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Court of Appeals
Division I
State of Washington

NO. 72951-9

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASPAL GILL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE BILL BOWMAN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DAVID SEAVER
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUES PRESENTED

1. Whether the trial court properly instructed the jury with regard to the purposes for which it could consider Gill's voluntary intoxication at the time of the shooting.

2. Whether the trial court properly allowed the State to present testimony regarding the ugly breakdown of Gill's marriage and the resulting fallout, which Gill attributed to the victim, as probative evidence of Gill's motive and intent.

3. Whether the trial court properly addressed a witness's complaint that the sworn interpreter assisting him during his testimony had incompletely translated his answers.

4. Whether the State's evidence adequately established that Gill acted with premeditated intent.

5. Whether the State's request to be allowed to treat a witness as hostile, pursuant to the rules of evidence, constituted misconduct.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Jaspal Gill, was charged by amended information with one count of first-degree murder, with a special firearm enhancement, for shooting Harjit Singh to death on August

28, 2012. CP 3. Gill's first trial on this charge ended in mistrial due to a hung jury. CP 137. At retrial, Gill was found guilty as charged. CP 350-51. He received a standard-range sentence. CP 374-81.

2. SUBSTANTIVE FACTS

In 1995, Daljit Gill (Daljit) immigrated to the United States from India to join her husband, Jaspal Gill (Gill), who had moved to the Seattle area earlier to find work.¹ 6RP 597, 600.² When Daljit arrived, she and Gill lived with Gill's close friend, Harjit Singh (Harjit) and Harjit's wife, Baljinder Kaur (Baljinder). 6RP 600-01.

Baljinder returned to India with her and Harjit's children for an extended visit in 2001. 6RP 603-04. Harjit moved into the Renton home where Gill and Daljit lived with their three children. 6RP 603-04. Daljit explained to the jury that she considered Harjit to be a brother to her. 6RP 605.

In August 2004, Gill accused Daljit of having an affair with Harjit. 6RP 606. Both Daljit and Harjit insisted to Gill that he had nothing to worry about, and that Daljit had not cheated on him. 6RP 611-12. Despite Daljit's continuing efforts to convince Gill of

¹ Many of the individuals involved in the underlying incidents in this matter share last names. The State will indicate parenthetically, as each individual is introduced, how that individual will be referred to thereafter. Many will be identified by their first name in order to avoid confusion. No disrespect is intended.

² Please see Appendix A for identification of volume numbers of verbatim report of proceedings and corresponding "RP" designation.

her fidelity, Gill filed for divorce, dissolving their marriage in October 2008. 6RP 618, 624. Both Daljit and her family law attorney explained to the jury that the dissolution process was awash with conflict and accusations, and that this extended into post-divorce litigation regarding financial support and child visitation. 6RP 624, 641; 7RP 744-72.

Daljit remained friendly with Harjit and his wife, Baljinder, who had returned to the States. 6RP 627. Harjit would often assist Daljit with handiwork and other household issues when she needed his help. 6RP 627. Despite being accused by Gill of participating in adultery, Harjit never spoke poorly of Gill to Baljinder or to Daljit or Daljit's children. 4RP 271, 349-50; 6RP 653-54.

Harjit earned his living as a taxi driver and often used his taxi van while on time off from work. 4RP 267. In January 2012, Gill's children, including daughter Manrit Kaur (Manrit) and son Jagrit Gill (Jagrit), were visiting Gill at his home when he briefly left to pick up a pizza. 4RP 328, 331. When Gill returned, he was extremely angry, and demanded to know why Harjit's taxi van was parked outside Daljit and the children's house. 4RP 331-32. Gill announced that he was cutting short the children's overnight visit and taking them back to their house immediately. 4RP 331. When

he let them out of his car, he told them, "You guys aren't my kids. I'm not going to come see you again." 4RP 334.

Harjit had come over to the family's house to repair their broken water heater. 4RP 334-35. The children did not see their father again for the next few months. 4RP 335-36.

Jagrit explained to the jury that his relationship with his father changed after his parents divorced. 5RP 464-65. Gill would insist that Jagrit, as the eldest son, prevent Harjit from visiting the family home, and told him to forcibly eject Harjit if he ever found him there. 5RP 465, 467-68. However, Jagrit and Manrit considered Harjit as akin to a relative, and called him "Uncle." 4RP 281; 5RP 465.

On the late afternoon of August 28, 2012, Harjit used his taxi van to drive Manrit back to the family's Renton home from a nearby hospital, where she had been visiting her ailing grandfather. 4RP 278, 283-84. Harjit drove his van up a long driveway leading from the street to the front door of Manrit's house. 4RP 289. Manrit asked Harjit if he wanted to come inside, but he declined, explaining that he just wanted to feed some birds outside the house and then drive to his own residence. 4RP 291. Harjit fed the birds,

and then got back into his van to back down the driveway. 4RP 291.

Manrit noticed a green Mustang drive up the driveway and stopped immediately behind Harjit's van. 4RP 292. Manrit had noticed the Mustang parked on the street when she and Harjit had first arrived. 4RP 293.

Manrit then watched as Gill got out of the passenger seat of the Mustang and hastened to the driver's side of Harjit's van. 4RP 296. Gill was holding a gun. 4RP 297. Speaking Punjabi, Gill called Harjit a "bitch" in a loud, angry voice, and then fired several shots at Harjit from approximately a foot away. 4RP 302. Gill immediately ran back to the Mustang, which sped away. 4RP 304, 306.

