup>17</sup> RP 720-721  
<sup>18</sup> RP 721-722.  
<sup>19</sup> RP 722-723.  
<sup>20</sup> RP 723-724.  
<sup>21</sup> RP 723-725, 1280.  
<sup>22</sup> RP 662-664, 1277-1278.

assault.<sup>23</sup> Mr. Bottemiller's nose was crushed but Mr. Bottemiller also exhibits signs of a concussion and mental impairment, such as having no recollection of the fight, being confused, having difficulty completing sentences, forgetting the day of the week, losing his sense of smell, having difficulty breathing, and having cognitive difficulty for days following the fight.<sup>24</sup> Mr. Bottemiller required medical treatment and surgical intervention, including refracturing his nose and suffered permanent injury as a result of Mr. Gritzke's beating him.<sup>25</sup> The morning after the fight Mr. Gritzke called Mr. Bottemiller and said that if Mr. Bottemiller ever came to Mr. Gritzke's house again he wouldn't be leaving.<sup>26</sup> Mr. Bottemiller believed this was a death threat.<sup>27</sup>

After the fight, Mr. Bottemiller's relationship with Mr. Gritske changed completely.<sup>28</sup> Mr. Gritzke continually threatened Mr. Bottemiller and Mr. Bottemiller avoided Mr. Gritske at all costs.<sup>29</sup> Mr. Gritzke made multiple death threats against Mr. Bottemiller directly to Mr. Bottemiller and indirectly.<sup>30</sup> Mr. Bottemiller did occasionally encounter Mr. Gritske during drug deals, possibly once or twice per year, but those encounters

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<sup>23</sup> RP 1271-1272.

<sup>24</sup> RP 677-678, 1271, 1484, 1498-1499.

<sup>25</sup> RP 690, 1280.

<sup>26</sup> RP 1281-1282.

<sup>27</sup> RP 1281-1282.

<sup>28</sup> RP 28 (June 29, 2017, afternoon session).

<sup>29</sup> RP 28-29 (June 29, 2017, afternoon session).

<sup>30</sup> RP 1282, 1285-1286.

were unplanned and short.<sup>31</sup> Mr. Bottemiller's family had multiple conversations in the house and on the phone about safety plans regarding Mr. Gritzke.<sup>32</sup> The family plan consisted of Mr. Bottemiller and his family avoiding contact with Mr. Gritzke and staying away from Mr. Gritzke and Mr. Gritzke's circle of friends, and the family tracked when Mr. Gritzke was in jail so they could let their guard down.<sup>33</sup>

Mr. Gritzke met Amanda Sweeney in the summer of 2014 and they began a romantic relationship in September of 2015.<sup>34</sup> Ms. Sweeny was using heroin daily and she and Mr. Gritzke both sold heroin.<sup>35</sup> In January of 2016, Mr. Gritzke's and Ms. Sweeney's house was raided and police found a safe containing two guns, several ounces of heroine, some meth, and about 60 Suboxone strips.<sup>36</sup> Mr. Gritzky was arrested and spent roughly 52 days in jail before being bailed out.<sup>37</sup>

As part of his security plan relating to Mr. Gritske, Mr. Bottemiller would type Lucas Gritzke's name into the jail roster in the Pierce County LINX browser because he felt safer when Mr. Gritzke was incarcerated than when Mr. Gritzke was out.<sup>38</sup> In February of 2016, Mr. Bottemiller

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<sup>31</sup> RP 29 (June 29, 2017, afternoon session).

<sup>32</sup> RP 1486-1487.

<sup>33</sup> RP 1299, 1340, 1344-1345.

<sup>34</sup> RP 230-231.

<sup>35</sup> RP 230-231.

<sup>36</sup> RP 233-234.

<sup>37</sup> RP 236-238.

<sup>38</sup> RP 1299.



became “scared” because he learned Mr. Gritzke had been jailed and charged with two counts of unlawful possession of a firearm in the first degree.<sup>39</sup> In the weeks prior to April 16, 2016, in the process of keeping track of Mr. Gritzke, Mr. Bottemiller learned that while Mr. Gritzke was in custody, he bragged he got into a fight with a guy over a dish soap box and beat the guy up and put him in the hospital.<sup>40</sup> Later, Mr. Bottemiller saw the individual who Mr. Gritzke beat up and described him as looking like “Frankenstein.”<sup>41</sup> Mr. Bottemiller was also aware of multiple violent drug “rips” (robberies) committed by Mr. Gritzke, in the weeks leading up to the killing.<sup>42</sup>

Around April 12, 2016, Ms. Westfall and Mr. Bottemiller rented a room at the Northwest Motor Inn.<sup>43</sup> Erik Jensen, Faith Worthington, and Taylor Nolte also stayed in the room.<sup>44</sup> Ms. Westfall and Mr. Bottemiller were selling drugs out of the room along with Mr. Jensen and Ms. Worthington, so other people were going in and out of the room.<sup>45</sup>

On the night of April 15, 2016, Ms. Sweeney and Mr. Gritzke were playing slot machines at BJ’s Bingo with their friend, Rebecca Freetus.<sup>46</sup>

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<sup>39</sup> RP 1289, 1299.

