72951-1

FILED
July 1, 2016
Court of Appeals
Division I
State of Washington

72951-1

No. 72951-1-I
King County Superior Court No. 12-1-05225-1 KNT

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

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

JASPAL GILL,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Bill Bowman, Judge

APPELLANT'S OPENING BRIEF

Suzanne Lee Elliott
Attorney for Appellant
1300 Hoge Building
705 Second Avenue
Seattle, WA 98104
(206) 623-0291

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 7

A. THE TRIAL COURT ERRED IN GIVING AN INSTRUCTION REGARDING "VOLUNTARY INTOXICATION" 7

1. The Instruction – Which Relates to an Affirmative Defense – was Given over The Defendant's Objection 13

2. The Instruction was A Comment on The Evidence 14

3. The Instruction Incorrectly Told the Jury that Jaspal could Not Claim Self-Defense if he had Consumed Alcohol 15

B. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CALL BOYD BUCKINGHAM, DALJIT GILL'S DIVORCE ATTORNEY 17

C. THE INTERPRETER FAILED TO ACCURATELY INTERPRET A KEY WITNESS'S TESTIMONY FOR THE JURY 22

1. The trial court failed to insure that Harjinder's testimony was completely and accurately interpreted for the jury. 27

2. Given that Harjinder's Testimony was Crucial to Establish Jaspal's Self-Defense Claim, the Inadequate Interpretation Violated Jaspal's Constitutional Rights and was Structural Error. 30

3. In the Alternative, if the Error is not Structural, the Garbled Translation was Prejudicial to Jaspal's Defense 32

D. THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION 35

E. THE PROSECUTION COMMENTED ON HARJINDER'S CREDIBILITY DURING HIS TESTIMONY 40

V. CONCLUSION 43

TABLE OF AUTHORITIES

Cases

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302, *reh'g denied*, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991) 31

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) 32

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh'g denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967) 32

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979) 38

Lambert v. State Farm Mut. Auto Ins. Co., 2 Wn. App. 136, 467 P.2d 214, *review denied*, 78 Wn.2d 993 (1970) 41

People v. Velasquez, 162 Cal. Rptr. 306, 606 P.2d 341 (1980) 40

Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) 31

State v. Ager, 128 Wn.2d 85, 904 P.2d 715 (1995) 14

State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984) 16, 17

State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997) 15

State v. Bingham, 105 Wn.2d 820, 719 P.2d 109 (1986) 39

State v. Brooks, 97 Wn.2d 873, 651 P.2d 217 (1982) 39

State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015) 14

State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976) 32

State v. Commodore, 38 Wn. App. 244, 684 P.2d 1364, *rev. denied*, 103 Wn. 2d 1005 (1984) 39

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) 40

State v. Coristine, 177 Wn.2d 370, 300 P.3d 400 (2013) 14

State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003)..... 20

State v. Ecklund, 30 Wn. App. 313, 633 P.2d 933 (1981) 21

State v. Gallegos, 65 Wn. App. 230, 828 P.2d 37, *review denied*, 119 Wn.2d 1024, 838 P.2d 690 (1992)..... 14

State v. Gonzales-Morales, 138 Wn.2d 374, 979 P.2d 826 (1999)..... 27

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 38

State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991) 39

State v. Janes, 121 Wn.2d 220, 850 P.2d 495 (1993) 16

State v. Lamar, 180 Wn.2d 576, 327 P.3d 46 (2014) 32

State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006)..... 15

State v. Lynch, 178 Wn.2d 487, 309 P.3d 482 (2013) 14

State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983) 15, 16, 17

State v. Miller, 141 Wash. 104, 250 P. 645 (1926)..... 16

State v. Ollens, 107 Wn.2d 848, 733 P.2d 984 (1987)..... 39

State v. Painter, 27 Wn. App. 708, 620 P.2d 1001 (1980), *review denied*, 95 Wn.2d 1008 (1981) 17

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984) 40, 43

State v. Smith, 106 Wn.2d 772, 725 P.2d 951 (1986) 20

State v. Thang, 145 Wn.2d 630, 41 P.3d 1159 (2002)..... 20

State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980) 16

State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977)..... 16, 17

State v. Williams, 285 N.W.2d 248 (Iowa 1979), *cert. denied*, 446 U.S. 921, 100 S.Ct. 1859, 64 L.Ed.2d 277 (1980)..... 40

State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012) 31

United States v. Peterson, 509 F.2d 408 (D.C. Cir. 1974)..... 40

Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).. 31

Statutes

RCW 2.43.010 27

RCW 2.43.030 ..... 27, 28

RCW 2.43.050 28

RCW 2.43.080 ..... 28, 29

RCW 9A.16.090..... 14

RCW 9A.32.030..... 38

Rules

ER 403 20

ER 404 20

ER 611 41

GR 11.2..... 28, 29, 30

Constitutional Provisions

Const. art. IV, § 16..... 14

Const., art. I, § 21..... 41

Const., art. I, § 22..... 32, 41

Const., art. I, § 3..... 41

U.S. Const., amend. VI 13, 32

U.S. Const., amend. XIV 32

I.
ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction 27, an altered version of the voluntary intoxication defense instruction.

2. The trial court erred in permitting the State to call Boyd Buckingham, Daljit Gill's divorce attorney.

3. The trial court failed to provide the defense witness with a competent interpreter.

4. There was insufficient evidence for the jury to find that the defendant premeditated the shooting.

II.
ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the defense did not request a voluntary intoxication instruction and where the altered instruction given by the court was both incorrect and a comment on the evidence, must this Court reverse the conviction?

2. Did the trial court err in permitting the State to introduce prejudicial and irrelevant testimony regarding the details of the defendant's divorce when those details did not relate any alleged motive for the shooting?

3. Where the interpreter for the defendant's critical witness is incompetent and actually translates incorrectly, was the defendant denied a fair trial?

4. Where the evidence showed that the meeting between the defendant and the victim was purely happenstance and where the State's evidence demonstrated all 5 shots occurred in 8 seconds, was there sufficient evidence to find that the defendant premediated the murder?

III.
STATEMENT OF THE CASE

The State initially charged Jaspal Gill with second degree murder for the August 28, 2012 shooting death of Harjit Singh in Burien, but amended its charge to first degree premeditated murder shortly before trial. CP 1-3. Jaspal's[1] first trial ended in a mistrial due to a hung jury. 9/22/14RP 2.[2] Retrial commenced on September 22, 2014.

Given the length of the record, the details supporting Jaspal's assignments of error will be discussed in the relevant argument sections.

---

[1] Because the names in this case can be confusing, this brief will refer to the witnesses by their first names. No disrespect is intended. In order to aid the court, a chart of the various witnesses and their role in the case is attached as Appendix 1 to this brief.

[2] The verbatim reports of proceedings will be referred to as "DateRP Page No." Proceedings from October 21, 2014, will be referred to as "DateAMRP Page No." or DatePMRP Page No." and proceedings from October 22, 2014, will be referred to as DateAM1RP Page No." or "DateAM2RP Page No."

What follows is an overview of the trial to provide the proper framework for the Court's examination of the issues and assignments of error.

About 5:30 p.m. on August 28, 2012, Jaspal shot and killed Harjit Singh in the driveway of his ex-wife's, Daljit Gill, Burien home. 9/30/14RP 145-46, 156-57, 293, 299, 960; 10/15/14RP 1727, 1830, 1840-46, 1851-52, 1854, 1856. There were only two issues : whether Jaspal acted in self-defense and, if not, whether he premediated Harjit's murder.

In 2001, Harjit immigrated to the United States from India and lived with Jaspal, Daljit, and their three children, Jagrit, Manrit and Gursunrit. 10/2/14RP 603-04; 10/21/14AMRP 2364. In 2004, Jaspal suspected Daljit and Harjit were having an affair. 10/2/14RP 606, 608-09; 10/21/14AMRP 2368. Jaspal came home late at night and found Harjit and Daljit in Harjit's bedroom with the lights out. The next morning Jaspal found a used condom in Harjit's waste basket. 10/21/14AMRP 2368-70. Jaspal was upset. Although he and Daljit attempted to reconcile, several years later their relationship ended following lengthy divorce proceedings. 10/2/14RP 625-26, 747; 10/21/14AMRP 2368-70; 10/21/14PMRP 5.