Manrit ran into her house and called 911, but Jagrit died, on his seat inside the taxi, before medics arrived. 4RP 144-45, 306. An autopsy was performed at the King County Medical Examiner's office, and it was determined that Jagrit had been shot in the torso five times at close range; the trajectory of several of the shots appeared to be downward. 12RP 1844-45, 1850, 1852. Forensic examination of Harjit's van revealed that Harjit was still wearing his

seat belt when at least one of the shots struck him. 13RP 1921, 1958-59.

The green Mustang had been driven by Gill's close friend, Harjinder Grewal (Grewal). Grewal testified that after Gill returned to his car following the shooting, he told Grewal to call 911. 8RP 1017. Grewal then drove Gill to a police station nearby. 8RP 1017.

Gill was taken into custody, and then initially questioned by King County Sheriff's Office (KCSO) deputy Carrie Andersen. 6RP 713-14. Gill told Andersen that he "was just trying to protect himself and his kids," and that he had not done anything wrong. 6RP 715. Gill said that Harjit had tried to run him over, so Gill shot him. 6RP 715. Andersen detected the odor of intoxicants while speaking to Gill, and blood tests taken roughly four hours later showed that Gill had a blood alcohol content of .06. 6RP 722; 14RP 2135-36.

Though initially reluctant, Gill eventually told Andersen that he had left his gun in the Mustang. 6RP 716. He hesitated to identify the Mustang's driver, but ultimately gave Andersen Grewal's address. 6RP 716-17. Officers responded to Grewal's address and recovered the gun, a five-shot, .357 magnum Smith &

Wesson revolver, from inside his apartment. 8RP 953, 960. All five bullets in the revolver's cylinder had been fired. 8RP 960.

KCSO detective Jeanne Walford interviewed Gill approximately an hour after the shooting. 11RP 1588. Like Andersen, Walford noticed the odor of intoxicants emanating from Gill. 11RP 1589. Gill did not appear completely inebriated, however, and was able to participate in the questioning. 11RP 1591. Gill told Walford that he had gone to his ex-wife's house to see his daughter. 11RP 1595. Gill was unwilling to discuss the circumstances of the shooting itself, but vaguely described that he had nearly been run over. 11RP 1595. Gill declined to identify his driver, and never mentioned that Harjit had threatened or otherwise frightened him in the past. 11RP 1601-02.

Gill testified in his case-in-chief that after he had divorced Daljit in 2008, Harjit began to stalk and harass him for reasons that Gill could not fathom. 16RP 8-9, 18. Gill stated to the jury that in 2010, Harjit confronted Gill at a grocery store and, brandishing a gun, told Gill that Daljit and Gill's children were "in my control," and that he could shoot him any time he wanted to. 16RP 18-19. It was after this event, Gill told the jury, that he acquired a gun for self-protection. 16RP 19-20.

Gill stated to the jury that he had asked Grewal to drive him to Daljit and the children's home on August 28, 2012, so that he could pick up his mail and see his children. 16RP 75. He said that he did not notice Harjit's van until Grewal had parked. 16RP 78. Gill told the jury that when he exited Grewal's car, Harjit began cursing at Gill from inside his van, and tried without success to run him over. 16RP 78-80. Harjit then, while yelling that he was going to shoot Gill, suddenly opened his door, which struck Gill in the chest. 16RP 83, 85. Gill told the jury that he thought he had been shot, so he returned fire. 16RP 85. Gill described to the jury that he numbly returned to Grewal and told him to drive to the police station. 16RP 88.

Gill called forensic psychiatrist Mark McClung to testify in his defense. 14RP 2091. McClung told the jury that he had diagnosed Gill as likely suffering from post-traumatic stress disorder (PTSD) caused by Harjit's years of stalking and harassment, as reported to him by Gill. 14RP 2108, 2112-13. According to McClung, Gill's PTSD likely contributed to Gill's belief that his life was in danger on August 28, 2012, and triggered the "fight-or-flight" response that resulted in Harjit's death. 14RP 2116-17. McClung stated that he could not conclusively determine whether Gill's consumption of

alcohol necessarily affected his PTSD on August 28, 2012, but that it was likely a contributor to his behavior. 14RP 2138-40.

The State called psychiatrist Douglas Zatzick as a rebuttal witness. 19RP 2412-13. Zatzick also interviewed Gill, and told the jury that he could not conclude that Gill suffered from PTSD. 19RP 2434. Rather, Zatzick diagnosed Gill with depression. 19RP 2436. Zatzick stated to the jury that he saw no indication from his review of the shooting incident that Gill's behavior was consistent with PTSD; he further explained that intoxication can affect a person's perception and behavior in a tense situation. 19RP 2443-45.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE SUBJECT OF INTOXICATION

Gill begins his appeal by contending that the trial court erred by instructing the jury that:

No act 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 at it relates to your consideration of post-traumatic stress disorder.

CP 344.

Gill asserts that this instruction requires reversal of his conviction for several reasons. First, he contends that it amounts to a statement of an affirmative defense – voluntary intoxication – that

he did not raise. Second, he argues that the instruction amounted to a judicial comment on the evidence. Finally, he maintains that the instruction was an erroneous statement of law, insofar as it prohibited the jury from accounting for the effect of intoxication on his claim of self-defense.