<sup>40</sup> RP 1451.

<sup>41</sup> RP 1453.

<sup>42</sup> RP 1453.

<sup>43</sup> RP 751-753.

<sup>44</sup> RP 753.

<sup>45</sup> RP 753-754.

<sup>46</sup> RP 241-244.

The group left when AJ, a friend of theirs, called and said he was staying in a tent.<sup>47</sup> The group picked up AJ and took him to the Quality Inn in Fife.<sup>48</sup> While the group was at the Quality Inn, AJ mentioned that he had received a text from Mr. Bottemiller's phone number that said, "Hey, if you need anything, this is Lucas."<sup>49</sup> Mr. Gritzke noted that people had told him that that kind of text had been happening a lot lately.<sup>50</sup>

Ms. Freetus said she knew where Mr. Bottemiller was because she had seen him recently.<sup>51</sup> The group went to the Northwest Motor Inn to look for Mr. Bottemiller because Mr. Gritzke wanted to ask Mr. Bottemiller why he was using Mr. Gritzke's name.<sup>52</sup> Mr. Gritzke also discussed robbing and assaulting Mr. Bottemiller. Mr. Gritzke was not interested in purchasing any drugs from Mr. Bottemiller, but the plan was that he would get into the room where Mr. Bottemiller was located by faking that he was going to buy drugs from Ms. Westfall.<sup>53</sup> They did not see Mr. Bottemiller's car in the parking lot, so they went to Walmart.<sup>54</sup> As the group was pulling into the Walmart parking lot they saw Mr.

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<sup>47</sup> RP 244.

<sup>48</sup> RP 244.

<sup>49</sup> RP 245.

<sup>50</sup> RP 245.

<sup>51</sup> RP 245.

<sup>52</sup> RP 249-250, 252-253, 258-259.

<sup>53</sup> RP 259-260, 311-312.

<sup>54</sup> RP 249-250.

Bottemiller's car pulling out of the parking lot.<sup>55</sup> Mr. Gritzke and the group bought some batteries at the Walmart then returned to the Northwest Motor Inn and saw Mr. Bottemiller's car in the parking lot.<sup>56</sup>

Mr. Gritzke met up with a man named Tarreq who was going to buy "a sack" from Mr. Bottemiller and Ms. Westfall so Mr. Gritzke accompanied the man to the room where Mr. Bottemiller was.<sup>57</sup> Ms. Westfall had warned Mr. Bottemiller that Mr. Gritzke was coming to the room to buy heroin and Mr. Bottemiller "was really against it."<sup>58</sup> Mr. Bottemiller didn't say why, but he was against Ms. Westfall selling to Mr. Gritzke.<sup>59</sup> Mr. Gritzke entered the room, saw Mr. Bottemiller, and immediately left and returned to the car where Ms. Sweeney was waiting.<sup>60</sup> Mr. Gritzke was upset because he felt that Mr. Bottemiller had disrespected him because Mr. Gritzke had walked into the room and Mr. Bottemiller did not say hello.<sup>61</sup>

When he returned to the car Mr. Gritzke was accompanied by Erik Jensen who was on his way to 7-11 to sell some drugs.<sup>62</sup> As the group travelled to 7-11, Mr. Jensen said that Mr. Bottemiller had "three ounces

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<sup>55</sup> RP 250.  
<sup>56</sup> RP 250, 253.  
<sup>57</sup> RP 258.  
<sup>58</sup> RP 464, 557, 761-762, 1027-1028.  
<sup>59</sup> RP 762.  
<sup>60</sup> RP 258-259.  
<sup>61</sup> RP 309.  
<sup>62</sup> RP 256, 259-260, 765.

and \$5,000 on him.”<sup>63</sup> Ms. Sweeney was worried that Mr. Gritzke might do something like rob Mr. Bottemiller and she didn’t want to go back to jail, so she told him “Don’t get any ideas. That’s not why we are here.”<sup>64</sup> Based on Gritzke’s words and conduct, Ms. Sweeney was also concerned that Mr. Gritzke would assault Mr. Bottemiller.<sup>65</sup> After Mr. Jensen sold his sack, the group returned to the Northwest Motor Inn and Mr. Gritzke told Ms. Sweeney he was going to talk to Mr. Bottemiller to find out “why this is happening.”<sup>66</sup> Ms. Sweeney was concerned that things would escalate to the point that cops might be called but Mr. Gritzke promised Ms. Sweeney that nothing was going to happen because Mr. Bottemiller was a “bitch” who wouldn’t fight Mr. Gritzke.<sup>67</sup> As Mr. Gritzke went up to the room to confront Mr. Bottemiller, due to Mr. Gritzke’s words and conduct, Ms. Sweeney was concerned that Mr. Gritzke intended to rob and assault Mr. Bottemiller.<sup>68</sup>

When Mr. Gritzke exited Mr. Bottemiller’s room the first time with Mr. Jensen, Mr. Gritzke asked Mr. Jensen about Mr. Bottemiller using Mr. Gritzke’s name and said he wanted to confront him.<sup>69</sup> Mr.