The divorce was finalized in 2008, but Jaspal continued to live in the same neighborhood as his ex-wife and children. 10/2/14RP 620; 10/6/14RP 742. Although Jaspal and Daljit had ongoing financial and custody disputes,

Jaspal maintained regular visitation with his children every Wednesday evening and weekend. 9/30/14RP 324-25; 10/1/14RP 392.

Following the divorce, Harjit harassed and threatened Jaspal. 10/21/14PMRP 8-11. Jaspal made his living as a limousine driver. 10/1/14RP 370; 10/2/14RP 692. Jaspal testified that Harjit followed him often while he was driving fares on I-5. 10/21/14PMRP 8-10. Harjit stuck his head out the window and yelled, "'Mother fucker, pull your vehicle on the side. I want to see you.'" 10/21/14PMRP 10-11. In 2010, when Jaspal was at the Indian grocery store with his limousine, Harjit arrived in a private vehicle, pushed Jaspal down, and said, "'Mother fucker, what's up?'" 10/21/14PMRP 19. When Jaspal tried to lift up, Harjit his shirt, revealing a gun and said,

> "If I want to, I could shoot you today. I won't shoot you today, I'll take everything that you own first. I'll shoot you first and then I'll see your family. Your wife and children are in my control, I can tell them to do whatever."

10/21/14PMRP 19.

Besides Jaspal's accounts, Jaspal's sister, Kamaljit Kaur testified that Jaspal told her he was very afraid because Harjit was threatening him. 10/21/14AMRP 2333. Jaspal indicated he wanted to move to an apartment building for security. 10/21/14AMRP 2334-35. Jagtar Singh, another taxi driver and no relation to Harjit, testified about an incident near the First

Avenue Bridge when Harjit approached Jaspal and said, "Motherfucker, what are you doing here? If you go to Dalit's house, I'll shoot you." 10/23/14RP 2535. Jagtar stated Jaspal was frightened and his hands were shaking. *Id.* at 2537. These incidents caused Jaspal significant fear and anxiety. 10/20/14RP 2112-13; 10/21/14PMRP 19-20, 54; 10/22/14AM2RP 122-23.

Twice during this period, Jaspal was hospitalized because he believed he was having heart attacks. 10/20/14RP 2099-101. According to psychiatrist Mark McClung, M.D., these episodes were panic attacks. *Id.* at 2100. Jaspal suffered from high blood pressure, nightmares, and significant anxiety. *Id.* at 2102, 2104-05.

Jaspal purchased a gun to protect himself 10/9/14RP 1313; 10/21/14PMRP 19, 21, 25. He later traded this gun for a "cowboy gun," a revolver belong to Harjinder Grewal's brother. 10/8/14RP 1165; 10/9/14RP 1410-11; 10/21/14PMRP23-24.

In March 2012, after a couple months without a visit, the children contacted Jaspal because they wanted to see him for his birthday. 9/30/14RP 336, 484-86; 10/21/14PMRP 35. Daljit drove the children to Jaspal's apartment where they spent two hours with Jaspal. 9/30/14RP 340; 10/1/14RP 487-88; 10/21/14PMRP 35, 41. After that, Jaspal's children no longer wished to see him. 9/30/14RP 344-45; 10/21/14PMRP 45. Jaspal

attempted to call his children a few times in June and July asking to meet, but they continued to refuse to spend any time with him. 10/1/14RP 368-69, 371-72,495, 569-72; 10/21/14PMRP 45, 47-48.

On the day of the shooting, Jaspal and his firend Harjinder Grewal were on this way to dinner when Jaspal asked Grewal to stop by his wife's home so that he could try to arrange a visit with his children. Harjit was at the home when Jaspal and Harginder arrived. The timeline and facts of the shooting that took place are described fully in Section D

Jaspal left the scene with Harginder but almost immediately called 911 to report the shooting. 10/7/14RP 1017; 10/14/14RP 1439-40, 1449-50. He told the operator that Harjit tried to shoot him and that "he scared me everyday." Defense Exhibit 92. He also said that Harjit "tried to kill me." *Id.* Jaspal turned himself in at the Burien police station while still on the phone with the operator. 10/7/14RP 1017; 10/21/14PMRP 15.[3]

Jaspal left the revolver he used in the shooting in Harjinder's car. 10/7/14RP 1017-18. At least one of the arresting officers smelled alcohol on Jaspal. 10/2/14RP 722-23; 10/15/14RP 1680. Jaspal was interviewed by officers and repeatedly indicated he was trying to protect himself and that

---

[3] Harjit was pronounced dead at the scene by the fire department. 9/29/14RP 78, 126-27; 9/30/14RP 146, 150, 156-57.

Harjit had tried to run him over with the van. 10/2/14RP 715, 720-21, 728; 10/21/14PMRP 65.

Police searched Harjinder's car and apartment with Harjinder's full cooperation. 10/9/14RP 1422; 10/14/14RP 1446. They recovered the gun, bullets, and Jaspal's phone and credit card. 10/6/14RP 927, 930; 10/7/14RP 959, 962-70, 984; 10/8/14RP 1180.

The jury found Jaspal guilty as charged. He was sentenced to 340 months in prison. CP 4032. This timely appeal followed. CP 385.

IV.
ARGUMENT

A. THE TRIAL COURT ERRED IN GIVING AN INSTRUCTION REGARDING "VOLUNTARY INTOXICATION"

Jaspal presented evidence he acted in self-defense at both trials. As a part of this defense Jaspal presented the testimony of Dr. Mark McClung. Dr. McClung testified about Jaspal's mental health on the day of the confrontation between Harjit and Jaspal. He said Jaspal saw a doctor in 2004 and described symptoms of anxiety, including a "pounding heart." 10/20/14RP 2098. He said he was having marital and family troubles. *Id.* He was prescribed Trazodone. *Id.*

Jaspal saw a doctor again in 2005. He was still depressed and had marital problems. This time he was prescribed Prozac. *Id.*

In 2006, Jaspal had stopped taking his medications and reported that he no longer felt depressed. However, he was experiencing a lack of strength, shortness of breath and fatigue. *Id.* at 2099.

In 2008, Jaspal went to the emergency room with chest pains. *Id.* The doctor concluded the pain was related to stress or depression. *Id.* It appeared to be a panic attack related to depression or anxiety. *Id.* at 2100.

In 2012, Jaspal filled a prescription for Ambien, a sleep medication, and Valium for anxiety. *Id.* at 2101. That same year, he again went to an acute care clinic with chest pains. *Id.* His blood pressure was also elevated. *Id.* Again, this appeared to be a panic attack. *Id.* at 2102. When he later saw his regular physician, he had symptoms of depression. *Id.* at 2103.

After he was arrested, Jaspal reported that he drank alcohol daily. *Id.* at 2104. He also reported experiencing nightmares, shortness of breath, sweating and tightness in his chest. He was prescribed Prazosin, a medication for blood pressure and post-traumatic nightmares. *Id.* The jail medical staff also included a notation in the records: "Rule out PTSD."[4] 10/20/14RP 2107.

Dr. McClung said that the records suggested PTSD. *Id.* at 2108, 2109. Dr. McClung noted that it was a

---

[4] Post-Traumatic Stress Disorder.

> challenge in getting detailed, accurate information from Mr. Gill because of the language and cultural challenges regarding talking about emotional issues in a mental health interview.

Id. at 2108.

Dr. McClung explained that people with symptoms of PTSD have increased startle responses and are "extra-vigilant." *Id.* at 2110-11. He said "they're vigilant and worried about things that might be similar to the trauma they experienced before." *Id.* at 2111. Dr. McClung said that his review of the records indicated that Jaspal's "main traumatic event" was his encounter with Harjit when he pulled up his shirt and showed Jaspal a weapon while threating to kill him. *Id.* at 2112. Dr. McClung said that Jaspal reported frightening encounters with Harjit while driving and the perception that Harjit was stalking him. *Id.* at 2113.

Dr. McClung said that a person with PTSD would have an increased "fight or flight" reaction in a fearful situation. *Id.* at 2114. He described "fight or flight" as "a rapid, biological reaction" where "you feel all your muscles tense up, and for the next several seconds, you feel your heart pounding out of your chest." 10/20/14RP 2115. It includes "a big rush of adrenaline" and increased blood flow to the brain, eyes and muscles. *Id.* He also explained that the "fight or flight" response also occurs without PTSD. *Id.* at 2116. But the reaction might be increased if the person had PTSD. *Id.*

Dr. McClung also opined that, given Jaspal's description of the events leading up to the death of Harjit, he was likely in a "dissociative state" at the time of the shooting. *Id.* at 2119-20. That might explain why Jaspal told the 911 dispatcher he did not know what happened. *Id.* at 2121-22.

