

FILED
COURT OF APPEALS
DIVISION II

NO. 36150-7

08 OCT 22 PM 3:18

STATE OF WASHINGTON
BY  DEPUTY

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

NATHAN BRIGHTMAN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 98-1-04401-4

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. In light of the controlling authority of *State v. Ervin* and *State v. Daniels*, has defendant failed to demonstrate that his retrial on the crime of premeditated murder in the first degree violated double jeopardy?..... 1

2. Has defendant failed to show that the use of the term “victim” constituted improper opinion testimony or that the trial court abused its discretion in allowing use of the term to refer to the decedent? 1

3. Has defendant failed to show that the trial court abused its discretion in allowing evidence relevant to the defendant’s financial motive for committing the crime?..... 1

4. Has defendant has failed to show the trial court abused its discretion in denying a request for a three day mid-trial recess when the court employed other means to allow defendant time to prepare for cross-examination of a surprise witness? 1

5. When the defendant objects to an instruction in the trial court solely on the grounds that it is an incorrect statement of the law, has he failed to preserve a claim for appeal that the instruction was not supported by sufficient evidence?..... 1

6. Has defendant failed to show that he is entitled to a new trial for cumulative error, when he has failed to demonstrate that any prejudicial error occurred below?.....2

B. STATEMENT OF THE CASE.....2

1. Procedure.....2

2. Facts3

C. ARGUMENT.....6

1. UNDER THE CONTROLLING AUTHORITY OF *STATE V. ERVIN* AND *STATE V. DANIELS*, THE STATE COULD RETRY DEFENDANT ON MURDER IN THE FIRST DEGREE WITHOUT VIOLATING DOUBLE JEOPARDY AS HE REMAINED IN CONTINUING JEOPARDY FOR THIS OFFENSE.6

2. DEFENDANT HAS FAILED TO SHOW THAT THE USE OF THE TERM “VICTIM” CONSTITUTED IMPROPER OPINION TESTIMONY OR THAT THE TRIAL COURT ABUSED ITS DISCRETION IS ALLOWING THE USE OF THE TERM AT TRIAL. 13

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING EVIDENCE RELEVANT TO THE DEFENDANT’S FINANCIAL MOTIVE FOR COMMITTING THE CRIME. 18

4. DEFENDANT HAS FAILED TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A REQUEST FOR A THREE DAY MID-TRIAL RECESS WHEN THE COURT EMPLOYED OTHER MEANS TO ALLOW DEFENDANT TIME TO PREPARE FOR CROSS-EXAMINATION OF A SURPRISE WITNESS. 23

5. DEFENDANT FAILED TO PRESERVE HIS CLAIM THAT THERE WAS INSUFFICIENT FACTUAL SUPPORT FOR THE GIVING OF A FIRST AGGRESSOR INSTRUCTION BY FAILING TO OBJECT ON THIS BASIS IN THE TRIAL COURT.....28

6. DEFENDANT HAS FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.....32

D. CONCLUSION.36

Table of Authorities

State Cases

<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 577, 854 P.2d 658 (1993)	13, 14
<i>City of Tacoma v. Bishop</i> , 82 Wn. App. 850, 861, 920 P.2d 214 (1996)	23
<i>In re Lord</i> , 123 Wn.2d 296, 332, 868 P.2d 835 (1994)	33
<i>In re PRP of Higgins</i> , 152 Wn.2d 155, 95 P.3d 330 (2004)	6
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 26, 482 P.2d 775 (1971)	23
<i>State v. Alexander</i> , 64 Wn. App. 147, 822 P.2d 1250 (1992).....	35
<i>State v. Badda</i> , 63 Wn.2d 176, 385 P.2d 859 (1963).....	35
<i>State v. Bobic</i> , 140 Wn.2d 250, 260, 996 P.2d 610 (2000)	6
<i>State v. Boot</i> , 89 Wn. App. 780, 789, 950 P.2d 964 (1998).....	19
<i>State v. Brett</i> , 126 Wn.2d 136, 204, 892 P.2d 29 (1995)	23
<i>State v. Brightman</i> , 155 Wn.2d 506, 525 n.13, 122 P.3d 150 (2005)	2, 29
<i>State v. Callahan</i> , 87 Wn. App. 925, 932-33, 943 P.2d 676 (1997).....	30
<i>State v. Coe</i> , 101 Wn.2d 772, 789, 681 P.2d 1281 (1984)	33, 35
<i>State v. Colwash</i> , 88 Wn.2d 468, 470, 564 P.2d 781 (1977)	30
<i>State v. Corrado</i> , 81 Wn. App. 640, 645, 915 P.2d 1121 (1996).....	7
<i>State v. Cruz</i> , 77 Wn. App. 811, 814-815, 894 P.2d 573 (1995)	13
<i>State v. Daniels</i> , 160 Wn.2d 256, 156 P.3d 905 (2007).....	1, 6, 8, 10, 12
<i>State v. Davis</i> , 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)	29