Gill waived his right to challenge this instruction on appeal when he declined to take exception to the instruction reprinted supra. The instruction is not manifestly, constitutionally erroneous, because it correctly states the law and was necessary due to the nature of Gill's defense. Furthermore, it is baseless to suggest that this instruction somehow amounted to an expression of the trial court's opinion as to the evidence presented to the jury. Gill's arguments should be rejected.

At the conclusion of the evidentiary phase of the trial, defense counsel explained to the court that he wanted to argue to the jury that Gill's intoxication at the time of the shooting insofar intensified his PTSD. 19RP 2609-10. Defense counsel explained that Gill was not offering a defense of diminished capacity or an inability to form the requisite intent to kill, but that his consumption of alcohol affected his perception. 19RP 2609. The State did not oppose an instruction that would allow the jury to consider the

effect of intoxication on Gill's purported PTSD, but did not want the jury to be erroneously instructed that, when considering Gill's claim of self-defense, it needed to consider it from the perspective of an objective "reasonable" inebriate. 19RP 2614.

The following day, the court provided the parties with an instruction it crafted itself. The court explained that it created the instruction (Instruction No. 27, reprinted supra) in the belief that it would allow both parties to argue their cases while giving the jury the appropriate law. 20RP 2625-27. The court invited the parties to take exception to any of the proposed instructions, including Instruction No. 27. 20RP 2636. Gill objected to none of the instructions. 20RP 2637.

CrR 6.15(c) requires that timely and well-stated objections be made to instructions so that the trial court has the opportunity to correct any error. See State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). Where no meaningful exception to an instruction is made, a challenge to that instruction on appeal is not preserved. See State v. Sengxay, 80 Wn. App. 11, 16, 906 P.2d 368 (1995), citing State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988).

To satisfy RAP 2.5(a) and assert error for the first time on appeal, an appellant must demonstrate a manifest error of

constitutional magnitude. See State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). A manifest constitutional error is one which implicates a constitutional interest and has been shown by the appellant to have caused unmistakable, practical prejudice. Id. at 98-99; see also State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

In his brief to this Court, Gill declines to address the matter of waiver, apparently and mistakenly believing that his objection to an instruction earlier proposed by the State on the subject of intoxication preserved the issue, despite the fact that the trial court expressly took into account Gill's objection and then crafted a revised instruction to which he did not object when given the direct opportunity. Thus, this Court is well within its rights to summarily decline to consider the remaining specifics of Gill's insufficiently-preserved argument.

Moreover, for RAP 2.5(a) to be satisfied, this Court must first be convinced that an error actually occurred; in the absence of any error, constitutional concerns and questions of prejudice are immaterial. Gill is unable to demonstrate any error here. Despite his argument to this Court, neither the State nor the trial court mistakenly believed that a defense of voluntary intoxication was

being posited or that the modified instruction created by the trial court was meant to address such a defense. Rather, the State, recognizing that defense counsel expressly intended to offer a claim of self-defense affected by PTSD, a mental syndrome that was arguably worsened by Gill's inebriation, merely wanted to ensure that the jury properly understood the purposes for which it could consider evidence of Gill's alcohol consumption.³ As the trial court perceptively observed, an appropriate instruction would more closely resemble a limiting instruction, rather than a statement and explanation of an affirmative defense. 19RP 2614-16. Gill's claim that the trial court somehow imposed an affirmative defense on him that he did not desire lacks any support in the record.

In addition, to the extent that Instruction No. 27 restricted the jury from taking Gill's intoxicated state into account when assessing the reasonableness of his exercise of purported self-defense, the instruction correctly stated the law. Although the undersigned has been unable to find a published opinion from Washington's

³ The illogic of such a defense – i.e., a claim that a jury should, when deciding whether the defendant acted reasonably when using force against a perceived threat, should take into account the fact that the defendant suffers from a disorder that, by definition, renders him unreasonable in such circumstances – causes one to question whether such a defense is appropriate as a matter of law. See State v. Helmer, No. 71607-7-1 (Wash. Ct. App., July 27, 2015) (noting that the self-defense inquiry involves consideration of facts as they truly existed, and not as they were perceived based on the defendant's poor mental health).

appellate courts directly addressing this issue, it is clear that a defendant's subjective perceptions are not the only consideration a jury must take into account when determining the validity of a claim of self-defense. The state supreme court noted in State v. Janes, 121 Wn.2d 220, 239-40, 850 P.2d 495 (1993), that "[t]he objective portion of the [self-defense] inquiry serves the crucial function of providing an external standard. Without it, a jury would be forced to evaluate the defendant's actions in the vacuum of the defendant's own subjective perceptions." Fittingly, numerous courts have long recognized that while a defendant's individual attributes, such as age, size, and strength are relevant to the reasonableness of his beliefs, voluntarily induced states of mind caused by drug and alcohol ingestion are not. See State v. Wheelock, 158 Vt. 302, 308-09, 609 A.2d 972 (Vt. 1992), citing 1 W. LaFave and A. Scott, Substantive Criminal Law § 4.10(d), at 558 (1986); see also State v. Brown, 22 Conn. App. 521, 529, 577 A.2d 1120 (Conn. App. Ct. 1990) (rejecting defendant's attempt to "have us abandon the requirement that his conduct be judged ultimately against that of a reasonably prudent person and replace it with what might be euphemistically called the 'reasonably prudent drunk' rule"); United States v. Yazzie, 660 F.2d 422, 431 (10th Cir. 1981).