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<sup>63</sup> RP 260.  
<sup>64</sup> RP 260-261, 305-306.  
<sup>65</sup> RP 310.  
<sup>66</sup> RP 262.  
<sup>67</sup> RP 262-263, 310-311.  
<sup>68</sup> RP 320, 310, 335.  
<sup>69</sup> RP 467.

Jensen, who had spent almost every day of the prior month with Mr. Bottemiller selling and taking drugs,<sup>70</sup> did not believe that Mr. Bottemiller had been using Mr. Gritzke's name to get Mr. Gritzke's former heroin-purchasing clientele.<sup>71</sup> Mr. Gritzke was not concerned about Mr. Bottemiller selling heroin to Mr. Gritzke's former heroin customers because Mr. Gritzke and Ms. Sweeney had stopped selling drugs.<sup>72</sup> Mr. Gritzke and Ms. Sweeney knew Mr. Bottemiller was selling drugs and would likely have drugs and cash but that had nothing to do with why they went to confront him.<sup>73</sup> Mr. Gritzke was concerned about Mr. Bottemiller using Mr. Gritzke's name.<sup>74</sup> Mr. Gritzke was "pissed off" because he had found out Mr. Bottemiller was using Mr. Gritzke's name.<sup>75</sup> Mr. Gritzke was upset that Mr. Bottemiller was using Mr. Gritzke's name because Mr. Gritzke would get in trouble if word got out that he was selling drugs.<sup>76</sup>

When Mr. Gritzke and Mr. Jensen returned to the hotel room, Mr. Gritzke got within a foot and a half of Mr. Bottemiller and in an aggressive manner and tone confronted Mr. Bottemiller about impersonating Mr. Gritzke.<sup>77</sup> This surprised Ms. Westfall because she had

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<sup>70</sup> RP 448-452.  
<sup>71</sup> RP 467.  
<sup>72</sup> RP 323.  
<sup>73</sup> RP 329.  
<sup>74</sup> RP 323.  
<sup>75</sup> RP 332.  
<sup>76</sup> RP 323.  
<sup>77</sup> RP 467, 474, 574, 766.

been with Mr. Bottemiller for almost two full months and Mr. Bottemiller had not been impersonating Mr. Gritzke.<sup>78</sup> Mr. Bottemiller also denied that he had been using the name of Mr. Gritzke for any purpose. Mr. Gritzke demanded that Mr. Bottemiller give Mr. Gritzke his cell phone.<sup>79</sup> Mr. Gritzke was yelling that he had heard Mr. Bottemiller had been impersonating him and demanded Mr. Bottemiller's phone so he could make sure Mr. Bottemiller had not been doing that.<sup>80</sup> Mr. Bottemiller produced his cell phone and Mr. Gritzke ripped the phone from Mr. Bottemiller's hands and told Mr. Bottemiller to "give me everything else you have," meaning Mr. Bottemiller's drugs and money.<sup>81</sup> Mr. Gritzke put Mr. Bottemiller's phone in his pocket where police later recovered it, postmortem.<sup>82</sup>

While Mr. Gritzke was demanding Mr. Bottemiller's phone, money, and drugs, Mr. Gritzke was pounding his fists and was getting closer to Mr. Bottemiller as Mr. Bottemiller remained seated and spoke calmly and softly, trying to defuse the situation.<sup>83</sup> At some point during his demands for the phone Mr. Gritzke said, "I'm going to kick your

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<sup>78</sup> RP 766.

<sup>79</sup> RP 574.

<sup>80</sup> RP 1309.

<sup>81</sup> RP 770-772, 1232, 1309-1310.

<sup>82</sup> RP 179-180, 195-196, 203-204, 1232, 1310.

<sup>83</sup> RP 773, 1285, 1302, 1310-1311.

ass.”<sup>84</sup> After Mr. Gritze took Mr. Bottemiller’s phone and demanded the money and drugs, Ms. Westfall got between the men to see if she could change Mr. Gritzke’s mind.<sup>85</sup>

Mr. Gritzke taunted Mr. Bottemiller and challenged him to fight.<sup>86</sup> Mr. Gritzke was flinching at Mr. Bottemiller, quickly jerking his body at him as if he was going to lunge at him.<sup>87</sup> Mr. Gritzke’s hands were clenched and he was pumping his fist.<sup>88</sup> Mr. Bottemiller put his hands up to cover his head and pulled away from Mr. Gritzke.<sup>89</sup> Mr. Bottemiller was concerned about a head injury, due to the compounding effects of his prior serious head injury suffered at the hands of Mr. Gritzke. Mr. Bottemiller never made a fist.<sup>90</sup> Mr. Bottemiller told Mr. Gritzke that he had not been impersonating him.<sup>91</sup> Mr. Bottemiller was scared and nervous and didn’t raise his voice.<sup>92</sup> Mr. Bottemiller was trying to remain calm and soft spoken because he was scared and trying to calm the situation down.<sup>93</sup>