<i>State v. Demery</i> , 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).....	13, 14, 17
<i>State v. Descoteaux</i> , 94 Wn.2d 31, 37, 614 P.2d 179 (1980), overruled on other grounds by <i>State v. Danforth</i> , 97 Wn.2d 255, 257, 643 P.2d 882 (1982)	19
<i>State v. Eller</i> , 84 Wn.2d 90, 96, 524 P.2d 1088 (1975), overruled on other grounds, <i>State v. Gosby</i> , 85 Wn.2d 758, 539 P.2d 680 (1975)	23, 24
<i>State v. Ervin</i> , 158 Wn.2d 746, 147 P.3d 567 (2006)	1, 6, 8, 9, 10, 12
<i>State v. Fankhouser</i> , 133 Wn. App. 689, 693, 138 P.3d 140 (2006)	19
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)	29
<i>State v. Gocken</i> , 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).....	7
<i>State v. Guloy</i> , 104 Wn.2d 412, 421, 705 P.2d 1182 (1985).....	18
<i>State v. Harris</i> , 62 Wn.2d 858, 385 P.2d 18 (1963).....	30
<i>State v. Hurd</i> , 127 Wn.2d 592, 594, 902 P.2d 651 (1995).....	23
<i>State v. Jackson</i> , 70 Wn.2d 498, 424 P.2d 313 (1967).....	30
<i>State v. Johnson</i> , 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998)	33, 34
<i>State v. Kennard</i> , 101 Wn. App. 533, 543, 6 P.3d 38, <i>review denied</i> , 142 Wn.2d 1011 (2000).....	20
<i>State v. Kinard</i> , 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979).....	34
<i>State v. Kitchen</i> , 110 Wn.2d 403, 409, 756 P.2d 105 (1988).....	33
<i>State v. Lucky</i> , 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by <i>State v. Berlin</i> , 133 Wn.2d 541, 544, 947 P.2d 700 (1997)	28-29
<i>State v. Matthews</i> , 75 Wn. App. 278, 286-87, 877 P.2d 252 (1994)	20, 21, 22
<i>State v. Olmedo</i> , 112 Wn. App. 525, 531, 49 P.3d 960 (2002).....	13, 14

<i>State v. Ortiz</i> , 119 Wn.2d 294, 308, 831 P.2d 1060 (1992)	14
<i>State v. Powell</i> , 126 Wn.2d 244, 259-60, 893 P.2d 615 (1995)	19
<i>State v. Rahier</i> , 37 Wn. App. 571, 575, 681 P.2d 1299 (1984)	30
<i>State v. Rehak</i> , 67 Wn. App. 157, 162, <i>review denied</i> , 120 Wn.2d 1022 (1992).....	18, 19
<i>State v. Riley</i> , 137 Wn.2d 904, 909, 976 P.2d 624 (1999)	28, 29
<i>State v. Russell</i> , 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), <i>cert. denied</i> , 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).....	33
<i>State v. Stevens</i> , 58 Wn. App. 478, 498, 795 P.2d 38, <i>review denied</i> , 115 Wn.2d 1025, 802 P.2d 38 (1990).....	34, 35
<i>State v. Swan</i> , 114 Wn.2d 613, 658, 700 P.2d 610 (1990)	18
<i>State v. Thetford</i> , 109 Wn.2d 392, 397, 745 P.2d 496 (1987)	19
<i>State v. Thompson</i> , 47 Wn. App. 1, 7, 733 P.2d 584 (1987)	29
<i>State v. Torres</i> , 16 Wn. App. 254, 554 P.2d 1069 (1976).....	35
<i>State v. Walker</i> , 136 Wn.2d 767, 771, 966 P.2d 883 (1998).....	28
<i>State v. Wall</i> , 52 Wn. App. 665, 679, 763 P.2d 462 (1988).....	34
<i>State v. Watson</i> , 69 Wn.2d 645, 651, 419 P.2d 789 (1966)	24
<i>State v. Whalon</i> , 1 Wn. App. 785, 804, 464 P.2d 730 (1970).....	34
<i>Trueax v. Ernst Home Ctr., Inc.</i> , 124 Wn.2d 334, 339, 878 P.2d 1208 (1994)	30

Federal and Other Jurisdictions

<i>Allen v. State</i> , 644 A.2d 982, 983 n.1 (Del. 1994)	17
<i>Brown v. United States</i> , 411 U.S. 223, 232, 93 S. Ct 1565, 36 L. Ed. 2d 208 (1973).....	32-33
<i>Jackson v. State</i> , 600 A.2d 21 (Del. 1991)	16, 17

<i>Mauk v. State</i> , 91 Md. App. 456, 605 A.2d 157, 170-71 (Md. App. 1992).....	10
<i>Neder v. United States</i> , 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999).....	32
<i>People v. Fields</i> , 13 Cal. 4th 289, 914 P.2d 832 (Cal. 1996)	10
<i>Richardson v. Marsh</i> , 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987).....	8
<i>Richardson v. United States</i> , 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984).....	7
<i>Rose v. Clark</i> , 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).....	32, 33
<i>State v. Klinger</i> , 698 N.E.2d 1199, 1202 (Ind. App. 1998).....	10
<i>United States v. Allen</i> , 755 A.2d 402, 410 (D.C. 2000), <i>cert. denied</i> , 533 U.S. 932, 121 S. Ct. 2556, 150 L. Ed. 2d 722 (2001).....	10
<i>United States v. Bordeaux</i> , 121 F.3d 1187 (8th Cir. 1997)	9
<i>United States v. Williams</i> , 449 F.3d 635 (5th Cir. 2006).....	10
<i>Weeks v. Angelone</i> , 528 U.S. 225, 235, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000).....	8

Constitutional Provisions

Fifth Amendment, United States Constitution	10
---	----

Rules and Regulations

CrR 6.15.....	30
ER 103	18
ER 401	19

ER 40319

ER 70413

Other Authorities

Webster's Third New International Dictionary 2550 (1993).....17

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. In light of the controlling authority of *State v. Ervin* and *State v. Daniels*, has defendant failed to demonstrate that his retrial on the crime of premeditated murder in the first degree violated double jeopardy?
2. Has defendant failed to show that the use of the term “victim” constituted improper opinion testimony or that the trial court abused its discretion in allowing use of the term to refer to the decedent?
3. Has defendant failed to show that the trial court abused its discretion in allowing evidence relevant to the defendant’s financial motive for committing the crime?
4. Has defendant has failed to show the trial court abused its discretion in denying a request for a three day mid-trial recess when the court employed other means to allow defendant time to prepare for cross-examination of a surprise witness?
5. When the defendant objects to an instruction in the trial court solely on the grounds that it is an incorrect statement of the law, has he failed to preserve a claim for appeal that the instruction was not supported by sufficient evidence?

6. Has defendant failed to show that he is entitled to a new trial for cumulative error, when he has failed to demonstrate that any prejudicial error occurred below?

B. STATEMENT OF THE CASE.

1. Procedure

This is the second time this case has been before the appellate courts.