As the Supreme Court of Tennessee vividly observed, in

1907:

[A defendant claiming to have acted in self-defense while inebriated] must stand at the bar of justice and be judged by the same rules which measure the conduct of sober men. Indeed, the consequences that would follow any other view are horrible to contemplate. If it be true that the red-handed murderer can say to the court... "I supposed, without any foundation in fact, but simply because I was drunk, that he was going to do me great bodily harm, and therefore I killed him," truly the quiet and peaceable and orderly members of every community in the state would be at the mercy of the drunken, the disorderly, and the brutal, and the courts would be powerless to check the quick and certain descent of social order into chaos and ruin. No such license to commit rapine and murder can be issued to vicious, drunken, and besotted men.

Atkins v. State, 119 Tenn. 458, 105 S.W. 353, 361 (Tenn. 1907).

Here, Gill did not ask the trial court to instruct the jury to take into account his inebriation at the time he shot Harjit to death when determining if he acted reasonably; rather, he wanted the jury to consider the effect of his intoxication on his pre-existing PTSD, and the court allowed such consideration. Nevertheless, had Gill sought such a "reasonably prudent drunk" self-defense instruction, the trial court could not be faulted for refusing his request.

Finally, Gill makes passing effort to label Instruction No. 27 as a judicial comment on the evidence, insofar as it told the jury

that “it could consider evidence of intoxication as it related to the consideration of post-traumatic stress disorder.” Brief of Appellant, at 15. An instruction is a comment on the evidence if it conveys to the jury the personal attitudes of the judge towards the merits of the case. State v. Johnson, 29 Wn. App. 807, 811, 631 P.2d 413 (1981). Even a cursory reading of the challenged language – “[E]vidence of intoxication may be considered at it relates to your consideration of post-traumatic stress disorder” – reveals that is nothing more than a fairly routine limiting instruction containing no hint of the trial judge’s subjective opinion of any evidence. To deem Instruction No. 27 a judicial comment on the evidence would require this Court to deem almost all limiting instructions unlawful intrusions on the role of the jury.

2. THE TRIAL COURT PROPERLY ALLOWED THE ATTORNEY FOR GILL’S EX-WIFE TO TESTIFY REGARDING THEIR DISSOLUTION AND POST-DISSOLUTION LITIGATION

Next, Gill contends that the trial court erred when it allowed the State to present, pursuant to ER 404(b), the testimony of Boyd Buckingham, an attorney who represented Daljit during her dissolution and post-dissolution litigation, regarding the history and nature of that litigation. Gill asserts that Buckingham’s testimony

was irrelevant to the issues at trial, and that any minimal probative value was outweighed by the unfair prejudice to him that it created. Gill's argument is without merit.

Evidence of other acts is admissible under ER 404(b) if it satisfies two distinct criteria. First, the evidence must be logically relevant to a material issue before the jury. Evidence is relevant if (1) the identified fact for which the evidence is admitted is of consequence to the trial, and (2) the evidence tends to make the existence of that fact more or less probable. ER 402; see also State v. Saltarelli, 98 Wn.2d 358, 362-63, 655 P.2d 697 (1982).

Second, if the evidence is relevant, its probative value must outweigh its potential for unfair prejudice. Saltarelli, 98 Wn.2d at 362.

Evidence of other bad acts is inadmissible if used only to prove criminal propensity. See ER 404(b). By contrast, when such evidence is logically relevant to a material issue distinct from propensity, such as proof of motive, the evidence is admissible, subject to the balancing test described in ER 403. Saltarelli, 98 Wn.2d at 362.

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239

(1997). A trial court abuses its discretion only when its exercise of judgment is manifestly unreasonable, or based upon untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Here, the State sought to present evidence of the nature and course of Gill's and Daljit's 2008 divorce in order to establish motive and to provide the fullest context surrounding the shooting four years later. 2RP 11-19. As the State explained at a pretrial hearing on this subject, evidence of Gill's motive was particularly crucial due to the fact that Gill claimed to have shot Harjit in an act of self-defense and had lived in pathological fear of Harjit for many years. 2RP 15-18. Contrary evidence showing that Gill had been involved for years in an ugly divorce and the divorce's aftermath, for which he blamed Harjit as a primary cause, was highly probative as to the credibility of Gill's account. 2RP 19.

The trial court permitted the State to call Buckingham as a witness, noting that the State's reasons for introducing evidence through the family law attorney had nothing to do with any supposed propensity by Gill to commit crimes, and that the evidence of the dissolution and post-divorce fallout was probative in light of Gill's stated defenses. 3RP 3-4. The court further observed

that excluding Buckingham would serve little purpose, since the jury would likely learn about this evidence through other witnesses, including Daljit and the forensic experts who would testify regarding Gill's self-reported PTSD. 3RP 4. Buckingham later testified in the State's case-in-chief consistently with the court's pretrial ruling. 7RP 742-79.

The trial court did not err. Proof of motive is well recognized in murder cases as evidence of intent, premeditation, or purpose. State v. Halstein, 122 Wn.2d 109, 119, 857 P.2d 270 (1993). Washington courts have historically admitted evidence of marital unhappiness and "ill-feeling" in spousal murder trials to prove motive. Powell, 126 Wn.2d at 259-60; see also State v. Messinger, 8 Wn. App. 829, 835, 509 P.2d 382 (1973) (noting that evidence of "marital disharmony and infidelity may be relevant and material and admissible if there exists some... natural connection between [those circumstances] and the criminal act with which the accused stands charged."). The Powell court noted that establishing motive – the impulse and desire that induces criminal action on the part of the accused – is often necessary in cases where only circumstantial proof as to one or more elements of guilt exists. See

id. at 260; see also State v. Athan, 160 Wn.2d 354, 382, 158 P.3d 27 (2007).