Dr. McClung reiterated that both he and Dr. Zatick, the state's expert, had challenges in evaluating Jaspal because of the language and cultural differences. *Id.* at 2126. Dr. McClung said that he could not use certain tests, including the CAPS scale used by Dr. Zatick, because they had not been validated in the Punjabi speaking population. *Id.* at 2128. While both Dr. McClung and Dr. Zatick were uncertain about a PTSD diagnosis, they agreed that Jaspal met some criteria. *Id.* at 2128-35.

Dr. McClung said he considered that Jaspal had consumed alcohol before the shooting. *Id.* at 2135. He said that he could not be certain of Jaspal's blood alcohol concentrate at the time of the shooting because the blood level was taken hours later. 10/20/14RP 2136. Dr. McClung said that according to the DSM, using alcohol can either intensify or diminish a PTSD response. *Id.* at 2139.

Dr. Zatick testified that he, too, was uncertain about a diagnosis of PTSD for Jaspal. His most striking disagreement with Dr. McClung had to do with Jaspal's consumption of alcohol. Dr. Zatick testified that Jaspal's

use of alcohol was a major factor in Jaspal's actions in shooting Harjit, and not his PTSD symptoms or a "fight or flight" response. 10/23/14RP 2443-45. He said that, in his view, the later blood test "suggests not dissociation and fight or flight, but disinhibition and alcohol intoxication." *Id.* at 2454, 2487.

When it came time to instruct the jury, the State asked the trial judge to give an edited version of the "voluntary intoxication instruction." The State's proposal was:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition.
>
> (Modified by eliminating the second sentence: However, evidence of intoxication may be considered in determining whether the defendant [acted][or][failed to act] with (fill in requisite mental state).

Supp. CP ____ (State's Proposed Jury Instruction No. ___). The defense objected.

The trial judge said:

> The voluntary intoxication, from what I gathered from the 18.10 that was submitted by the State, the issue is not voluntary intoxication, the issue is how the evidence of intoxication can be viewed by the jury. In other words, this isn't a voluntary intoxication case, so it can't be used to vitiate the intent element, but it is used as part of the self-defense and the reasonableness of the defendant's belief as to what was occurring at the time.

10/22/14AM1RP 31. The State agreed that was the intent of the instruction. *Id.* at 32. The trial judge then said:

> So it seems to me it may be more appropriate for us to have a limiting instruction as to how the alcohol evidence can be used, rather than a modification of the voluntary intoxication instruction as to how they can't use it.

Id. The prosecutor said:

> Well, at this point, your Honor, I'm not sure there is any law to support that even with the current defense, the PTSD defense, that alcohol can somehow play into that.
>
> The testimony is that this could have been fueled by alcohol. But regardless of whether you have PTSD or don't have PTSD, if you are intoxicated . . . and you misperceive things, that is not a defense at all.
>
> [Defense counsel]: I disagree, you Honor. I think that's a question for the jury and a question for closing argument.

Id.

The judge inquired further about how the parties intended to argue about Jaspal's use of alcohol on the day of the shooting. The prosecutor argued that the defense

> [C]annot say you're standing in the shoes of somebody who has had a few drinks and that you have to accept that perspective and that perception of events as they unfold. I think that's clearly prohibited by law.

10/23/14RP 2606.

The defense argued that it was proper to mention the use of alcohol in a self-defense case because there was a subjective component to that claim. *Id.* at 2609. Defense counsel said:

> The evidence is relevant, just like PTSD, and fight or flight, to the extent that it affected his perception of what was

> happening at the moment, and that will be argued. I don't think this instruction should be given, WPIC 18.10.
>
> For one thing, you can't just give half of it, the part that helps the State, and take out the sentence that helps the Defense, which is what they have done. It's based on RCW 9A.16.090, which is the statute that has the same language in it. It's got both sentences, not just the one that helps the State.

10/23/14RP 2609-10. Defense counsel reiterated that no instruction on the issue should be given because the defense was not raising a voluntary intoxication or diminished capacity defense. *Id.* at 2611-12. The defense also pointed out that both experts had discussed Jaspal's use of alcohol. Any instruction on intoxication would be an impermissible comment on the evidence. *Id.* at 2618.

The trial judge took the matter under advisement and then drafted his own in instruction and gave it to the jury. That instruction stated:

> No act is committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered as it relates to your consideration of post-traumatic stress disorder.

CP 344, Instruction 27.

Giving this instruction was reversible error for at least three reasons.

1. The Instruction – Which Relates to an Affirmative Defense – was Given over The Defendant's Objection

First, the Sixth Amendment right to control one's defense encompasses the decision to present an affirmative defense. *State v.*

Coristine, 177 Wn.2d 370, 376, 300 P.3d 400, 403 (2013). Imposing a defense on an unwilling defendant impinges on the independent autonomy the accused must have to defend against charges. *State v. Lynch*, 178 Wn.2d 487, 493, 309 P.3d 482, 485 (2013). Jaspal never claimed that his culpability was reduced because he had consumed alcohol before the shooting.[5] He claimed that he acted in self-defense because Harjit had threatened his life.

It was the State – not Jaspal – that argued that Jaspal's use of alcohol undermined his claim of self-defense.

2. The Instruction was A Comment on The Evidence

The second sentence is a comment on the evidence. The Washington State Constitution does not allow judges to "charge juries with respect to matters of fact, nor comment thereon." Wash. Const. art. IV, § 16. Instead, they "'shall declare the law.'" *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015) (quoting Wash. Const. art. IV, § 16). A judge is prohibited by article IV, section 16 from "'conveying to the jury his or her personal

---

[5] Second, even if Jaspal had used such a defense, the instruction is completely incorrect without the second sentence. The defense is statutory and the statute includes both sentences. RCW 9A.16.090. Voluntary intoxication is not a complete defense but it is relevant if the drinking affected the defendant's ability to acquire the mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37, *review denied*, 119 Wn.2d 1024, 838 P.2d 690 (1992) (cited in *State v. Ager*, 128 Wn.2d 85, 904 P.2d 715 (1995)). Thus, if a voluntary intoxication instruction was proper, something Jaspal does not concede, it was error to edit the instruction to eliminate the second sentence.

attitudes toward the merits of the case'" or instructing a jury that "'matters of fact have been established as a matter of law.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). An instruction improperly comments on the evidence if the instruction resolves a disputed issue of fact that should have been left to the jury. *Becker*, 132 Wn.2d at 65.

Here, the judge told the jury it could consider evidence of intoxication as it related to the consideration of post-traumatic stress disorder. But this was a disputed issue of fact upon which the experts disagreed. The trial judge told the jury it should credit the State expert's opinion. It emphasized the State's case to the detriment of Jaspal's defense. Defense counsel was correct this was a jury question. The jury could have decided that any evidence of intoxication was irrelevant to any issue. The instruction relieved, in no small way, the State's burden to disprove Jaspal's claim of self-defense.

3. The Instruction Incorrectly Told the Jury that Jaspal could Not Claim Self-Defense if he had Consumed Alcohol

An act performed in self-defense negates the intent element of a crime and the State must disprove that a defendant acted in self-defense. *State v. McCullum*, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983).

A jury may find self-defense on the basis of the defendant's subjective, reasonable belief of imminent harm from the victim. *State v. Janes*, 121 Wn.2d 220, 238–39, 850 P.2d 495 (1993); *State v. Allery*, 101 Wn.2d 591, 594-95, 682 P.2d 312 (1984). A finding of actual imminent harm is unnecessary. *State v. Theroff*, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980); *State v. Miller*, 141 Wash. 104, 105, 250 P. 645 (1926). Rather, the jury should put itself in the shoes of the defendant to determine reasonableness from all the surrounding facts and circumstances as they appeared to the defendant. *Janes*, 121 Wn.2d at 238-39; *Allery*, 101 Wn.2d at 594; *McCullum*, 98 Wn.2d at 488-89; *State v. Wanrow*, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977).

The first sentence of the intoxication instruction said: "No act is committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition." That sentence contradicts the legal requirement that the jury put itself in Jaspal's shoes.

In addition, that sentence relieved the State from its burden of proof. It told the jury that any act committed by Jaspal after consuming alcohol was criminal. The instruction told the jury that Jaspal's acts made in self-defense were still "criminal" because he had something to drink. There is no authority for the position that using alcohol alleviates the State's burden to disprove Jaspal's claim of self-defense.