Mr. Jensen observed that it seemed like Mr. Bottemiller didn’t

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<sup>84</sup> RP 575, 773.  
<sup>85</sup> RP 772.  
<sup>86</sup> RP 952-953.  
<sup>87</sup> RP 1050.  
<sup>88</sup> RP 1314.  
<sup>89</sup> RP 1314.  
<sup>90</sup> RP 1314.  
<sup>91</sup> RP 1312.  
<sup>92</sup> RP 476, 573.  
<sup>93</sup> RP 1302, 1310-1311.

know what was going on and that you could tell he was nervous by the tone in his voice.<sup>94</sup> In response to the aggression, Mr. Bottemiller got to a point where he was scared and needed to get Lucas Gritzke away immediately, so he told him, “Hey, stuff is in my car,” even though there was not actually anything in the car.<sup>95</sup> Mr. Bottemiller told Mr. Gritzke the stuff was in his car because he was trying to put space between himself and Mr. Gritzke since Mr. Gritzke was getting angrier and angrier.<sup>96</sup>

Mr. Gritzke started walking towards the door and saw that Mr. Bottemiller was not behind him. RP 479. When Mr. Gritzke realized Mr. Bottemiller was not following him to the door, he turned around and said, “really” before he started walking back towards Mr. Bottemiller. RP 584. Mr. Gritzke was going forward towards Mr. Bottemiller with his hands out front. RP 482. Mr. Bottemiller stood up and pulled out a gun. RP 479. Lucas Gritzke responded with “really” before he took another step towards Troy Bottemiller. RP 479.

Once Mr. Gritzke started coming towards him, Mr. Bottemiller felt threatened for his life and worried that Lucas Gritzke was going to come and take the gun and use it against him or severely beat him with it.<sup>97</sup> Mr. Bottemiller backpedaled to create distance between himself and Mr.

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<sup>94</sup> RP 475.

<sup>95</sup> RP 1058, 1315.

<sup>96</sup> RP 1315-1316.



Gritzke.<sup>98</sup> Mr. Bottemiller pulled the gun in hopes that Mr. Gritzke would stop or leave.<sup>99</sup> Mr. Bottemiller was concerned because Mr. Gritzke appeared to not be afraid of the gun and continued to stride aggressively towards Mr. Bottemiller.<sup>100</sup> Because Mr. Gritzke did not slow down after taking Mr. Bottemiller's phone, Mr. Bottemiller thought that nothing was going to slow him down. RP 1329. Having been backed into a corner from which there was no exit, and with Mr. Gritzke between he and the exit door, Mr. Bottemiller raised and fired his gun once to defend himself, but not intending to kill Mr. Gritzke. RP 1318-1319, 1323.

Unfortunately, Mr. Gritzky, having closed the distance between himself and Mr. Bottemiller to approximately 20 inches, was hit by the bullet and died.<sup>101</sup>

On April 18, 2016, Mr. Bottemiller was charged with murder in the second degree.<sup>102</sup> Mr. Bottemiller asserted the defense of self-defense at trial and indicated that, if found innocent, he would be seeking to be reimbursed under RCW 9A.16.110.<sup>103</sup>

The jury found Mr. Bottemiller not guilty of second-degree

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<sup>97</sup> RP 1329.  
<sup>98</sup> RP 778, 1314-1318.  
<sup>99</sup> RP 1318, 1521.  
<sup>100</sup> RP 1320-1322.  
<sup>101</sup> CP 3-4.  
<sup>102</sup> CP 1-2.  
<sup>103</sup> CP 5.

murder, not guilty of either first- or second-degree manslaughter, and found that he had acted in self-defense.<sup>104</sup> The jury also found that Mr. Bottemiller had “engaged in conduct substantially related to giving rise to the crime” with which he was charged.<sup>105</sup>

Based on this finding, the trial court ruled that Mr. Bottemiller was not entitled to **any reimbursement** of the money he spent defending himself against the second-degree murder charge, despite being found not guilty due to his acting in self-defense.<sup>106</sup>

Mr. Bottemiller appealed the trial court’s ruling denying Mr. Bottemiller’s attorney fees, costs, and expenses reimbursement.<sup>107</sup> On appeal, Mr. Bottemiller argued (1) there was insufficient evidence to support the jury finding that Mr. Bottemiller was engaged in criminal activity that was substantially related to the events leading to the death of Mr. Gritzky; and (2) the trial court abused its discretion in denying Mr. Bottemiller any reimbursement of his fees and costs.<sup>108</sup>

The Court of Appeals found that there was sufficient evidence to support the jury’s finding<sup>109</sup> and that the trial judge did not abuse his

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<sup>104</sup> CP 76-79, 81.