There is no logical reason to distinguish between instances of spousal murder and cases, such as the instant matter, where the victim of the crime was someone who, the perpetrator believed, had been engaged in an adulterous relationship with the perpetrator's spouse. The end result – an irretrievably broken relationship between the spouses – is the same, and it is no stretch of the imagination to see how the jilted partner's animosity could be directed toward both his unfaithful spouse and her lover, particularly when the marriage's breakdown leads to long, stressful court proceedings and attendant economic hardship, throughout which the victim remained in a relationship with the ex-spouse. Furthermore, in a situation such as was present here, where no direct evidence in the form, for example, of a vocal declaration of intent made by Gill at the time of the shooting, proof of his bitterness toward Harjit was highly probative circumstantial evidence of Gill's premeditated intent, and belied his claims of spontaneous self-defense or excessive fear.

It is hard to see how Buckingham's testimony could have been misapplied to Gill's detriment, i.e., that the jury unfairly

inferred that a person who is divorced, or is not the world's finest parent, is more likely to commit murder than someone who is not. Nevertheless, it must be noted that the trial court appropriately advised defense counsel to craft a limiting instruction to be read to the jury prior to Buckingham's testimony to alleviate any risk that the jury would misuse the evidence of Gill's divorce and subsequent legal difficulties.⁴ 6RP 654-55. Defense counsel expressly declined to offer such an instruction. 6RP 656-57. Gill's claim to this Court of unfair prejudice should be assessed with his refusal to request a limiting instruction in mind. Cf. Athan, 160 Wn.2d at 383 (holding that the failure of a trial court to give a limiting instruction is not error when no instruction was requested, and that an appellant waives his right to claim on appeal that he was harmed by the absence of such an instruction).

3. REVERSAL IS UNWARRANTED DUE TO THE PERFORMANCE OF A WITNESS'S INTERPRETER

Harjinder Grewal testified in the State's case-in-chief over the course of several days. Although Grewal spoke English, he was given the assistance of a Punjabi interpreter at the request of

⁴ See ER 105 (providing that where evidence is admissible as to one purpose but not as to another, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly).

defense counsel. Initially, Gill's interpreter, having been offered by defense counsel, assisted Grewal. 8RP 992-93. During that day's testimony, Grewal described the events of August 28, 2012, leading up to and including the shooting, and described his relationship with Gill. At one point, the interpreter interrupted Grewal and asked the court to advise Grewal to wait until the interpreter had finished translating the prosecutor's question before answering the question. 8RP 1018.

The following day, the State informed the trial court that it had arranged for another interpreter for Grewal, so that Gill's interpreter could return to counsel table and assist the defendant as needed on a standby basis. 9RP 1115. Defense counsel had no objection. 9RP 1115. Christina Manuel, an employee of the U.S. Department of Justice, longtime professor at the Defense Language Institute, and Punjabi interpreter since 1989, was sworn in by the court and provided interpretation once Grewal retook the witness stand. 9RP 1136; 10RP 1335-36.

Grewal quickly took issue with Manuel's translation of his testimony, interjecting in English that he did not think she was interpreting his words correctly. 9RP 1140. Manuel responded by asking Grewal to speak more slowly and avoid repeating himself.

9RP 1140. Grewal continued his testimony for the day without event, other than a single instance in which Manuel and Grewal spoke in Punjabi because Manuel apparently could not understand what Grewal was saying; the confusion was rectified, and Grewal's testimony proceeded without further disruption. 9RP 1180.

On the following day, Grewal resumed direct examination, again assisted by Manuel. 10RP 1290. During a morning recess, defense counsel informed the trial court that both Grewal and Gill had complained to him that Manuel's interpretation had been inaccurate and incomplete, causing him to appear evasive. 10RP 1332. Defense counsel asked that Gill's interpreter be substituted for Manuel. 10RP 1332.

The court had concerns about defense counsel's request, insofar as using a party's interpreter for a witness raised the appearance of a potential conflict of interest. 10RP 1334. Instead, the court questioned Manuel under oath. 10RP 1335. Manuel testified that she had been accurately and truthfully interpreting for Grewal. 10RP 1335. She noted, however, that, at times, Grewal "just babbles, like extra words, which -- and I'm supposed to interpret not translate." 10RP 1335. Manuel explained that Grewal added incoherent words to his sentences, and that she did not

believe she needed to translate each and every word under such circumstances. 10RP 1337. She further complained, as had Gill's interpreter when he assisted Grewal, that Grewal started his answers before she could finish translating the attorney's questions. 10RP 1338.

The court instructed Manuel to translate every single word that Grewal uttered, and directed Grewal to wait until a question was completely translated before beginning his answers and to answer in short segments so that Manuel could interpret each word rather than be forced to paraphrase a long answer. 10RP 1343. Grewal's direct examination and cross-examination continued through the remainder of that day and the beginning of the following court day without further complaint to the court.

Gill now asks this Court to reverse his murder conviction on the ground that he was deprived of a fair trial by Manuel's performance as Grewal's interpreter. He contends that Manuel's translation work was so inadequate that it deprived him of his right to a fair trial and either amounted to structural error or non-harmless constitutional error.