Jury instructions must more than adequately convey the law of self-defense. *Allery*, 101 Wn.2d at 595. The instructions, read as a whole, must make the relevant legal standard """"manifestly apparent to the average juror."""" *Allery*, 101 Wn.2d at 595 (quoting *State v. Painter*, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980), *review denied*, 95 Wn.2d 1008 (1981)). In *Allery* the court disapproved a jury instruction that adequately conveyed the reasonableness standard for self-defense but, by omitting a direction to consider all surrounding circumstances, failed to make that standard manifestly clear. *Allery*, 101 Wn.2d at 593, 595. A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial. See, e.g., *McCullum,* 98 Wn.2d at 487-88; *Wanrow*, 88 Wn.2d at 237.

B. THE TRIAL COURT ERRED IN PERMITTING THE STATE TO CALL BOYD BUCKINGHAM, DALJIT GILL'S DIVORCE ATTORNEY

Prior to trial, Jaspal moved to exclude any evidence from Boyd Buckingham, Daljit's divorce attorney. The defense argued that the divorce had nothing to do with Harjit and had been finalized four years before the shooting. The prosecutor argued that the divorce was caused by Jaspal's conclusion that Daljit had an affair with Harjit in about 2003 or 2004. According to the State, this affair was the motive for Jaspal to kill Harjit. In the State's pretrial motion, the prosecutor said the State was seeking to

admit evidence that related to the accusations of an affair and the ongoing preoccupation with the victim's role in the demise of his marriage. Supp. CP ____ (State's Trial Memorandum, filed 9/22/14). To support its motion the State attached declarations signed by Jaspal that briefly mentioned the affair but otherwise focused on the parties ongoing disputes over child custody, visitation and money. *Id.*

The trial judge ruled that the nature and length of the divorce proceedings were admissible. 9/29/14RP 3. The State called Boyd Buckingham, Daljit's divorce attorney. Divorce proceedings were filed in 2005 and were dismissed by agreement in 2006 when the parties attempted to reconcile. 10/6/14RP 743. The divorce proceedings Buckingham was involved in were refiled in 2007 and concluded by agreement in mediation in 2008. 10/6/14RP 742. He testified that Daljit and Jaspal disagreed about whether Daljit had permission to enroll the children in school in India and other disagreements. *Id.* at 744. Buckingham could also testify there had been a motion for contempt and that people can go to jail for contempt. He said that during the contempt proceedings Jaspal "alleged that he didn't have much income, so he was given a public defender to represent his interests." *Id.* at 746.

The final parenting plan provided that the children should live with Daljit and Jaspal had visitation. *Id.* at 752. In early 2009, Daljit and Jaspal

had a disagreement about whether Daljit was giving Jaspal access to the children. Disputes back and forth regarding visitation issues recurred throughout the divorce proceedings.

The prosecutor asked, "Would you describe their dissolution as contentious, or pretty par for the course?" Buckingham could answer,

> I've done a lot, I did a lot of dissolutions over 34 years . . . [t]his was one of the worst ones in terms of contentiousness and continued filings and motions and arguments about resolving these issues. So on a scale of one to ten, it was up there in the nine to ten category.

10/6/14RP 747.

Buckingham also testified that that Daljit had sued Jaspal for the limousine business. He testified that the lawsuit was settled when Daljit was paid $45,000 for her interest in the business. 10/6/14RP 760. The lawsuit regarding the limousine business was concluded in 2010. *Id.* at 759.

The prosecutor examined Buckingham regarding Jaspal's failure to pay child support and various motions to have him held in contempt. *Id.* at 757-58. Buckingham continued to testify regarding Jaspal's inability to pay child support. *Id.* at 761.

Daljit was granted full custody of the children on April 28, 2011. *Id.* at 763. Jaspal filed modification pleadings trying to reduce the child support in 2011 and it was changed to $202.23/month. *Id.* at 763. Buckingham did

not even represent Daljit when this was reduced but he said, "That's what I gleaned from this document." *Id.* at 764.

The Court also admitted State's exhibit No. 43, which are declarations filed by Jaspal during the divorce proceedings. In those documents there is only one mention of the affair. The remainder included statements from Jaspal he makes little money and that he never gets to see his children. He also notes that Daljit started another lawsuit against him and that the stress was killing him.

ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

"The State must meet a substantial burden when attempting to bring in evidence of prior bad acts under one of the exceptions to this general prohibition." *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Therefore, "in doubtful cases, the [ER 404(b)] evidence should be excluded." *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002) (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)).

In addition, ER 403 requires a balancing of probative value versus the danger of unfair prejudice as an integral part of the test for admissibility

under Rule 404(b), and must always be considered. Balancing prejudice versus probative value must be conducted on the record, absent the jury. *State v. Ecklund,* 30 Wn. App. 313, 633 P.2d 933 (1981).

Evidence of Jaspal's conclusion that Daljit and Harjit had an affair was admissible to prove motive. But Daljit testified to Jaspal's suspicions in that regard. Hover, the evidence elicited from Daljit's lawyer about Daljit and Jaspal's protracted and acrimonious divorce proceedings was not admissible. The State elicited from Buckingham general evidence that Jaspal was a bad father subject to contempt and incarceration because he could not pay his child support. These facts were intended to portray Jaspal as a "bad" person – an improper purpose under the rules. In particular, Buckingham's opinion that this was a particularly acrimonious divorce and his testimony on documents and events in which he did not participate was improper.

And, the trial court did not adequately weigh the probative value of the details of Daljit and Jaspal's divorce which were unrelated to the alleged affair against its prejudicial value on the murder of Harjit. Those disputes were so attenuated from any allegations of the affair that they were irrelevant. The trial court's failure to exclude Buckingham's repetitive and irrelevant testimony was error.

Further, the error was not harmless. The prosecutor relied on Buckingham's testimony to portray Jaspal as a bad person with ongoing disputes with Daljit – not with the victim. She mentioned that Buckingham testified this was one of the worst divorces he had seen. 10/24/14RP 2643. She also noted that ten years later both Daljit and Jaspal testified about their grievances with each and not the murder. *Id.*

C. THE INTERPRETER FAILED TO ACCURATELY INTERPRET A KEY WITNESS'S TESTIMONY FOR THE JURY

Harjinder Grewal, the only eye-witness to the shooting, supported Jaspal's self-defense claim. But during Harjinder's testimony, several issues arose regarding the services of Punjabi interpreter Christina Manuel. Immediately after she started, Harjinder corrected her interpretations. 10/8/14RP 1137-39. Harjinder explicitly indicated he was dissatisfied with the interpretation, stating, "I'm misunderstanding you or you're misunderstanding me." *Id.* at 1140.

The interpreter's difficulty with her duties was apparent from the record. While interpreting during Harjinder's testimony, Manuel refused to interpret Harjinder's testimony because, in her view, "It [didn't] make sense." *Id.* at 1180.

At one point, the prosecutor asked Grewal whether he had stopped using the name "Henry," and the interpreted answer was "It's not a big deal.

By 9:00." 10/8/14RP 1137. This prompted Grewal to say "what?" and led to a discussion between Harjinder and the interpreter in Punjabi. Id.

Shortly thereafter, Harjinder corrected the interpreter again when discussing the ownership of Jaspal's limousine business:

> Q. [Swarn Gill] has the limousine company that the Defendant used to own; is that right?
>
> A. Same person was taking care of.
>
> Q. I'm sorry?
>
> A. Jaspal Gill used to take care of the company.
>
> Q. He used to take care of the company? Or was it his company?
>
> A. What I knew was that Swarn Gill was -- used to take care of the company.
>
> WITNESS: No. He's the owner.
>
> THE INTERPRETER: He's the owner and take care of the company.

10/8/14RP 1139.

Harginder also directly voiced his concerns about the adequacy of Manuel's interpretation:

> THE WITNESS: By the way, I have a question. It looks like I'm translating literally wrong way. Every time I'm having kind of issue. I saw something else, every time something else. You know?
>
> I don't want to speak very good English, but I try to understand most of it. It looks like it's interpreting a little bit different way. I'm sorry. I'm misunderstanding you or you're misunderstanding me.

3RP 1140.