<sup>105</sup> CP 81.

<sup>106</sup> CP 249-252.

<sup>107</sup> CP 253-257.

<sup>108</sup> Appellant’s Opening Brief, p. 19-30.

<sup>109</sup> *State v. Bottemiller*, 51571-7-II, 2019 WL 5395324, at \*3 (Wash. Ct. App. Oct. 22, 2019)

discretion in denying Mr. Bottemiller any reimbursement.<sup>110</sup>

**V. Argument Why Review Should Be Accepted**

Under RAP 13.4(b), this Court may accept discretionary review of a Court of Appeals decision terminating review only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or**
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.**

(Emphasis added.)

**The Court of Appeals' interpretation of RCW 9A.16.110(3) is in conflict with the legislative intent clearly expressed in RCW 9A.04.020(1)(b) and RCW 9A.16.110(1) and the traditional interpretation of RCW 9A.16.110(1).**

RCW 9A.16.110(1) mandates that

No person in the state shall be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary, himself [when he] is in imminent danger of or the victim of assault, robbery, kidnapping, arson, burglary, rape, murder, or any other violent crime as defined in RCW 9.94A.030.

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<sup>110</sup> *Bottemiller*, 51571-7-II, 2019 WL 5395324, at \*4.

However, RCW 9A.16.110(3), enacted after RCW 9A.16.110(1), purports to carve out an exception to RCW 9A.16.110(1). RCW 9A.16.110(3) states that

Notwithstanding a finding that a defendant's actions were justified by self-defense, if the trier of fact also determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant the judge may deny or reduce the amount of the award. In determining the amount of the award, the judge shall also consider the seriousness of the initial criminal conduct.

RCW 9A.04.020(1)(b) clearly states that one of the purposes of RCW title 9A is “To safeguard conduct that is without culpability from condemnation as criminal.” The purpose of RCW 9A.16.110 “is to ensure that costs of defense shall befall ‘[n]o person in the state’ if he or she acts in self-defense; and ... reimbursement is available when such person incurs costs in defending against some kind of ‘legal jeopardy.’”<sup>111</sup>

RCW 9A.16.110 plays an important part of this safeguarding of conduct because it provides a strong financial disincentive for the State to pursue unfounded charges against individuals who lawfully use force in self-defense.

To protect the right of citizens of this state to use lawful force in self-defense, the Legislature has provided, in RCW 9A.16.110, for

reimbursement by the State of the costs a defendant incurs in successfully defending against a criminal prosecution for assault. Under the statute, when a person charged with assault is found not guilty by reason of self-defense, the State is required to reimburse such person “*for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense.*”<sup>112</sup>

Historically, RCW 9A.16.110 has been interpreted as mandating reimbursement for individuals found to have used force in self-defense even where those individuals were involved in unsavory and even criminal behavior. For example, in *State v. Anderson*, 72 Wn.App. 253, 863 P.2d 1370 (1993), *review denied* 124 Wn.2d 1010 (1994), the court held that Sampson, a defendant in that case, who was guilty of much more intentional, malevolent, and serious criminal conduct than Mr. Bottemiller was entitled to full reimbursement. Sampson was having sex with a prostitute, he was drunk, and he was attempting to buy drugs, late at night, for the prostitute when the killing occurred. The *Anderson* court noted that: “Sampson’s case is similar but not identical. On January 16, 1991, after ingesting cocaine and alcohol, he ‘deliberately sought out a drug transaction in a high crime area’, while armed with a loaded handgun. A

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<sup>111</sup> *State v. Villanueva*, 177 Wn. App. 251, 255, 311 P.3d 79 (2013), *citing City of Seattle v. Fontanilla*, 128 Wn.2d 492, 500, 909 P.2d 1294 (1996) (alteration in original) (quoting former RCW 9A.16.110(1) (1989)).

confrontation ensued, and he shot two men, killing one.”<sup>113</sup> The *Anderson* court held that an individual found not guilty because he or she was acting in self-defense is **not disqualified** from being reimbursed by the State under RCW 9A.16.110 just because *“the need to use self-defense was precipitated by unsavory or even illegal activities.”*<sup>114</sup> (our emphasis). The *Anderson* court held that RCW 9A.16.110 *“allows recovery of appropriate expenses by anyone who, according to a preponderance of evidence, acted lawfully in self-defense.”*<sup>115</sup> (our emphasis).

While acknowledging RCW 9A.16.110(1)’s mandate that “People shall not ‘be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary’ themselves, their family, or their property,”<sup>116</sup> the court of appeals ultimately held that RCW 9A.16.110(3) permitted the trial court to deny a defendant who the jury finds acted in self defense all reimbursement if the jury finds the defendant was also engaged in criminal conduct substantially related to the events giving rise to the charges. This interpretation of RCW 9A.16.110(3) conflicts with RCW 9A.16.110(1) and RCW 9A.04.020(1)(b).