Gill's claim should be rejected. He cannot demonstrate with sufficient specificity that Manuel's performance was legally deficient

so as to constitute incompetence. Nor can he establish such prejudice as to warrant reversal.

RCW chap. 2.43 provides for the arrangement of language interpreters for non-English-speaking persons. It is largely an administrative-minded chapter, and delegates the creation of a code of conduct for court interpreters to the state supreme court. See RCW 2.43.080. GR 11.2 sets forth the code of conduct, and section (b) outlines the responsibilities of the interpreter in the courtroom itself:

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.

GR 11.2(b).

Although Washington case law analyzing RCW chap. 2.43 and GR 11.2 is nearly non-existent, the subject of interpreter performance has been discussed by the courts of a number of other jurisdictions, and their assessments are instructive here.

There is a rebuttable presumption that an interpreter in the course of performing her official duty has acted regularly. State v.

Casipe, 5 Haw. App. 210, 214, 686 P.2d 28 (Haw. Ct. App. 1984),

citing State v. Van Pham, 234 Kan. 649, 675 P.2d 848 (1984).

Although an interpreter may have some difficulties translating a witness's testimony, those difficulties, without more, are not sufficient to rebut the presumption of satisfactory performance.

Casipe, 5 Haw. App. at 214, citing People v. DeLarco, 142 Cal.

App. 3d 294, 190 Cal. Rptr. 757 (1983). In addressing a claim that

translation errors deprived a defendant of his right to a fair trial,

reviewing courts apply a standard which asks whether the

translation of trial testimony was, on the whole, adequate and

accurate. State v. Her, 510 N.W.2d 218, 222 (Minn. Ct. App.

1994).

As the Supreme Court of Minnesota cogently observed:

Translation is an art more than a science, and there is no such thing as a perfect translation of [a witness's] testimony. Indeed, in every case there will be room for disagreement among expert translators over some aspects of the translation. Defense counsel, with the assistance of the defendant's own interpreter, is always free to object contemporaneously if counsel believes that the court-appointed interpreter has significantly misinterpreted or omitted parts of the [witness's] testimony.

State v. Mitjans, 324 N.W.2d 824, 832 (Minn. 1987).

The Her court held that although there is no clear standard for determining whether a translation was adequate, a key consideration is the effect of the purported errors on the defendant's ability to present a defense. Her, 510 N.W.2d at 222. Appropriately, the burden of proving on appeal that interpretation was inadequate is placed on the defendant. Id. This principle is particularly sensible where the witness and/or the defendant have the ability due to their familiarity with English to monitor the interpreter's translation and inform the court of any inconsistencies. See Gonzales v. U.S., 697 A.2d 819, 825 (D.C. 1997).

Gill fails to carry his burden of establishing that Manuel's performance was so deficient as to constitute incompetence. Aware of and utilizing his opportunity to notify the trial court of disagreement he had with Manuel's translation, Gill presented few specifics, despite his and Grewal's ability to both speak English and use Gill's own Punjabi translator, and merely complained to the court that Manuel's interpretation was causing Grewal to falsely appear evasive. The trial court questioned Manuel and concluded that the inconsistencies were due to the mechanics of the give-and-take between Grewal and Manuel as she translated the attorneys' questions into Punjabi and interpreted the witness's answers into

English, rather than any actual unfamiliarity on Manuel's part with either language or caused by her interjection of her personal mood or attitude. The trial court properly exercised its discretion in declining to find Manuel deficient. See Dang v. U.S., 741 A.2d 1039, 1045 (D.C. 1999) (applying abuse of discretion standard to review of trial court's determination of a translator's competence).

Furthermore, Gill's argument to this Court must be assessed in light of the fact that the vast majority of Grewal's testimony was interpreted without complaint, though both he and Gill had demonstrated comfort with complaining of inconsistencies. The absence of recurring complaint belies the claim that Manuel's performance was so thoroughly unprofessional that it infringed on Gill's ability to present a defense, and strongly suggests that her translation of was, on the whole, adequate and accurate.

Gill offers no authority for his proposition that *any* defect in a translator's interpretation amounts to structural error. Structural errors are a highly limited class of defects that "affect the framework within which the trial proceeds, rather than simply an error in the trial process itself." Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Such errors, which

“infect the entire trial process,” include total denial of counsel, a biased trial judge, and denial of a public trial. Neder, 527 U.S. at 8.

This Court should decline Gill’s request to find structural error here. Gill has failed to establish that the complained-of inconsistencies between Grewal’s Punjabi answers and Manuel’s English translation were anything more than isolated, limited instances that did not affect the essence of Grewal’s testimony. Rather, they were found, by the trial court after careful consideration, to be the byproduct of the difficulties Manuel faced in translating Grewal’s too-hasty, long-winded answers. To say that a small number of errors, contemporaneously recognized in a context where immediate and simple correction was afforded, so “infected the entire trial process” that no showing of prejudice is needed is fairly absurd, and runs counter to existing case law. See, e.g., United States v. Huang, 960 F.2d 1128, 1135-36 (2nd Cir. 1992) (citations omitted) (holding that deviations from word-for-word translation do not require automatic reversal); Gonzalez, 692 A.2d at 825 (requiring defendant to demonstrate prejudice).