On October 12, 1998, appellant, Nathan Brightman (defendant), was charged in Pierce County Cause Number 98-1-0440104, with murder in the first degree and unlawful possession of a firearm. CP 1-6. Defendant pleaded guilty to the firearms charge. CP 7-16. He went to trial on the homicide charge; the jury could not reach agreement on the charge of murder in the first degree, but found defendant guilty of murder in the second degree. CP 17, 18. The conviction for second degree murder was reversed on appeal for violation of the defendant's right to a public trial during jury selection. CP 21-46; *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005).

On remand, defendant again faced trial on the charge of premeditated murder in the first degree. CP 118-119, 390-423. The second jury could not reach agreement on this charge and found defendant guilty of intentional murder in the second degree. CP 425, 426. It also

found defendant was armed with a firearm in the commission of this crime. CP 429.

The court sentenced defendant to a high end standard range sentence of 275 months on the murder plus an additional 60 months for the firearm enhancements for a total sentence of 335 months. CP 430-442. The court sentenced defendant to a standard range sentence of 48 months on the firearm charge to run concurrently. *Id.*

From entry of this judgment, defendant filed a timely notice of appeal. CP 443-456.

2. Facts

October 1, 1998, defendant approached Dexter Villa and Mark Skaggs in the parking lot of Tacoma Community College and asked both for a ride; according to defendant the requested ride was to Gig Harbor. RP 1100-1103, 1144-1145, 1181-1184. Skaggs testified that defendant asked for a ride for “a couple of blocks” and pointed in a direction toward the Narrows Plaza, which is not in the direction of Gig Harbor. RP 1184. Skaggs told defendant he couldn’t because he had a class, but really it was because the situation did not seem right to him; as he left he heard the defendant working on Villa to give him a ride. RP 1184-1186. Villa agreed, but instead of driving to Gig Harbor, the pair ended up at a parking area near Titlow Beach. RP 793-794, 1145, 1597. According to witnesses, after Villa parked, the men began arguing inside the car. RP

794-795, 1598-1600. Then defendant got out of the car and headed toward the driver's side. RP 796. Villa jumped out of the car, and the fistfight ensued. RP 796-797, 817. One witness testified that each man remained on his feet, and it seemed to be an even fight. RP 798. Another testified that Villa looked like he was trying to get away, but defendant was holding onto Villa's shirt. RP 1602-1603. Each witness saw defendant shoot Villa. RP 798-799, 911-917, 1603-1604. Defendant looked over at one of the witnesses in the parking lot, pulled his coat over his face, got in Villa's car, and drove away. RP 803-805.

Defendant's former testimony¹ was presented in the State's case in chief. RP 1032. According to this evidence, when defendant and Villa were driving away from the community college, he gave Villa \$7 for gas. RP 1066-1067. The conversation turned to parties and drugs; defendant claims he gave Villa \$20 to get him some marijuana. RP 1067. He testified that Villa then drove to the parking area near Titlow Beach, parked the car, and ordered defendant to get out of his car. RP 1067-1070. Defendant replied that he wanted his money back. RP 1070. Defendant testified that when Villa leaned across him to open the passenger door, he shoved Villa's hand away and a fight ensued. RP 1071. Defendant claims that he yelled "help me," tried to fight back, and eventually got out of the

¹ The defendant did not testify at the second trial; any references to the defendant's testimony pertains to the former testimony adduced in the State's case in chief.

car. RP 1071-1072. Defendant stated that Villa also got out of the car and the fight continued. RP 1072- 1073. Defendant testified that both men threw punches. RP 1073. Defendant admitted that he resumed the fight once both men were outside of the car, and he had no fear of Villa during the fight. RP 1161- 1163. Villa was unarmed. RP 1163.

Defendant testified that he eventually drew a gun, intending only to club Villa with it. RP 1073-1074, 1099. Defendant hit Villa with the gun twice, and the second time the gun went off; Villa fell to the ground. RP 1074-1075. Defendant testified that he never pointed the gun at Villa's head. RP 1098-1099. Defendant testified that he panicked as he thought because the clip was in his pocket that the gun was not loaded. RP 1075-1076. Defendant testified that he retrieved his money from Villa, threw his coat over his face, got in Villa's car, and drove away. RP 1076-1077.

Defendant drove across the Tacoma Narrows Bridge. RP 1078. He tossed the gun and the clip out of the sunroof and off the bridge. RP 1078. They were never recovered. A state trooper he tried to stop defendant's car, and defendant started to pull over but then sped away. RP 1105-1106. Defendant indicated that he parked the car on a gravel road, threw the keys in the bushes, and ran home. RP 1078-1079. Later that night, defendant's friends returned to Villa's car and stole his stereo, CDs, and other items. RP 1082-1084, 1134-1135.

When Mark Skaggs heard of Villa's death, he contacted the police, gave a statement, and identified a photo of the defendant from a montage. RP 1187- 1188. The police eventually connected defendant to the shooting, and he was arrested. RP 1085.

C. ARGUMENT.

1. UNDER THE CONTROLLING AUTHORITY OF *STATE V. ERVIN* AND *STATE V. DANIELS*, THE STATE COULD RETRY DEFENDANT ON MURDER IN THE FIRST DEGREE WITHOUT VIOLATING DOUBLE JEOPARDY AS HE REMAINED IN CONTINUING JEOPARDY FOR THIS OFFENSE.