Later testimony revealed Manuel's continued failure to accurately interpret Harjinder's testimony:

> Q. These items that you shoved under the seat, what are you claiming they are?
>
> A. Whatever I told them, I did it to my best of my knowledge. And I didn't take anything out.
>
> Q. What did you shove under that seat?
>
> A. I picked up the gun and put it in a bag.
>
> I picked up the bag.
>
> THE INTERPRETER: And?
>
> (Punjabi discussion.)
>
> THE INTERPRETER: It doesn't make sense.
>
> Q. Would you please repeat yourself.
>
> THE INTERPRETER: Yeah.

10/8/14RP 1180.

Defense counsel raised an objection to the accuracy of Manuel's interpretation. 10/9/14RP 1332. The trial court swore Manuel in as a witness to question the accuracy of her interpretation. The court questioned Manuel, asking her whether she had "been accurately and truthfully interpreting questions from English to Punjabi for Mr. Grewal?" Id. at 1335. Manuel responded, "Yes, I do." Id. Then the trial court asked, "And have you been accurately interpreting from Punjabi to English the answers given

by Mr. Grewal," to which Manuel replied, "I do at times. He just babbles, like extra words, which – and I'm supposed to interpret not translate." 10/9/14RP 1335. Manuel continued,

When a question is asked, he would not answer the question, but he goes sideways. And if he's asked, "Did this happen," he would say, "because." You know?

> So -- and then he would add extra incoherent words to that sentence . . .
>
> . . . Like, he will say, "Oh, I took these things from there and put them there," and all of those and little bit this, you know, he will add those simple words.
>
> And there is a possibility, you know, sometimes, when they're thinking -- they know the case, they know what happened; I don't. I'm not familiar with the case. So when they have something in their mind, they're saying that; they might not -- the words might not come out, but I only interpret what I hear.

10/9/14RP 1336-37. The trial court then asked, "So are you telling us that you interpret literally what is said? You don't paraphrase or try to translate what is meant?" Id. at 1337. Manuel responded,

> I do paraphrase. I do interpret. I do not translate. So that's why sometimes they think that we are not translating right, because we don't translate each word; we just interpret.

Id.

Upon further questioning, Manuel indicated she was just interpreting the gist of Grewal's testimony rather than its full content:

> Like, he may be adding so many words to say that, "I took the bag and put something in there and left the other things there and shoved them." But -- so I would just say that, the important thing, that is -- that is the gist of it.
>
> I will interpret that, but not the extra thing, that there was other plastic bags and there were paper bags, and there were some other things, which are -- what I would interpret is the main thing that what happened there, not each and every -- we try to. We try to give each and every thing that they talk about but we have to interpret the idea. We don't translate, literally translate.

10/9/14RP 1337-38.

Manuel also confirmed she had not interpreted the entirety of Harjinder's testimony but instead had altered or omitted its content at her whim. She agreed with the prosecutor that, going forward, she would interpret "every word that comes out of the ... witness' mouth" "[e]ven if it doesn't make sense" and even "if he gives... half a sentence," which establishes that until that point she had not been doing so. *Id.* at 1339-40. Manuel's answers also demonstrated that she had willingly edited the content of Grewal's testimony based on her own opinion of the evidence (a photo from Grewal's apartment):

> Sometimes, too -- to err is human -- I did say "phone" instead of the -- there were two remotes, so, you know, you are looking at a picture, and, you know, instead of saying two remotes, he said remote, and there was another thing there. So I just thought that there is a phone there, too.[ ]

10/9/16RP 1340.

During closing argument the State attacked Harjinder's credibility, relying on portions of his testimony that occurred during the time that Manuel was not providing complete and accurate interpretation. 10/24/14RP 2663, 2672.

1. The trial court failed to insure that Harjinder's testimony was completely and accurately interpreted for the jury.

RCW 2.43.030(1) provides for the appointment of interpreters to assist non-English speaking persons in legal proceedings. The purpose of chapter 2.43 RCW is to uphold the due process rights of non-English speakers by providing them with competent and accurate interpretation. RCW 2.43.010; *State v. Gonzales-Morales*, 138 Wn.2d 374, 378-79, 979 P.2d 826 (1999) (discussing constitutional importance of accurate interpretation). The interpreter appointed for the majority of Harjinder's testimony failed to competently interpret his's testimony. This failure deprived Jaspal of the right to have Harjinder's account of the events before, during, and after the shooting – which was crucial evidence for Gill's self-defense claim – accurately communicated to the jury.

All interpreters appointed in legal proceedings must affirm by oath that they

> will make a true interpretation to the person being examined of all the proceedings in a language which the person understands, and that the interpreter will repeat the statements of the person being examined to the court or

> agency conducting the proceedings, in the English language, to the best of the interpreter's skill and judgment.

RCW 2.43.050(3). The trial court must "satisfy itself *on the record* that the proposed interpreter" "[i]s capable of communicating effectively with the court or agency and the person for whom the interpreter would interpret" and "[h]as read, understands, and will abide by the code of ethics for language interpreters established by court rules." RCW 2.43.030(2)(a)-(b) (emphasis added). "All language interpreters serving in a legal proceeding... shall abide by a code of ethics established by supreme court rule." RCW 2.43.080.[6]

---

[6] GR 11.2 is titled "Code of Conduct for Court Interpreters," and establishes the ethical requirements for interpreters serving in Washington legal proceedings. "The purpose of this Code of Conduct is to establish and maintain high standards of conduct to preserve the integrity and independence of the adjudicative system." GR 11.2 (preamble). According to the code,

> (a) A language interpreter, like an officer of the court, shall maintain high standards of personal and professional conduct that promote public confidence in the administration of justice.
>
> (b) A language interpreter shall interpret or translate the material *thoroughly and precisely, adding or omitting nothing,* and *stating as nearly as possible what has been stated in the language of the speaker,* giving consideration to variations in grammar and syntax for both languages involved. A language interpreter shall use the level of communication that best conveys the meaning of the source, and *shall not interject the interpreter[']s personal moods or attitudes.*
>
> (c) When a language interpreter has any reservation about ability to satisfy an assignment competently, the interpreter *shall immediately convey that reservation to the parties and to the court.* If the communication *mode or language of the non-English speaking person cannot be readily interpreted,* the interpreter shall notify the appointing authority or the court.

Manuel's misconduct plainly violated chapter 2.43 RCW and GR 11.2. RCW 2.43.080 required her to comply with GR 11.2's code of conduct in rendering interpreter services. As the court's and parties' examination of her showed, however, she failed to "interpret or translate the material thoroughly and precisely." GR 11.2(b). GR 11.2(b) requires that interpreters "add[] or omit[] nothing, and stat[e] as nearly as possible what has been stated in the language of the speaker..." There can be no doubt from Manuel's own statements she violated this requirement.

Moreover, "[a] language interpreter shall use the level of communication that best conveys the meaning of the source, and shall not interject the interpreter[']s personal moods or attitudes." GR 11.2(b). As discussed, Manuel herself shared an example of how she interjected her personal views of the evidence regarding what a photograph of Harjinder's apartment showed, directly contrary to the strictures of the interpreter code of conduct. *Compare* GR 11.2(b) *with* 10/9/14RP 1294, 1340.

Manuel also violated GR 11.2(c), which requires an interpreter with any reservation about her ability to competently interpret to "immediately convey that reservation to the parties and to the court." Here, Manuel expressed several problems interpreting Harjinder's supposed half

---

GR 11.2 (emphasis added).

sentences, babbling, use of extra words, and use of words that did not make sense to h. *Id.* at 1335-37. She stated she was not a translator and could not interpret each word, and was attempting instead to convey only the gist of Grewal's testimony. *Id.* at 1337-38. However, Manuel did not immediately convey these reservations or problems to counsel or the court as GR 11.2(c) requires. Only when defense counsel objected to the inaccuracies of her interpretation did Manuel say anything about her difficulties. Manuel violated the plain terms of both GR 11.2 and chapter 2.43 RCW.

Manuel failed to "maintain high standards of personal and professional conduct that promote public confidence in the administration of justice." GR 11.2(a). Manuel's inability or unwillingness to accurately communicate Harjinder's words to the jury violated court rules, statutes, and Jaspal's constitutional rights.

2. Given that Harjinder's Testimony was Crucial to Establish Jaspal's Self-Defense Claim, the Inadequate Interpretation Violated Jaspal's Constitutional Rights and was Structural Error.

Manuel's inaccurate, incompetent interpretation severely diminished Jaspal's self-defense evidence. Manual's inadequate interpretation qualifies as structural error.