Gill has not demonstrated with any precision how Manuel’s purported incompetence actually impacted the presentation of his defense or that he was without recourse to timely address any

concerns he had. The law does not require perfection in translation for plainly evident reasons, given that no two languages contain terms that seamlessly correspond to one another. So long as the interpreter “best conveys the meaning of the source” and avoids interposing her own moods or attitudes, she is not in violation of GR 11.2 or her obligations as established by statutory and case law. Difficulties that an interpreter may encounter in the back-and-forth of in-court translation do not rebut the presumption of competence, and the trial court here reasonably found that any discrepancies were due to challenges created, at least in part, by the witness’s behavior and choice of words. The trial court crafted a remedy that led to no further complaint.

As to Gill’s claim on appeal that Manuel’s interpretation created the “false” impression that Grewal was insincere and cagey, it is clear from the entirety of Grewal’s testimony that any deficiency in the credibility of his testimony was due to his markedly different performance when being questioned by his longtime friend’s attorney, as opposed to the prosecutor, and by the many inconsistencies between his in-court testimony and his statements to investigators. Grewal can establish neither deficient

interpretation nor resulting reversible prejudice. Accordingly, his claim should be denied.

4. THE STATE'S EVIDENCE WAS SUFFICIENT TO ESTABLISH PREMEDITATION

Gill also challenges the sufficiency of the State's evidence supporting the jury's determination that he acted with the requisite level of intent to justify conviction for murder in the first degree. See Brief of Appellant, at 35-40. His claim is meritless. The State's evidence more than adequately established motive, procurement of a weapon, and a murderous attack that can be characterized as a deliberate, excessively violent ambush.

Evidence is sufficient to support a conviction if, after viewing it in the light most favorable to the State, any rational trier of fact could have found any disputed elements proved beyond a reasonable doubt. State v. Finch, 137 Wn.2d 792, 831, 975 P.2d 967 (1999). When a defendant challenges the evidentiary sufficiency of the State's case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). Crucially, a defendant who claims

insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. Id.

The premeditated intent to cause another's death is an essential element of the crime of first-degree murder. See RCW 9A.32.030. Premeditation "must involve more than a moment in point of time." RCW 9A.32.020(1). The State must present evidence upon which the jury can reasonably conclude that the defendant formed and reflected on his intent to kill, for however short a period of time. State v. Hoffman, 116 Wn.2d 51, 82-83, 804 P.2d 577 (1991).

The general standard for reviewing a challenge to evidentiary sufficiency applies when determining whether evidence of premeditation is sufficient. Gentry, 125 Wn.2d at 597. Premeditation can be proven by circumstantial evidence. State v. Luoma, 88 Wn.2d 28, 33, 558 P.2d 756 (1977). Indeed, the essential element of intent is most often proved by such evidence, as premeditation and deliberation are mental processes that are not readily susceptible to proof by direct evidence. State v. Ginyard, 334 N.C. 155, 158, 431 S.E.2d 11 (N.C. 1993).

The Supreme Court of Washington has long recognized the value of circumstantial evidence as proof of premeditation when

that evidence has appeared in the forms of infliction of multiple wounds, the use of a weapon, stealth or surprise attack, and evidence of a motive. Gentry, 125 Wn.2d at 599, citing State v. Ollens, 107 Wn.2d 848, 853, 733 P.2d 984 (1987). Nationwide, courts have also noted other evidence as indicative of premeditation, such as the nature of the wounds inflicted, the conduct of the defendant before and shortly after the killing, and a lack of immediate provocation on the victim's part. See, e.g., State v. Thacker, 164 S.W.3d 208, 222 (Tenn. 2005); State v. Navarro, 272 Kan. 573, 35 P.3d 802 (Kan. 2001); Ginyard, 334 N.C. at 158-59.

The testimony of Gill's children, Manrit Kaur and Jagrit Gill, was sufficient alone to prove that Gill killed Harjit with premeditated intent. Manrit explained to the jury that she had not seen her father in months, and that there was no reason for him to show up at her family's home on August 28th. 4RP 335-36, 343-44, 346. She described seeing the green Mustang parked on the street outside her home when she and Harjit drove up the very long driveway from the street to her house. 4RP 289-93. Manrit invited Harjit in, but he elected to remain outside in order to feed some birds. 4RP 291. Finishing that task, he then returned to his van. 4RP 291.

Manrit then noticed the green Mustang drive up the lengthy driveway and stop directly behind the van. 4RP 292, 296.

Manrit then watched Gill get out of the Mustang, holding a gun. 4RP 296-97. He quickly moved to the driver's side of the van; yelled, "Bitch!" in a loud, angry voice; and shot Harjit multiple times at very close range. 4RP 299-301. Manrit explained that she had not heard Harjit say anything to Gill before he opened fire. 4RP 301. After shooting Harjit repeatedly, Gill then returned to the Mustang, which immediately sped away. 4RP 304, 306.

Both Manrit and her brother, Jagrit, described a very unhappy family dynamic concerning their estranged father. 4RP 328-32; 5RP 464-65. Gill believed that Harjit had committed adultery with Manrit and Jagrit's mother, which had led to their parents' divorce many years earlier. 4RP 323; 5RP 465. Gill's animosity toward Harjit was unabated by the passage of time; Gill had insisted to Jagrit that he, as the eldest son, keep Harjit away from Jagrit's mother, to the extent that he should bodily force to eject Harjit from the house if he found him there. 5RP 467-68. Gill had announced to his children that he was disowning them a few months earlier after he had seen Harjit's van parked outside their house. 4RP 331-335; 5RP 474-84.