The constitutional prohibitions against double jeopardy protect a defendant from (1) a second prosecution following acquittal; (2) a second prosecution following conviction; and 3) multiple punishments for the same offense imposed in the same proceeding. *State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). Washington's double jeopardy clause offers the same scope of protection as the federal double jeopardy clause. *In re PRP of Higgins*, 152 Wn.2d 155, 95 P.3d 330 (2004); *State v.*

Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Before a prosecution will be barred under this provision three elements must be met: “(a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy for the same offense.” **State v.**

Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). The first two elements determine “former” jeopardy and must be met before there can be “double” jeopardy. *Id.* When “former” jeopardy is established, the third element determines “double” jeopardy. *Id.*

Assuming a court has jurisdiction, jeopardy will attach in a jury trial when the jury is sworn and, in a bench trial, when the first witness is sworn. *Id.* at 646. Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final, but not with a conviction that a defendant successfully appeals. *Id.* at 646-647. A second trial following a successful appeal is generally not barred because the defendant’s appeal is part of the initial jeopardy or “continuing jeopardy.” *Id.* at 647. Thus, the successful appeal of a judgment of conviction will not prevent further prosecution on the same charge unless the reversal was based upon insufficiency of the evidence. *Id.* at 647-648. Similarly, a retrial following a “hung jury” does not normally violate the Double Jeopardy Clause because this is another instance of continuing jeopardy. **Richardson v. United States**, 468 U.S. 317, 324, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984).

In *State v. Ervin*, 158 Wn.2d 746, 147 P.3d 567 (2006) and *State v. Daniels*, 160 Wn.2d 256, 156 P.3d 905 (2007), the Washington Supreme Court analyzed whether a verdict form on a greater charge left blank under “unable to agree” instructions constituted an implied acquittal of that charge when the jury returns a verdict on a lesser charge. It held that when a jury is instructed using “unable to agree” instructions and leaves a blank verdict form on a greater charge while convicting on a lesser offense, that the blank jury form is not equivalent to an implied acquittal on the greater offense. *Ervin*, 158 Wn.2d 756-757; *Daniels*, 160 Wn.2d at 264, n.4 (applying *Ervin* as controlling authority). The court in *Ervin* went on to hold that the conviction on the lesser offense will bar retrial on the greater offense unless and until that lesser conviction is overturned on appeal. 158 Wn.2d at 757-758.

The *Ervin* analysis begins with a well established principle – well established with the United States Supreme Court as well as in Washington - that a jury is presumed to follow its instructions. *Weeks v. Angelone*, 528 U.S. 225, 235, 120 S. Ct. 727, 145 L. Ed. 2d 727 (2000); *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). The Court in *Ervin* noted that the jury was instructed to leave the verdict forms blank if it was unable to agree on a verdict for each particular charge. Consequently, it was a logical conclusion that the blank verdict forms A and B in that case meant that the jury could not agree on a

verdict for the crimes of aggravated murder in the first degree or attempted murder in the first degree. This Court went on to hold:

The instructions and verdict forms are a part of the record. Both the United States Supreme Court and this court have found that “where a jury ha[s] not been silent as to a particular count, but where, on the contrary, a disagreement is formally entered on the record,” the implied acquittal doctrine does not apply. Therefore, regardless of any inquiry by the trial court, the blank verdict forms indicate on their face that the jury was unable to agree. Because the jurors were unable to agree, we cannot consider them to have acquitted Ervin of the greater charges. Thus, Ervin has no acquittal operating to terminate jeopardy.

State v. Ervin, 158 Wn.2d at 756-757 (citations to authority and the record omitted). Defendant fails to cite any United States Supreme Court precedent which would interfere with the analysis set forth in *Ervin*.

The Eighth Circuit Court of Appeals came to a similar conclusion as the *Ervin* court. In *United States v. Bordeaux*, 121 F.3d 1187 (8th Cir. 1997), the trial court submitted the case to the jury with instructions on the greater offense of attempted aggravated sexual abuse as well as on the lesser included offense. The jury was given an “unable to agree” type instruction that read:

If your verdict under these instructions is not guilty, or if, after all reasonable efforts you are unable to reach a verdict, you should record that decision on the verdict form and go on to consider whether defendant is guilty of the crime of abusive sexual contact under this instruction.

United States v. Bordeaux, 121 F.3d 1187, 1190 (8th Cir. 1997). When it could not agree on the greater charge, the jury wrote, as instructed, on the

verdict form for that offense that “[a]fter all reasonable efforts, we, the jury, were unable to reach a verdict on the charge ‘Attempted Aggravated Sexual Abuse.’” *Id.* at 1192. The jury went on to convict Bordeaux of the lesser charge. When Bordeaux obtained a reversal of the conviction on the lesser offense, the issue arose as to whether he could be retried on the greater offense. The Eighth Circuit held that the government could proceed on the greater charge as the record showed that the jury had been unable to agree on the greater charge. *Id.* at 1193. *See also United States v. Williams*, 449 F.3d 635 (5th Cir. 2006)(where record shows the jury was unable to reach an agreement, blank jury form does not preclude retrial).

Other jurisdictions have come to similar conclusions. *United States v. Allen*, 755 A.2d 402, 410 (D.C. 2000), *cert. denied*, 533 U.S. 932, 121 S. Ct. 2556, 150 L. Ed. 2d 722 (2001); *Mauk v. State*, 91 Md. App. 456, 605 A.2d 157, 170-71 (Md. App. 1992); *State v. Klinger*, 698 N.E.2d 1199, 1202 (Ind. App. 1998); *see also People v. Fields*, 13 Cal. 4th 289, 914 P.2d 832 (Cal. 1996)(concluding that the Fifth Amendment of the United States Constitution does not compel application of the doctrine of implied acquittal in every case in which the jury returns a verdict of guilty on the lesser included, but determining that independent state grounds prevented retrial on greater offense).

Here, the first trial court gave the unable to agree form of instruction nearly identical to those used in the *Ervin* and *Daniels* cases.

The first trial court's instruction stated, in the relevant part:

When completing the verdict forms, you will consider the crime of Murder in the First Degree If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict for Murder in the First Degree, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B or C. If you (1) unanimously find the defendant not guilty of the crime of Murder in the First Degree, or (2) if after full and careful consideration of the evidence, you cannot agree as to Premeditated Murder in the First Degree, then you will consider the lesser crimes of Murder in the Second Degree and Manslaughter in the First Degree.

CP 477-505, Instruction No. 25. The jury in defendant's first trial returned Verdict Form A looking as follows:

We, the jury, find the defendant _____
(Not Guilty or Guilty) of the crime of Murder in the First Degree as charged in Count One.