This case presents several issues of first impression under RCW

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<sup>112</sup> RCW 9A.16.110(2) (emphasis added).  
<sup>113</sup> *Anderson*, 72 Wn.App. at 257, 863 P.2d 1370.  
<sup>114</sup> *Anderson*, 72 Wn.App. at 259, 863 P.2d 1370.  
<sup>115</sup> *Anderson*, 72 Wn.App. at 259-260, 863 P.2d 1370

9A.16.110(1) and (3) regarding the tension between section (1)'s mandate that a defendant found to have acted in self defense shall not be placed in legal jeopardy of any kind and section (3)'s mandate that a judge may reduce the reimbursement amount of defendant found to have acted in self-defense while engaged in criminal conduct substantially related to the events giving rise to the charges against the defendant.

This case also highlights the tension between RCW 9A.16.110(3), RCW 9A.04.020(1)(b)'s statement that one of the purposes of RCW title 9A is "To safeguard conduct that is without culpability from condemnation as criminal," and *Anderson*. ***Anderson has never been overruled or abrogated*** following the 1995 amendments to RCW 9A.16.110.

## VI. Conclusion

This court should accept review of this case to evaluate and resolve the tension and conflict between RCW 9A.16.110(1), RCW 9A.16.110(3), RCW 9A.04.020(1)(b), and *Anderson*.

DATED this 20<sup>th</sup> day of November, 2019.

Respectfully submitted,

 #14380  
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Attorney for Mr. Bottemiller

<sup>116</sup> *State v. Bottemiller*, 51571-7-II, 2019 WL 5395324, at \*2 (Wash. Ct. App. Oct. 22, 2019).

# APPENDIX



October 22, 2019

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

TROY E. BOTTEMILLER,

Appellant.

No. 51571-7-II

UNPUBLISHED OPINION

MELNICK, J. — A jury found that Troy Bottemiller killed Lucas Gritzke in self-defense. As a result, it found that Bottemiller was not guilty of murder or manslaughter and that his use of force was justified, but that Bottemiller was engaged in criminal conduct substantially similar to the charged crime. Based on this latter finding, the trial court denied him attorney fees or costs under RCW 9A.16.110. Bottemiller contends substantial evidence does not support the jury's finding that he was engaged in criminal activity substantially related to the charged crime and that the trial court abused its discretion by denying him any fee or cost award. We affirm.

**FACTS**

In April 2016, Bottemiller, Sabrina Westfall, and two others sold heroin from a motel room in Puyallup. Gritzke and Bottemiller had known each other for many years and Gritzke had previously been in a relationship with Westfall.

Gritzke learned that Bottemiller had used Gritzke's name while dealing drugs. Gritzke went to the motel where Bottemiller was staying and, with a mutual acquaintance, developed a plan to get into the room and confront Bottemiller. Gritzke and another man entered the room and asked to buy heroin. Gritzke left for ten to twenty minutes with one of the room's occupants who had been making drug deliveries.

Bottemiller believed that Gritzke and some others in the room intended to rob him, so while Gritzke was out of the room, he retrieved a gun from a bag stashed behind the bed. When Gritzke returned to the room, he "blew up," got in Bottemiller's face, and accused Bottemiller of impersonating him. 10 Report of Proceedings (RP) at 1308-09. Gritzke stood over Bottemiller yelling at him while Bottemiller tried to reason with him.

Gritzke then threatened physical violence against Bottemiller and demanded his drugs. Bottemiller tried to diffuse the situation but he believed Gritzke would beat him regardless of whether he gave Gritzke his drugs. Bottemiller told Gritzke that the drugs were in the car. Gritzke went to the motel room door and told Bottemiller to come with him to get the drugs. Bottemiller then took out the gun and pointed it at Gritzke who then stepped towards Bottemiller. Bottemiller shot Gritzke in the chest, killing him.

The State charged Bottemiller with murder in the second degree, and the jury found Bottemiller not guilty of murder in the second degree. After returning its verdict, the court instructed the jury it would have to decide whether Bottemiller's use of force was justified. *See* RCW 9A.16.110.

On a special verdict form, the jury found that Bottemiller proved by a preponderance of the evidence that the use of force was justified. It also found that he was “engaged in criminal conduct substantially related to the events giving rise to the crime with which [he] was charged.” Clerk’s Papers at 81.

Bottemiller argued to the court that he was entitled to costs despite the jury’s findings. He requested \$131,774.85 in attorney fees. In ruling on the costs issue, the trial court found that it was “clear” that Bottemiller “was a drug dealer” and he and others had been working together to sell drugs. 15 RP at 1719. The court found that “[t]he ostensible reason that Mr. Gritzke was at Mr. Bottemiller’s hotel room was to buy drugs.” 15 RP at 1721. It described Gritzke’s “ruse” about Bottemiller impersonating him as purely intended to justify robbing Bottemiller of his drugs and dismissed it as “BS.” 15 RP at 1722, 1724.