The above-described evidence fairly allowed the jury to conclude that Gill had been gripped by hatred of Harjit for years. Manrit's testimony painted a picture of a man who lay in wait outside her home and, upon seeing Harjit's van near, stood by while Harjit drove up a very long driveway and deposited her near her front door. The car in which Gill sat then blocked Harjit's van as Harjit attempted to leave after feeding some birds. Gill walked up to Harjit's car door while carrying a gun, swore at him, and then shot him several times without any provocation whatsoever. Gill then returned to the waiting car and fled the scene.

Manrit and Jagrit's account of Gill's hatred of Harjit provided motive. Manrit's recounting of the murder described a cold-blooded ambush involving Gill's scouting of the attack site, lying in wait so Manrit could be away from Harjit, carrying his gun from the Mustang to Harjit's van, and inflicting numerous, close-range gunshots in an act that can justifiably be described as overkill. The jury was warranted in determining that Harjit's murder was not merely a spontaneous act of rage, but the execution of a thought-out, deliberated-upon calculation. Gill's argument to the contrary, which inappropriately relies in large measure on the testimony of defense witnesses, should be rejected.

5. THE PROSECUTOR'S REQUEST TO BE ALLOWED TO TREAT GREWAL AS A HOSTILE WITNESS WAS NOT A STATEMENT OF THE PROSECUTOR'S PERSONAL OPINION

Finally, Gill argues that one of the State's attorneys improperly expressed his personal opinion about the credibility of Harjinder Grewal during Grewal's direct examination. Gill contends that this occurred when the prosecutor, in response to an objection by defense counsel that he was asking Grewal a leading question, asked the trial court for permission to treat Grewal as a hostile witness. Gill maintains that the prosecutor's statement amounted to reversible misconduct. His claim is unfounded.

In order to establish prosecutorial misconduct, a defendant must prove that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial. State v. Carver, 122 Wn. App. 300, 306, 93 P.2d 947 (2004). A defendant can establish prejudice only if he shows a substantial likelihood that the misconduct affected the jury's verdict. Id.

ER 611 governs the mode of examination of witnesses at trial. The trial court is invested with the power to oversee questioning by the parties:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and

presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

ER 611(a). Generally speaking, a party conducting direct examination should ask only non-leading questions. ER 611(c). However, the trial court is invested with the authority to allow leading questions on direct examination “when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party....” ER 611(c).

The deputy prosecutor did not engage in improper conduct here. He was obligated to seek the trial court’s permission to ask leading questions by citing to the relevant rule of evidence, which specifically refers to a “hostile witness.” The prosecutor’s request was hardly inflammatory:

DEFENSE COUNSEL: Your honor, I object to that characterization. It’s improper form. And Counsel’s doing most of the testifying here. He’s leading the witness, and I object to that.

THE COURT: Counsel?

PROSECUTOR: Your Honor, as far as leading, at this point, I’m going to ask the Court to allow me to treat him as a hostile witness based on the way he’s answering my questions.

9RP 1149-50. The trial court called the morning recess, and, after some discussion, granted the State's request. 9RP 1150-57.

Gill presents no authority for the proposition that an attorney's direct citation to the language of an evidentiary rule constitutes misconduct in the form of expression of a personal opinion. This Court should decline Gill's invitation to create such a rule, as doing so would inevitably throw the entire process of objection and response into disarray.

Furthermore, Gill makes no effort to establish prejudice. Grewal's performance on the witness stand made readily clear that his account of Harjit's death was at odds with the State's theory of the case and the testimony of other witnesses. The challenged statement by the prosecutor was brief, rule-based, and unprovocative. The trial lasted several weeks and involved over three dozen witnesses, and the jury was instructed that the parties' objections and remarks were not evidence and should not be treated as such. CP 317. Under the circumstances, and in the absence of any showing of harm by Gill, it would be imprudent to hold that Gill was unfairly prejudiced by the prosecutor's response to the trial court's call for an answer to defense counsel's objection.

The prosecutor did not err, and Gill cannot demonstrate prejudice. His claim of prosecutorial misconduct should be rejected.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Jaspal Gill's conviction for first-degree murder.

DATED this 27th day of October, 2016.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 
DAVID SEAVER, WSBA# 30390
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
WSBA Office #91002

APPENDIX A

The verbatim report of proceedings consists of 22 volumes, referred to in this brief as follows:

VOLUME	DATE OF HEARING
1RP	9/22/2014
2RP	9/24/2014
3RP	9/29/2014
4RP	9/30/2014
5RP	10/1/2014
6RP	10/2/2014
7RP	10/6/2014
8RP	10/7/2014
9RP	10/8/2014
10RP	10/9/2014
11RP	10/14/2014
12RP	10/15/2014
13RP	10/16/2014
14RP	10/20/2014
15RP	10/21/2014 (Reported by Bridget O'Donnell)
16RP	10/21/2014 (Reported by Brenda Steinman)
17RP	10/22/2014 (8:44 A.M. start time)
18RP	10/22/2014 (9:16 A.M. start time)
19RP	10/23/2014
20RP	10/24/2014
21RP	10/27/2014
22RP	12/16/2014

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Suzanne Elliott, the attorney for the appellant, containing a copy of the Brief of Respondent, in STATE V. JASPAL GILL, Cause No. 72951-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

10-27-16

Date