PRESIDING JUROR

CP 17. The first jury completed Verdict Form B as follows:

We, the jury, having found the defendant: (1) not guilty of the crime of Murder in the First Degree, or (2) having found the defendant not guilty of the crime of Felony Murder in the first degree, and being unable to unanimously agree as to Premeditated Murder in the first

Degree, find the defendant Guilty (Not Guilty or Guilty) of the lesser included crime of Murder in the Second Degree.

[Signature of presiding juror]
PRESIDING JUROR

CP 18. This shows that the first jury after a “full and careful consideration of the evidence” was unable to reach a unanimous agreement on the charge of murder in the first degree so it returned Verdict form A with an empty blank rather than filling it with the words “not guilty” or “guilty.” The first jury expressed its inability to agree on that charge in accordance with the instructions. Under the controlling authority of *Ervin* and *Daniels*, this is a sufficient indication of jury deadlock to keep defendant in continuing jeopardy on the charge of murder in the first degree if his conviction for murder in the second degree was reversed on appeal. Defendant later succeeded in challenging his conviction for murder in the second degree and, therefore, it was permissible for the State to retry him on the charge of premeditated murder on retrial. CP 21-46.

Ervin and *Daniels* are controlling authority on this issue.

Defendant’s claim that double jeopardy was violated when he was retried on the charge of premeditated murder in the first degree is without merit.

2. DEFENDANT HAS FAILED TO SHOW THAT THE USE OF THE TERM “VICTIM” CONSTITUTED IMPROPER OPINION TESTIMONY OR THAT THE TRIAL COURT ABUSED ITS DISCRETION IS ALLOWING THE USE OF THE TERM AT TRIAL.

To determine “whether testimony constitutes an impermissible opinion on the defendant’s guilt” the court looks to the circumstances of each case. *State v. Olmedo*, 112 Wn. App. 525, 531, 49 P.3d 960 (2002)(citing *State v. Cruz*, 77 Wn. App. 811, 814-815, 894 P.2d 573 (1995)). In doing this, courts should consider factors that “include the type of witness, the nature of the charges, the type of defense and the other evidence.” *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)(citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

Generally, testimony given by lay and expert witness may not directly or by inference refer to defendant’s guilt. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)(citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). But, “an opinion is not improper merely because it involves ultimate factual issues.” *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)(citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993)(citing ER 704)).

In deciding whether to admit evidence, including testimony, “trial courts are afforded broad discretion.” *State v. Olmedo*, 112 Wn. App.

525, 530, 49 P.3d 960 (2002)(citing *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001); *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). “A trial court’s decision to admit or deny evidence will be upheld unless the appellant can show an abuse of discretion.” *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)(citing *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001)).

Defendant alleges that the court committed reversible error by allowing the prosecutor and witnesses to refer to the decedent as a “victim.” He contends that these references “invaded the province of the jury and constituted improper opinions on the defendant’s guilt.” The record shows that prior to opening statements defense counsel moved to exclude the use of the term “victim” to refer to Mr. Villa but did not provide the court with any case authority to support his request. RP 595, 600. The Court indicated that it preferred Mr. Villa be referred to by name, but did not preclude the State from using the term “victim.” RP 600. When the State began to adduce evidence in its case in chief, the witnesses used the term “victim” to reference Mr. Villa on several occasions without objection from the defense. RP 632, 633, 634, 638. 672. 673, 676, 677. The next day, defense counsel brought a motion for mistrial arguing that three pages of the transcript from the first trial made it “look like” the trial court in the first court ruled that the term should not

be used. RP 751-752. The court denied the motion for mistrial analyzing the situation as follows:

COURT: Let me be clear ...that my concern was that pursuant to arguments by the defense that the term “victim” not be used as a legal conclusion, and that’s what I think would be prohibited, and a legal conclusion as to Mr. Brightman’s guilt. And in this particular case, I don’t believe that it is inaccurate to say the Mr. Villa is a victim of a shooting. In fact it is not disputed. Whether it’s accidental or not has yet to be proved, just like a person that was injured in an accident would be an accident victim, although that doesn’t lead to a legal conclusion as to who’s at fault. So my ruling stands. ... [A]s I indicated yesterday, that my preference is to refer to Mr. Villa as Mr. Villa. I think that’s the most accurate, and I think that’s the most respectful; however, to the extent that the term “victim” is used and not to draw a legal conclusion as to the guilt of Mr. Brightman, my ruling stands and the motion for mistrial is denied.

RP 756-757; *see also* RP 1201-1203 (discussion out of the presence of the jury regarding narration on a videotape and a defense objection to use of the term “victim” in the narration; court indicates that term “victim” is not being used on tape in a way to indicate a legal conclusion so there is nothing improper). These portions of the record indicate that any use of the term “victim” as a legal conclusion would be improper but any use of the term referring the Mr. Villa as a “victim” of a shooting would not be objectionable or improper. After making this ruling, witnesses referred to Villa as a “victim” a few more times in several hundred pages of transcript. RP 871-872, 951, 1175, 1255, 1356, 1819, 1842, 2048. As

Defendant was given a standing object to the use of the term, a claim of error has been preserved on these later instances. RP 758.

Defendant does not argue that any use of the term “victim” at trial constituted a “legal conclusion” in violation of the trial court’s ruling. Rather defendant contends that *any* use of the term “victim” constitutes reversible error as it is improper opinion testimony. He cites to no Washington case holding that witnesses referring to a deceased person as a “victim” is improper. The State cannot find any Washington case holding that this is improper.