The court agreed with the jury that “Bottemiller’s illegal drug dealing was substantially related to the need to use any force at all” and that it “gave rise to this homicide in many ways.” 15 RP at 1726. It noted that Gritzke would not be dead if Bottemiller was not a drug dealer. The court then denied Bottemiller any fees or costs. Bottemiller appeals.

#### ANALYSIS

People shall not “be placed in legal jeopardy of any kind whatsoever for protecting by any reasonable means necessary” themselves, their family, or their property. RCW 9A.16.110(1). When a person is charged with murder, or any other crime listed in RCW 9A.16.110, and the person is found not guilty by reason of self-defense, the State must “reimburse the defendant for all reasonable costs, including loss of time, legal fees incurred, and other expenses involved in his or her defense.” RCW 9A.16.110(2).

Reimbursement sought under RCW 9A.16.110 is not an independent cause of action. It is governed by the civil rules of procedure. *State v. Park*, 88 Wn. App. 910, 915, 946 P.2d 1231 (1997). To award the defendant reasonable costs, the trier of fact must find that the defendant has proved his claim of self-defense by a preponderance of the evidence. RCW 9A.16.110(2). Once the trier of fact makes such a determination, “the judge shall determine the amount of the award.” RCW 9A.16.110(2). However,

[n]otwithstanding a finding that a defendant’s actions were justified by self-defense, if the trier of fact also determines that the defendant was engaged in criminal conduct substantially related to the events giving rise to the charges filed against the defendant the judge may deny or reduce the amount of the award.

RCW 9A.16.110(3).

Bottemiller contends that insufficient evidence supported the jury’s finding that he was engaged in criminal activity substantially related to the charged crime. He claims that, although he possessed drugs on the night of the incident, his possession had nothing to do with Gritzke’s actions or subsequent death. He provides alternative explanations for Gritzke’s and Bottemiller’s confrontation, including their mutual relationship with Westfall and Bottemiller’s use of Gritzke’s name to attract drug clients. We conclude that substantial evidence supports the jury’s finding.

We review civil jury verdicts for whether they are supported by substantial evidence.<sup>1</sup> *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001). In so doing, we “consider all evidence and draw all reasonable inferences in the light most favorable to the

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<sup>1</sup> The State suggests that we should review the jury’s findings in a post-acquittal action for costs and attorney fees under the criminal sufficiency of the evidence standard. See Br. of Resp’t at 7 (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Bottemiller does not propose a standard of review for this issue, but phrases his argument in terms of “insufficient evidence.” Br. of Appellant at 19. As discussed in the main text, post-acquittal cost proceedings are civil so this court reviews using the civil substantial evidence standard.

verdict.” *Gorman v. Pierce County*, 176 Wn. App. 63, 87, 307 P.3d 795 (2013). Substantial evidence is evidence “sufficient to persuade a rational, fair-minded person that the finding is true.” *Cantu v. Dep’t of Labor & Indus.*, 168 Wn. App. 14, 21, 277 P.3d 685 (2012). We defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *McCoy v. Kent Nursery, Inc.*, 163 Wn. App. 744, 769, 260 P.3d 967 (2011).

In this case, all of the witnesses agreed that Bottemiller was selling drugs from the motel room. Many witnesses, including Bottemiller, testified that Gritzke tried to rob Bottemiller of his drugs. This robbery and Bottemiller’s fear of Gritzke then led to Bottemiller shooting Gritzke. This scenario was consistent with Bottemiller’s theory of the case in closing arguments. A reasonable trier of fact could find from the evidence presented that Bottemiller “was engaged in criminal conduct substantially related” to the murder charge. RCW 9A.16.110(3).

Bottemiller contends that “[e]ven if Mr. Bottemiller had no drugs or money on his person, Mr. Gritzke would still have found some excuse to enter the room and assault Mr. Bottemiller.” Br. of Appellant at 20 (emphasis omitted). He does not provide any citation or support for this statement and we reject it.

Bottemiller also contends that Gritzke’s motivations were unrelated to Bottemiller’s drug dealing, but entirely focused on Bottemiller’s alleged impersonation of Gritzke. The purpose of Bottemiller allegedly impersonating Gritzke was to acquire drug customers and sell drugs, a reason wrapped up in Bottemiller’s criminal conduct. To the extent the impersonation provides a motive distinct from drug robbery, we defer to the trier of fact where witnesses provided conflicting evidence.

We conclude that whether Bottemiller's drug dealing was "substantially related" to the charged crime was appropriately a question for the jury and that substantial evidence supported the jury's decision.

Bottemiller contends that the trial court abused its discretion by denying him any reimbursement of attorney fees, costs, or expenses related to his defense. He claims that defendants who "successfully assert[] self-defense [are] entitled to full reimbursement unless [their] initial criminal conduct is so heinous that some reduction is warranted." Br. of Appellant at 28. Bottemiller largely relies on *State v. Anderson*, 72 Wn. App. 253, 863 P.2d 1370 (1993), a case that interpreted a prior version of RCW 9A.16.110.<sup>2</sup> We disagree with Bottemiller.