"Structural error is a special category of constitutional error that 'affect[s] the framework within which the trial proceeds, rather than simply

an error in the trial process itself.'" *State v. Wise*, 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012) (alteration in original) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302, *reh'g denied*, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 472 (1991)). Where there is structural error, "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Fulminante*, 499 U.S. at 310 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986)). Structural error is not subject to harmless error analysis. *Id.* at 309-10. Nor is a defendant required to show specific prejudice to obtain relief. *Waller v. Georgia*, 467 U.S. 39, 49, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

Here, no court can have any confidence regarding the accuracy or completeness of the interpretation of Harjinder's testimony. There is no way to know whether Harjinder testified to everything that was interpreted or that the testimony he provided was fully relayed to the trier of fact. Where an interpreter fails to communicate the full testimony of a key witness – the primary witness corroborating the defense theory of self-defense – and also freely admits to editing the testimony's content based on her own assessments of the evidence, the failure infects the entire quality of the evidence. No longer may the criminal trial reliably serve as a vehicle for determining guilt or innocence. Because essential evidence supporting

Jaspal's self-defense claim was tainted by the interpreter's misconduct, this Court should find structural error and reverse so Jaspal may have a fair trial.

3. In the Alternative, if the Error is not Structural, the Garbled Translation was Prejudicial to Jaspal's Defense

Even if it were not structural error, however, the interpreter's misconduct violated Jaspal's constitutional right to defend against the State's charges and must be presumed prejudicial. The Sixth and Fourteenth Amendments and article I, section 22 guarantee the right to defend against the State's allegations. These constitutional guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process and an essential hallmark of a fair trial. *Chambers v. Mississippi,* 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *State v. Burri,* 87 Wn.2d 175, 181, 550 P.2d 507 (1976). Constitutional errors are presumed prejudicial and the State must prove beyond a reasonable doubt that the error did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh'g denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967); *State v. Lamar*, 180 Wn.2d 576, 588, 327 P.3d 46 (2014).

Harjinder's testimony was central to Jaspal's self-defense case. Harjinder was the only witness to the shooting who fully corroborated Jaspal's version of events. Harjinder testified that a taxi van reversed and the

driver attempted to hit Jaspal immediately before the shooting. 10/9/14RP 1307, 1317, 1319-22. Harjinder stated that when Jaspal asked the driver, "Are you going to hit me," the driver slammed open the taxi door into Jaspal and cursed at and threatened to shoot him. *Id.* at 1322-23. Harjinder also confirmed that Jaspal had previously expressed fear of being stalked and killed by someone, which led to Jaspal's purchase of a firearm for self-defense. *Id.* at 1311-13.

Given Manuel's admittedly inaccurate and incomplete interpretation, there is no way to know whether Harjinder's testimony and his version of events were fully communicated to the jury. Jaspal was denied a full and fair opportunity to present a complete defense as the constitution requires.

The inadequate interpretation unquestionably contributed to the prosecutor's attack on Harjinder's credibility. The prosecutor asserted Harjinder was lying because "for the first time when he said, 'Oh, maybe that's not the Defendant's bag that I brought up to my apartment. I know I told you all that before, but, you know, I'm not sure,' after he heard the Defendant denying it ..." 10/24/14RP 2664. The prosecution also argued,

> But you know that before Mr. Grewal knew any better, he said, "That's the bag. That's the bag the Defendant had when he got in the car. That's the bag he had when he got out of the car. That's the bag when he got back into the car. And that's the bag and the stuff in it when I brought it into my apartment," and he identified it.

> Luckily -- and so now their version is that, "Well, I did have this big bag of clothes. I don't know where it is.["] Mr. Grewal said he shoved some stuff under the seat. Just saw a murder, just dropped his friend off at the station, and he comes back.
>
> I understand why you don't want to leave a gun in the car when you have a split roof or something. But now he's cleaning up? He's shoving stuff under the seat that he never tells us about, even when we asked, that he never produces?

10/24/14RP 2672-73.

Had Harjinder's answers regarding the items under the passenger seat not been distorted by Manuel's inadequate interpretation, the State would could not argue that Harjinder's answers showed he was lying. Manuel herself asserted in front of jurors that Harjinder's answers to the prosecutor's questions did not make sense, bolstering the State's arguments that he was being less than forthright in his explanations.

When a witness's testimony is not communicated accurately, it damages the trier of fact's assessment of the witness's credibility. See *Perez-Lastor v. Immigration & Naturalization Serv.*, 208 F.3d 773, 780-81 (9th Cir. 2000) (discussing cases indicating that inaccurate interpretation undermines fair assessment of witness's credibility). As the Ninth Circuit explained, when the interpretation is inadequate:

> [o]bviously we do not know what his actual testimony was. No record of it was preserved. All we have is the garble produced by the translator. We cannot require Perez-Lastor to produce a record that does not exist.

Id. at 781.

The same is true here. The record before this Court demonstrates that Manuel's interpretation of Harjinder's testimony was grossly inadequate and legally deficient. The State relied on portions of this incorrectly or incompletely interpreted testimony to argue that jurors should not believe Harjinder's version of events. This prejudiced Jaspal's ability to rely on the substance of Harjinder's testimony to support his self-defense claim, and the State cannot demonstrate otherwise beyond a reasonable doubt.

D. THERE WAS INSUFFICIENT EVIDENCE OF PREMEDITATION

Appendix 2 to this brief is a copy of the timeline and map of all locations used by defense counsel in closing argument. It is taken from the testimony of Ronald Karstetter, a computer forensics expert. 10/16/14RP 1982-2044; Defense Exhibit 84 (a compilation of slides from various cameras and cell phone records).

On the day of the shooting, August 28, 2012, Jaspal spent time with relatives in the morning and then worked at a Burien auto shop. 10/7/14RP 1000; 10/21/14AMRP 2336-37; 10/2114PMRP 65-67. Jaspal left work at 5:00 p.m. and planned to get dinner at a Burien Subway with his friend, Harjinder Grewal. 10/7/14RP 1003, 1005-06; 10/21/14PMRP 68-69. Jaspal and Harjinder went to their respective apartments to change clothes.

10/7/14RP 1003; 10/21/14PMRP 69-70. Jaspal had a couple drinks at home. 10/21/14PMRP RP 69-70. Then Harjinder picked Jaspal up outside Jaspal's apartment in a green Mustang convertible shortly before 5:30 p.m. 10/7/14RP 1009-10; 10/21/14PMRP 70. On their way to Subway, Harjinder and Jaspal passed by Daljit's house. 10/7/14RP 1016; 10/21/14PMRP 75, 77. Jaspal asked Harjinder to stop for a couple minutes so Jaspal could ask his children if they would have regularly scheduled visitation with him the following day, a Wednesday. 10/7/14RP 1016; 10/21/14PMRP 75, 77.

Harjinder pulled into the driveway and he and Jaspal saw a green taxi van driven by Harjit, already there. 10/7/14RP 1016; 10/21/14PMRP RP 78-79. Harjit had just dropped Manrit off at home after picking her up at a downtown Seattle hospital where she had spent several hours with her grandfather, who had had recent bypass surgery. 9/30/14RP 281-82; 10/2/14RP 649.

Although witnesses' accounts varied, the green Mustang drove rapidly into the driveway and stopped behind Harjit's taxi van. 9/30/14RP 293, 295; 10/14/14RP 1605-06. Jaspal exited the Mustang. 9/30/14RP 296; 10/7/14RP 1016. Harjit put the taxi van in reverse. Jaspal and Harjinder stated that Harjit was attempting to back his van into Jaspal. 10/7/14RP 1016; 10/9/14RP 1317; 10/21/14PMRP 78-79. Jaspal jumped out of the

way, and at that point he was near the van's driver's side door. 9/30/14RP 298; 10/7/14RP 1016; 10/9/14RP 1320-21, 1348; 10/21/14PMRP 78-79.

Harjit swung open the driver's side door, which both Harjinder and Jaspal testified hit or almost hit Jaspal, causing Jaspal to stagger backward as Harjit exited the taxi. 10/9/14RP 1322, 1348, 1350, 1374-75; 10/14/14RP 1475, 1481-82; 10/15/14RP 1652, 1672; 10/21/14PMRP 81, 85, 87; 10/22/14AM2RP 8-9. According to Jaspal and Harjinder, Harjit called Jaspal a motherfucker, told Jaspal he would fuck his sister and his daughter, and threatened to shoot Jaspal. 10/7/14RP 1016; 10/9/14RP 1322-24, 1350, 1354-55, 1358; 10/21/14PMRP 83-84, 88; 10/22/14AM2RP 8-9, 131. According to Manrit, Jaspal called Harjit a bitch. 9/30/14RP 300. Shortly after the verbal exchanges, Jaspal shot Harjit at close range. 9/30/14RP 298-99, 304; 10/9/14RP 1379-80; 10/14/14RP 1475-76; 10/21/14PMRP 87; 10/22/14AM2RP 9.