Defendant cites only one case in which a court criticized the use of the term “victim” during the taking of testimony. *See* Appellant’s Brief at p. 26, citing *Jackson v. State*, 600 A.2d 21 (Del. 1991). Jackson was charged with two counts of unlawful sexual intercourse in the first degree. He admitted that he and the complaining witness had sexual intercourse, but claimed it was consensual. He did not object at trial when the prosecutor referred to the woman as “the victim.” After being convicted, however, he argued that referring to the complaining witness as the victim conveyed to the jury a conclusion of guilt because calling her a victim assumed that the sexual acts were non-consensual. The Supreme Court of Delaware held that “the term should be avoided in the questioning of witnesses in situations where consent is an issue,” but did not overturn the conviction because the use of the term did not constitute plain error and there was no objection at trial. *Jackson*, 600 A.2d at 24-25. The

Delaware court has since stated that the statement in *Jackson* regarding use of the term “victim” was limited to rape cases where consent is the sole defense. *Allen v. State*, 644 A.2d 982, 983 n.1 (Del. 1994). In sum, defendant asks this court to rely upon a Delaware decision to find error even though the Delaware Supreme Court has indicated that *Jackson* is limited to sex offense crimes which is not apposite here.

While there is no Washington case authority addressing whether use of the term “victim” constitutes improper opinion testimony, there is Washington authority setting forth guidelines as to how to assess whether testimony constitutes improper opinion testimony. The factors the court should examine are the type of witness, the nature of the charges, the type of defense and the other evidence. *State v. Demery*, 144 Wn.2d at 759. Defendant does not address this standard or argue how the ruling below constitutes an abuse of discretion under *Demery*.

The State submits that using the term “victim” under the facts presented here is not the same as expressing an opinion that the defendant was guilty of a crime. Under the common dictionary definition of the term “victim” means “someone put to death [or harmed] ...by another;” the entry states further that “victim applies to anyone who suffers either as a result of ruthless design or incidentally or accidentally.” *Webster's Third New International Dictionary* 2550 (1993). In this case Dexter Villa died from a gunshot wound to his head; describing him as a “victim” does not indicate that anyone is guilty of a crime with regard to his death. It is not

surprising that a police officer, responding to a report of a shooting, might refer to a person lying in the street with a gunshot wound to the head as “the victim” even though he has no information about the events that led to the shooting. RP 627- 632. The chances are remote that a jury would interpret the use of the term “victim” in these circumstances as a comment on the defendant’s guilt. Whether or not Villa was injured by accident, in self-defense, or was injured unlawfully, he was a victim. The trial court acted well within its discretion in holding that the manner in which the term was being used did not constitute improper opinion testimony. Defendant has failed to demonstrate an abuse of discretion.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING EVIDENCE RELEVANT TO THE DEFENDANT’S FINANCIAL MOTIVE FOR COMMITTING THE CRIME.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court’s decision will not be reversed on appeal absent an abuse of

discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.” ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

Neither the State nor the defendant may impeach a witness on a collateral issue. *State v. Descoteaux*, 94 Wn.2d 31, 37, 614 P.2d 179 (1980), *overruled on other grounds by State v. Danforth*, 97 Wn.2d 255, 257, 643 P.2d 882 (1982); *State v. Fankhouser*, 133 Wn. App. 689, 693, 138 P.3d 140 (2006). An issue is collateral if it is not admissible independently of the impeachment purpose. *Descoteaux*, 94 Wn.2d at 37-38.

Motive is the impulse that tempts or induces a mind to commit a crime. *State v. Powell*, 126 Wn.2d 244, 259-60, 893 P.2d 615 (1995); *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964 (1998). Evidence of a defendant’s financial condition may be relevant to showing motive. *State*

v. *Matthews*, 75 Wn. App. 278, 286-87, 877 P.2d 252 (1994); *State v. Kennard*, 101 Wn. App. 533, 543, 6 P.3d 38, *review denied*, 142 Wn.2d 1011 (2000)(evidence of defendant's bankruptcy and finances admitted to show motive to commit robberies; court find that while such evidence is not always admissible, there was no showing that court abused its discretion under the particular facts of this case). In *Matthews*, the defendant was convicted of first degree murder. *Matthews*, at 279. The State's theory at trial was that the murder occurred when the defendant, a financially pressured man, attempted a robbery. *Id.* at 284. The trial court allowed testimony concerning the defendant's financial situation and recent bankruptcy to show motive for the crime. *Matthews*, 75 Wn. App. at 282-83.

In this case the State presented a redacted² version of the defendant's former testimony from the first trial in its case in chief. RP 1032-1166. The jury heard defendant's direct and cross- examinations, although the information was presented in such a manner so as to not inform the jury of these demarcations. RP 997-1023, 1089. The former testimony included statements from the defendant that he was working on and off for Owens Painting Company in September/October, 1998, and that he did not go to work on October 1, 1998 so that he could visit his

² The testimony was redacted to deleted phrasing that would inform the current jury that this testimony occurred in an earlier trial. RP 997-1023.

grandmother in the hospital. RP 1033, 1039, 1089. Defendant indicated that this was the Ron Owens Painting and Construction Company with an office in University Place. RP 1089. Later he indicated that he was working regularly for a couple days a week and was paid in cash. RP 1165-1166. He also testified regarding his financial situation and presented his bank statement showing that in October 1998 he had \$36.28 in his Seafirst account. RP 1037-1038, 1090. On the day of the crime, defendant tried to withdraw \$50 from his account but discovered that he did not have enough in the account so he withdrew \$40 instead. RP 1057-1058. Defendant testified that he did not have a car in October 1998 as he had sold his Camaro. RP 1037. He also testified that he had taken in roommates because he needed help paying the rent. RP 1034. None of this evidence is challenged on appeal.

The State also called Ronald Owens to the stand to testify that he owned Owens painting, that he was responsible for hiring and firing of workers and that he knew all of the employees that worked for him in September/October 1998; he testified that he did not know the defendant and that the defendant had never worked for him. RP 1238-1239. Defendant unsuccessfully tried to prevent the State from calling Mr. Owens to the stand arguing that his testimony was impeachment on a collateral matter. RP 125-132, 451-463. The Court found that the case of *State v. Matthews, supra*, was analogous to the defendant's situation and

that Mr. Owens' testimony was relevant as to whether the defendant's financial situation provided him with a motive for robbery.