Once the jury finds that a defendant "engaged in criminal conduct substantially related" to the charged crime, "the judge may deny or reduce the amount of the award." RCW 9A.16.110(3). "In determining the amount of the award, the judge shall also consider the seriousness of the initial criminal conduct." RCW 9A.16.110(3). We review the amount of a fee award under RCW 9A.16.110 for an abuse of discretion. *See State v. Villanueva*, 177 Wn. App. 251, 254 n.1, 311 P.3d 79 (2013). A trial court abuses its discretion where it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons by applying the wrong legal standard or relying on unsupported facts. *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015).

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<sup>2</sup> Bottemiller further claims that, because the jury's finding of his criminal conduct was not supported by sufficient evidence, the trial court "never lawfully obtained the discretion" to reduce or eliminate his cost award. Br. of Appellant at 22-23. This argument is contingent on the substantial evidence argument discussed in the previous section and we reject it because substantial evidence supported the jury's findings.

In *Anderson*, 72 Wn. App. at 257, the defendant ingested cocaine and alcohol and “deliberately sought out a drug transaction in a high crime area while armed with a loaded handgun,” leading to a confrontation where he shot two men. (Internal quotation marks omitted). The trial court denied him recovery under former RCW 9A.16.110, ruling that the legislature had not intended to provide compensation to such defendants. *Anderson*, 72 Wn. App. at 258. On appeal, the court concluded that RCW 9A.16.110 did “not disqualify a claimant from recovering appropriate expenses because he or she [was] of bad character, or because the need to use self-defense was precipitated by unsavory or even illegal activities.” *Anderson*, 72 Wn. App. at 259. Because the jury had found self-defense by a preponderance of the evidence and the defendant had incurred “loss of time, legal fees, or other expenses,” to establish self-defense, the court reversed. *Anderson*, 72 Wn. App. at 260, 264.

Since *Anderson*, the legislature added subsection (3) to RCW 9A.16.110, providing trial courts with discretion to deny or reduce cost awards to defendants engaged in criminal conduct substantially related to the charged crime. LAWS OF 1995, ch. 44 § 1. In amending the statute, the legislature specifically noted the facts of *Anderson* and stated, “Concern has been raised that this situation was not what the Legislature intended the self-defense reimbursement statute to cover.” S.B. 5278, 54th Leg., Reg. Sess. (Wash. 1995).

Bottemiller’s reliance on *Anderson* ignores the subsequent legislative amendments that specifically responded to *Anderson*’s facts. Bottemiller emphasizes that “*Anderson* has never been overruled or abrogated following the 1995 amendments,” Br. of Appellant at 27 (emphasis omitted), but ignores that the statutory amendments themselves constituted a legislative response

to that case and would likely change its outcome.<sup>3</sup> Under the version of the statute in effect at the time of *Anderson*, Bottemiller would undoubtedly recover his costs. The exception added by the amendments is the central basis for denying Bottemiller costs, making *Anderson*'s reasoning unhelpful.

As discussed above, the evidence demonstrated Bottemiller's involvement in drug distribution. His criminal conduct was directly related to his conflict with Gritzke that ended in Gritzke's death. Bottemiller contends his criminal conduct was minor and that the legislature "did not intend that a trial court could deny all reimbursement simply because a defendant committed some minor infraction." Br. of Appellant at 27 (emphasis omitted). Bottemiller's criminal activity in this case was substantial and the gravity of his crimes and degree to which to reduce the award were both for the trial court to decide. Because its decision does not seem manifestly unreasonable given Bottemiller's criminal conduct, we conclude it did not abuse its discretion.

We Affirm.

#### ATTORNEY FEES

Bottemiller contends he is entitled to his reasonable fees on appeal pursuant to RAP 18.1 and RCW 9A.16.110. Because we rule against Bottemiller, we do not award him fees for this appeal.

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<sup>3</sup> Relying on *State v. Jones*, 92 Wn. App. 555, 964 P.2d 398 (1998), Bottemiller additionally argues that fee reimbursement is mandatory and the State is required to reimburse in all self-defense cases. *Jones* decided whether fees related to a mistrial were recoverable where the defendant was later acquitted. 92 Wn. App. at 561. The case did not implicate the criminal conduct provision and the court did not discuss it. *See generally Jones*, 92 Wn. App. 555.



RAP 18.1 permits recovery of reasonable attorney fees on appeal if applicable law grants that right. RCW 9A.16.110(2) permits an award of “all reasonable costs, including loss of time, legal fees incurred, and other expenses involved” in the defense of a defendant who successfully argues self-defense.

We deny Bottemiller’s request for fees for bringing this appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
Melnick, J.

We concur:

  
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Maxa, C.J.

  
\_\_\_\_\_  
Glasgow, J.

**LAW OFFICE OF REED SPEIR**

**November 21, 2019 - 10:58 AM**

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