Jaspal described feeling numb and believed he had been shot. 10/21/14PMRP 87; 10/22/14AM2RP 9, 131. After a few moments, Jaspal got back into the green Mustang, and Harjinder pulled out of the driveway. 10/7/14RP 1017; 10/14/14RP 1437; 10/21/14PMRP 88. Jaspal was visibly shaken. 10/7/14RP 1063, 1065; 10/9/14RP 1389; 10/14/14RP 1444.Jaspal called 911 approximately one minute later.

In closing argument the State admitted that all five shots were made in 8 seconds. 10/24/14RP 2648. The rest of the argument about how or when Jaspal "premediated" is confusing and contradictory. At one point the State argued that Jaspal premediated the murder of Harjit beginning in 2010 when his wife sued him over the limousine business. But this was based on the improper admission of Buckingham's testimony. And there was simply no evidence that Jaspal ever planned to kill Harjit.

Evidence will satisfy the federal due process clause only if, when considered in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979). *Jackson* required this Court to abandon its more deferential "substantial evidence" test. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). "[T]he application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievably committed to jury discretion." *Jackson*, 443 U.S. at 317 n.10. "A properly instructed jury may occasionally convict when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Id.* at 317.

Premeditation is an essential element of first degree murder. RCW 9A.32.030(1)(a). Premeditation, as distinct from intent to kill, requires "the

deliberate formation of and reflection upon the intent to take a human life," and must involve the "mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Hoffman*, 116 Wn.2d 51, 82, 804 P.2d 577 (1991); *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987); *State v. Brooks*, 97 Wn.2d 873, 876, 651 P.2d 217 (1982).

The State also appeared to argue that the premeditation occurred when Jaspal got of the car with the gun. But "premeditation cannot simply be inferred from the intent to kill." *State v. Commodore*, 38 Wn. App. 244, 247, 684 P.2d 1364, *rev. denied*, 103 Wn. 2d 1005 (1984). As the court noted in *Commodore*, "intent" and "premeditation" are separate elements, each of which must be proved by the State; "intent" involves only "acting with the objective or purpose to accomplish a result which constitutes a crime," while premeditation requires "the mental process of thinking beforehand," deliberating and reflecting. *Commodore*, 38 Wn. App. at 247 (voluntary intoxication can prevent the defendant from premeditating even where it does not prevent him from forming the intent to kill). Nor can premeditation be inferred from the fact that the defendant had the opportunity to deliberate. *State v. Bingham*, 105 Wn.2d 820, 827, 719 P.2d 109 (1986). "[T]he crux of the issue of premeditation and deliberation is . . . whether the defendant did engage in the process of reflection and

meditation." *Austin v. United States*, 382 F.2d 129, 136 (D.C. Cir. 1967); accord *United States v. Peterson*, 509 F.2d 408, 412 (D.C. Cir. 1974); *People v. Velasquez*, 162 Cal. Rptr. 306, 606 P.2d 341, 347 (1980); *State v. Williams*, 285 N.W.2d 248 (Iowa 1979), *cert. denied*, 446 U.S. 921, 100 S.Ct. 1859, 64 L.Ed.2d 277 (1980). "Many murders most brutish and bestial are committed in a consuming frenzy or heat of passion, and that these are in law only murder in the second degree." *Bingham*, 105 Wn.2d at 827, quoting *Austin*, 382 F.2d at 138-39.

Even taking the evidence in a light most favorable to the State, the State simply presented no evidence from which a juror could have found that Jaspal deliberated, reflected and decided beforehand to take a life, rather than merely acted with the intent to kill.

E. THE PROSECUTION COMMENTED ON HARJINDER'S CREDIBILITY DURING HIS TESTIMONY

Prosecutors are quasi-judicial officers with an independent duty to ensure a fair trial to the defendant, and may not lay aside impartiality to become a heated partisan. *State v. Reed*, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Prosecutors are prohibited from giving a opinion on the credibility of witnesses. *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). When a prosecutor's comments are improper and there is a substantial likelihood they affected the jury's verdict, it violates the

defendant's rights to a fair trial by an impartial jury. U.S. Const. amend. XIV; Const. art. I §§ 3, 21, 22; *Reed*, 102 Wn.2d at 145.

Here, after defense counsel objected to the prosecutor's leading questions, the prosecutor asked the trial court to allow him "to treat [Grewal] as a hostile witness based on the way he's answering [the prosecutor's] questions." 10/8/14RP 1149-50. Defense counsel objected, asserting that the prosecutor "should not be making statements like that." *Id.* at 1150. The prosecutor's characterization of Harjinder as a hostile witness and assertion that he was inadequately responding to questioning impermissibly expressed the prosecutor's opinion regarding Harjinder's credibility to the jury.

The trial court has significant leeway to permit leading questions on direct examination "[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party . . ." ER 611(c). However, the witness must qualify as hostile based on his or her demeanor. *Lambert v. State Farm Mut. Auto Ins. Co.*, 2 Wn. App. 136, 143, 467 P.2d 214, *review denied*, 78 Wn.2d 993 (1970).

There was no basis for the State's assertion that Harjinder was hostile, as he was responding to the State's leading examination of him to the best of his ability. *See* 10/7/14RP 992-1076; 10/8/14RP 1136-49. As defense counsel asserted, the State was examining Harjinder primarily

through leading questions, and "the fact that the witness wants to answer in his own words instead of adopting the Prosecutor's characterization of what happened is appropriate. And that's not a sign of hostility." 10/8/14RP 1152. The trial court agreed with this assessment, indicating, "I don't think he's been particularly hostile. I'm not going to comment on the credibility of anything that's been said. That's not my role. But I don't think he has been particularly hostile." *Id.* at 1155. The trial court also pointed out that part of the problem might be the use of the interpreter: "we do have a unique circumstance, as well, where we have an interpreter, and things can be very confusing with an interpreter, and we have an interpreter that Mr. Grewal has indicated at one point that he doesn't necessarily agree with the way that it's been interpreted." 10/8/14RP 1155-56. The State was incorrect when it asserted Harjinder was a hostile witness.

But even if Harjinder was hostile, it was inappropriate for the State to say so in front of the jury. The State's label of a witness as "hostile" provides the jury with the State's opinion that the witness is not being honest or forthcoming with his or her answers. This is especially true when the prosecutor states his reason for labeling the witness "hostile" is "based on the way he's answering my questions." *Id.* at 1149-50. The State could easily have asked to be heard outside the jury's presence to address its claim, but instead undermined Harjinder's credibility in front of jurors. By

calling him "hostile"' in front of the jury, the State impermissibly gave its opinion on Harjinder's veracity as a witness.

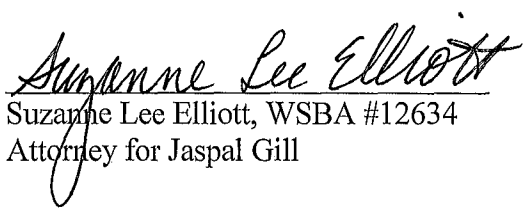
As argued above, Harjinder's testimony was critical to Jaspal's defense. In *Reed*, the prosecutor's improper comments were prejudicial when they struck directly at the evidence supporting the defense theory. *Reed*, 102 Wn.2d at 147-48. That is precisely what the prosecutor did here. There is a substantial likelihood that the prosecutor's label of Harjinder as a "hostile witness based on the way he's answering my questions" affected the jury's verdict. Because the prosecutor's comment denied Jaspal a fair trial, this Court should reverse.

V.
CONCLUSION

For the reasons stated above, this Court should reverse Japal's murder conviction.

DATED this 1st day of July, 2016.