The evidence adduced below showed that defendant had to take in roommates to help with his rent, that he had sold his car, and that, on the day of the crime, he had tried to withdraw more money than what was available in his account. Defendant had previously testified that he was employed by Owens, thereby representing that he had a legitimate source of income. Mr. Owens testimony was relevant to refute defendant's claim of a legitimate source of income. A jury might not find an empty bank account probative of a motive for robbery if it believed that defendant has an expectation of a paycheck. If the jury believed Mr. Owens testimony, it would conclude that no such expectation of paycheck existed and that defendant was down to the last of his funds.

Based on the evidence that was before the jury regarding defendant's financial situation, defendant cannot show that the trial court abused its discretion in admitting Owens's testimony. The trial court considered the holding of *Matthews* and found that case analogous to defendant's. This shows a proper exercise of discretion.

4. DEFENDANT HAS FAILED TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING A REQUEST FOR A THREE DAY MID-TRIAL RECESS WHEN THE COURT EMPLOYED OTHER MEANS TO ALLOW DEFENDANT TIME TO PREPARE FOR CROSS-EXAMINATION OF A SURPRISE WITNESS.

An appellate court reviews a trial court's denial of a continuance for an abuse of discretion. *State v. Hurd*, 127 Wn.2d 592, 594, 902 P.2d 651 (1995); *State v. Brett*, 126 Wn.2d 136, 204, 892 P.2d 29 (1995). An appellate court will reverse a trial court's discretionary decision only if it is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. See *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In exercising its discretion, the trial court may consider various factors including diligence, due process, the need for an orderly procedure, the possible effect on the trial, and whether prior continuances were granted. *City of Tacoma v. Bishop*, 82 Wn. App. 850, 861, 920 P.2d 214 (1996). There are no litmus tests to determine whether a denial of continuance deprives a criminal defendant of a fair trial; the reviewing court must examine the circumstances presented in each case. *State v. Eller*, 84 Wn.2d 90, 96, 524 P.2d 1088 (1975), *overruled on other grounds*, *State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975). Factors properly considered include surprise, diligence, materiality, redundancy, due process and the maintenance of orderly procedures. *Eller*, 84 Wn.2d at 95. Concern about the impact of the delay upon the jury is a worthwhile

objective, but efficiency and the conservation of the time of the court should not override a defendant's rights on an important point. *State v. Watson*, 69 Wn.2d 645, 651, 419 P.2d 789 (1966)(finding an abuse of discretion in denying a continuance so that a material defense witness could be located when defense counsel had acted diligently to secure his attendance). The trial court's ruling denying a continuance will not be reversed unless the defendant can demonstrate prejudice or that the result of the trial would have been different had the motion been granted. *State v. Eller*, 84 Wn.2d at 95.

Defendant contends that the trial court abused its discretion by denying him a requested mid trial continuance or recess in order to contend with some newly discovered evidence. The facts surrounding this event are as follows:

On February 7, 2007, the State was near the end of its case in chief. RP 1673. The prosecutor indicated that the night before he listened to a voicemail from Michelle Ramirez³ who was the mother of defendant's two children. RP 1682-1683. She indicated that she had information⁴ regarding the gun that had been used to shoot Dexter Villa and defendant's

³ She was known as Michelle Ramirez in 1998 and Michelle Vickery in 2007.

⁴ The offer of proof regarding the substance of Ms. Ramirez's testimony was that she would testify that a gun, identical in description to the one used to shoot Villa, had been in the defendant's possession for about a year prior to the shooting and that he regularly carried guns which would contradict the defendant's former testimony that he had had the gun for a brief period of time prior to the shooting. RP 1681-1682.

ownership of that gun. *Id.* A detective had made several attempts to contact Ms. Ramirez back in 1998 and she had not been cooperative. RP 1682. She was not called as a witness in the first trial and the prosecution had not been intending to call her in the second trial until she revealed her knowledge of the defendant's ownership of the gun used to shoot Villa in the voicemail left on February 6, 2007. RP 1683.⁵ The prosecutor sent an email to opposing counsel that night regarding this new information and had Ms. Ramirez present for a defense interview the morning of Wednesday, February 7, 2007. RP 1683.

Defense counsel asked the court to not allow Ms. Ramirez to testify or, in the alternative, to recess the case until the following Monday so he could find witnesses to impeach her. RP 1674-1678. The State contended that defense counsel had everything he needed to conduct a cross-examination of Ms. Ramirez and that he could call impeachment witnesses in the defense case which was expected to cover several court days, giving him roughly a week to subpoena witnesses. RP 1684. The court responded that it appeared from defense counsel arguments regarding the need for a continuance that counsel was prepared to conduct a cross-examination of Ms. Ramirez. RP 1686-1687. The trial court indicated that it would allow the defense to recall Ms. Ramirez as a hostile

⁵ This page of the verbatim report of proceedings incorrectly attributes statements made by the prosecutor, Mr. Schacht, to the defense attorney, Mr. McNeish.

witness in the defense case if that was needed and, further, that he could ask for additional time to get rebuttal witnesses if that turned out to be necessary, but that the court did not see a reason to suspend the trial for three court days. RP 1686. At that time, defense counsel modified his request to ask for a one day continuance. RP 1686. The court directed the prosecution to proceed with other witnesses before Ms. Ramirez. RP 1688. As it turned out Ms. Ramirez was not called to the stand until the following day. RP 1788. The court set forth the parameters of what Ms. Ramirez could testify about and excluded evidence pertaining to domestic violence between her and the defendant. RP 1770-1772. After the State completed its direct, the defendant was given a full opportunity to cross examine the witness. RP 1794-1797. After her testimony, defense counsel also asked the court to sign two subpoena duces tecums for employment records from Multicare and for records with the Department of Employment Security regarding Ms. Ramirez. RP 1920-1926. The court refused to sign either as it found that the subpoenas were unlikely to result in any relevant, admissible impeachment evidence. RP 1926. The court did direct the prosecutor to produce anything it had regarding possible perjury from Ms. Ramirez stemming from a domestic violence case in which she was the victim, but reserved ruling as to whether any of this information would be admissible at trial. RP 1929. Defendant does not challenge these discovery rulings on appeal. Defense counsel rested

his case on Monday, February 12, 2007, after calling several witnesses to the stand, but none of whom impeached Ms. Ramirez. RP 2050.

This record does not reveal an abuse of discretion. The trial court properly weighed the competing interests and allowed defense counsel several means of preparing for the cross examination and impeachment of Ms. Ramirez without taking a three day recess. Ms. Ramirez testified on February 8, 2007, giving defendant overnight to prepare for cross-examination. RP 1788. The defendant did not avail himself of many of the court's proffered opportunities such as recalling Ms. Ramirez as a hostile witness or calling impeachment witnesses in the defense case. The State cannot find in the record that defense counsel ever sought additional time to locate impeachment evidence or witnesses after Ms. Ramirez had testified.

Moreover, the record does reveal any basis for finding that defendant was prejudiced by the manner in which the trial court handled the request for a continuance or that the result of the trial would have been different had the motion been granted. There is nothing in the record to indicate that there was any discoverable, admissible impeachment evidence to be found regarding Ms. Ramirez had defense counsel been given a three day recess. The defense rested its case on February 12, 2007, without seeking additional time to further explore potential leads on impeachment evidence. RP 2050. As there is nothing to indicate that additional time would have revealed admissible evidence, defendant has

failed to show that he was prejudiced by the court's ruling. He asks this court to reverse upon speculation that impeachment evidence existed. That request is not supported by the law.

Because defendant has failed to demonstrate that the trial court abused its discretion in delaying the presentation of a witness's testimony rather than granting a full three day continuance in the middle of trial in order to give the defense time to prepare for cross examination and because he has failed to demonstrate that the outcome of the trial would have been different had the continuance been granted, he has failed to show reversible error.

5. DEFENDANT FAILED TO PRESERVE HIS CLAIM THAT THERE WAS INSUFFICIENT FACTUAL SUPPORT FOR THE GIVING OF A FIRST AGGRESSOR INSTRUCTION BY FAILING TO OBJECT ON THIS BASIS IN THE TRIAL COURT.

Jury instructions are appropriate where they "permit each party to argue his theory of the case and properly inform the jury of the applicable law." *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). The standard for review applied to a challenge to a trial court's instructions depends on whether the trial court's decision is based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's decision is reviewable only for abuse of discretion if based on a factual dispute. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483

(1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's decision based upon a ruling of law is reviewed de novo. *Id.*

Generally, self-defense cannot be invoked by a defendant who is the first aggressor and whose acts result in an altercation unless he or she first withdraws. *State v. Riley*, 137 Wn.2d at 909. A first aggressor instruction is appropriate when there is some credible evidence from which a jury can reasonably determine that the defendant engaged in conduct that precipitated the fight and "provoked the need to act in self-defense." *Id.* The trial court may give an aggressor instruction despite conflicting evidence about whether the defendant's conduct precipitated the fight. *Id.* at 910 (citing *State v. Davis*, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)). To determine whether there is sufficient evidence to support giving the instruction, a court views the evidence in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). If there is credible evidence that the defendant made the first move by drawing a weapon, the evidence supports the giving of an aggressor instruction. *Riley*, 137 Wn.2d at 910, citing *State v. Thompson*, 47 Wn. App. 1, 7, 733 P.2d 584 (1987).

Instructions on the law regarding self-defense may be relevant even when the defense is raising a claim of excusable homicide. *See State v. Brightman*, 155 Wn.2d 506, 525 n.13, 122 P.3d 150 (2005)(explaining

how self-defense can be relevant and necessary to an excusable homicide claim); *State v. Callahan*, 87 Wn. App. 925, 932-33, 943 P.2d 676 (1997).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963); see also *Trueax v. Ernst Home Ctr., Inc.*, 124 Wn.2d 334, 339, 878 P.2d 1208 (1994)(The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection....If an exception is inadequate to apprise the judge of certain points of law, 'those points will not be considered on appeal.'")

The trial court below gave a first aggressor instruction modified to for application in an excusable homicide defense; it stated:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon kill, use deadly force or non-deadly force upon another person. Therefore, if you find

beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then excusable homicide based on a lawful use of force to recover property is not available as a defense.

CP 390-423, Instruction 21. The defense objected to the giving of the instruction in the following manner:

Defense Counsel: And I don't have the WPICs in front of me now. I think we argued about it yesterday, and I thought the language was not accurate, was not the language from the WPICs and would object to the giving of the entire instruction first and the language about kill or use deadly force. I don't believe that deadly force is ever mentioned in the WPIC.

RP 2173. The objection made at trial was that the instruction was not a correct statement of the law in that it departed from the standard pattern instruction. No claim was raised regarding the factual support for the instruction. *Id.*

On appeal, defendant does not challenge the instruction as being an incorrect statement of the law, but alleges that the trial court should not have given it because it was factually unsupported. *See* Appellant's Assignment of Error No 5 and Brief of Appellant at pp.46-48. Defendant did not object to this instruction on the basis that it was factually unsupported and did not preserve that issue for review. The court should not review this claim as it was not preserved below.

Nor has defendant demonstrated that the giving of this instruction interfered with his ability to argue his theory of the case to the jury. The

theme of the defense closing was that the defendant did not start the confrontation or altercation with Villa and that the gun accidentally fired while they were struggling –he did not intend to shoot Villa. RP 2233-2269. Defense counsel argued that they jury should find defendant guilty of manslaughter in the second degree. RP 2269. Defendant failed to show that his theory of the case could not be argued under the court’s instructions and there for has failed to show that the giving of an aggressor instruction, if error, was prejudicial.

6. DEFENDANT HAS FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999)(internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411

U.S. 223, 232, 93 S. Ct 1565, 36 L. Ed. 2d 208 (1973)(internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)(“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors

have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial,

either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. He has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the judgment and sentence entered below.

DATED: OCTOBER 22, 2008

GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date Signature

FILED
COURT OF APPEALS
DIVISION II
08 OCT 22 PM 3:18
STATE OF WASHINGTON
BY DEPUTY