Respectfully submitted,



Suzanne Lee Elliott, WSBA #12634
Attorney for Jaspal Gill

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

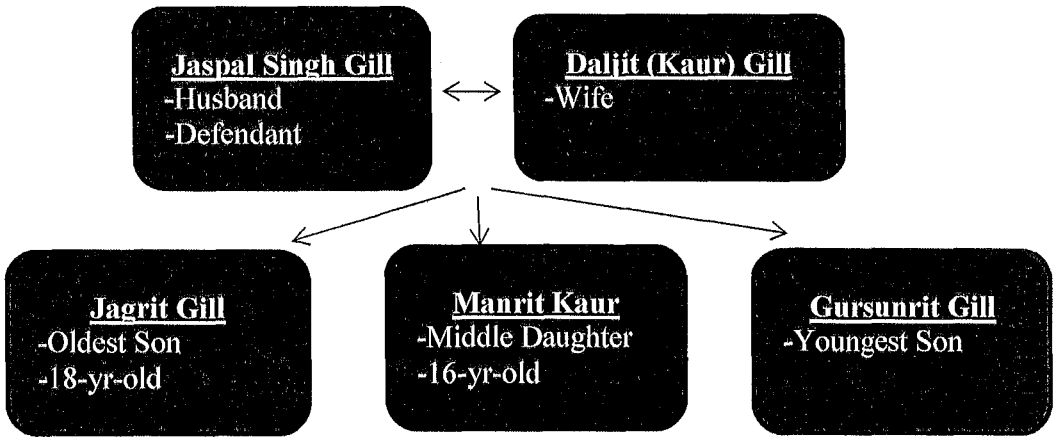
King County Prosecutor's Office
King County Courthouse, Room W554
516 Third Avenue
Seattle, WA 98104-2362

Mr. Jaspal Gill #380116
Washington State Penitentiary
1313 North 13th Street
Walla Walla, WA 99362

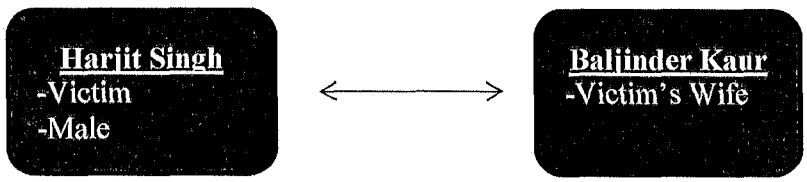
07/01/2016
Date

Peyush Soni

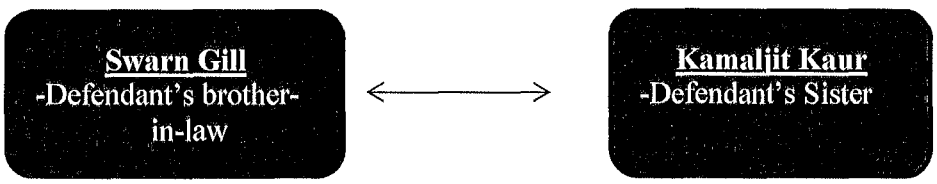
DEFENDANT & NUCLEAR FAMILY



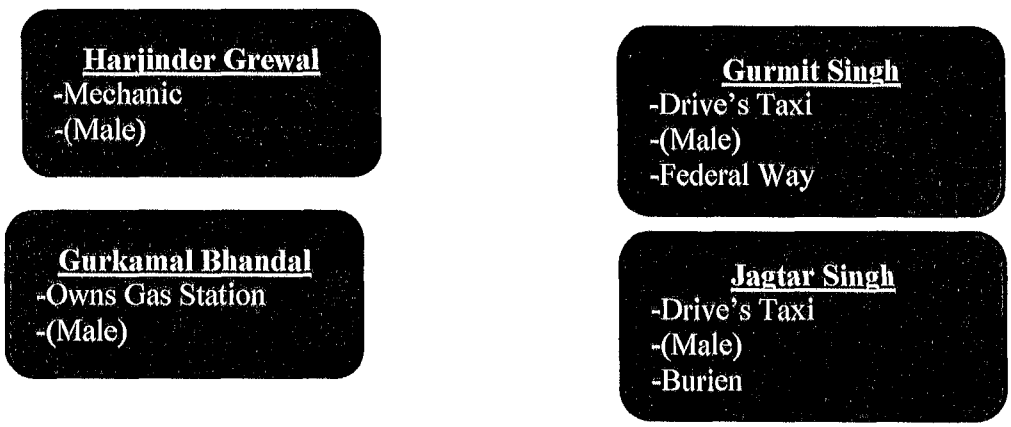
VICTIM & NUCLEAR FAMILY



DEFENDANT'S EXTENDED FAMILY



DEFENDANT'S FRIENDS



Appendix 1

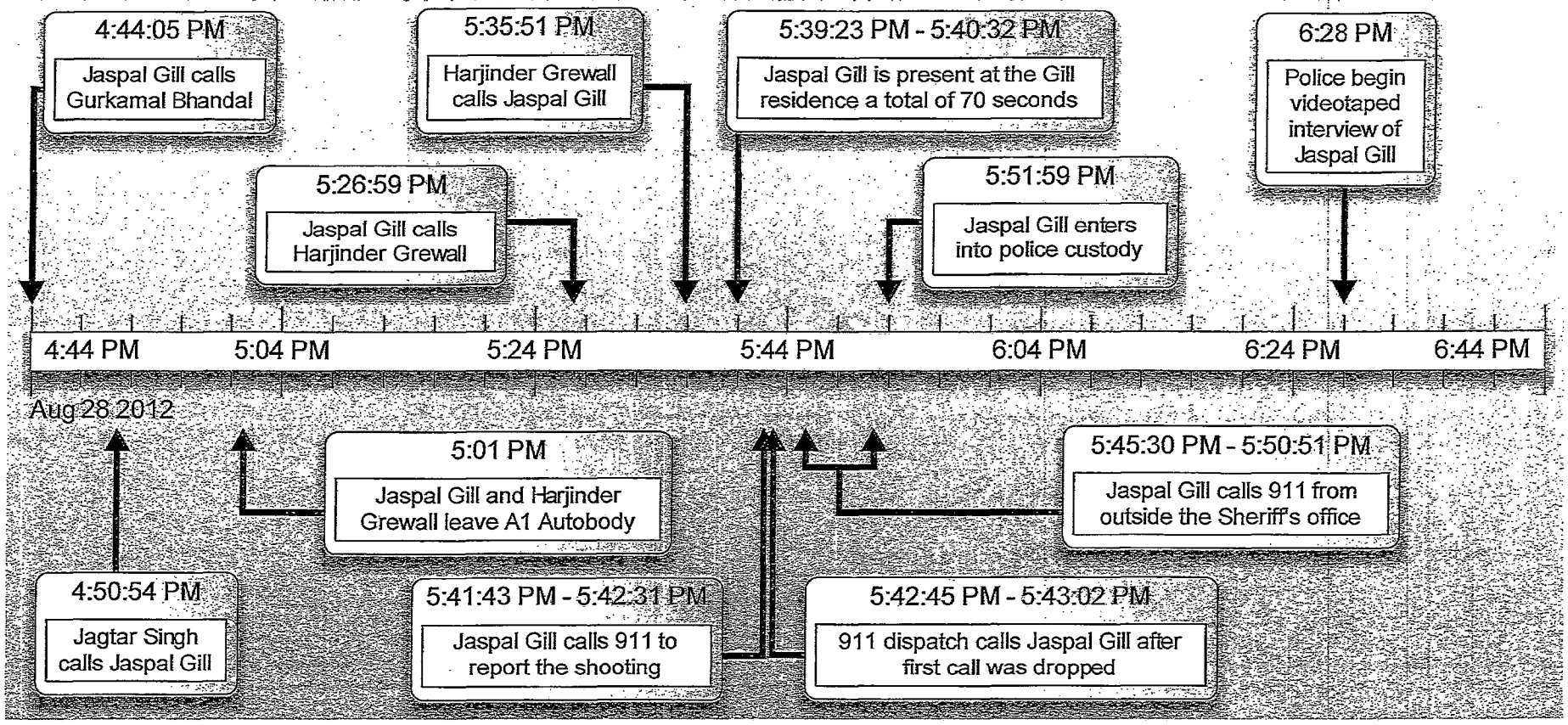
VICTIM'S FRIENDS

Baljit Singh Sandu
-Real Estate Agent
-Surry, BC
-(Male)

Surrinder Singh
-Mechanic: Glendale Auto
-(Male)

Amarinderjit Singh Chadha
-Substitute Teacher, Tutor, Cab
-(Male)

State v. Jaspal Gill
Event Timeline on August 28, 2012
from 4:30 p.m. to 6:30 p.m.



Appendix 2