

NO. 36241-4

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

STATE OF WASHINGTON, RESPONDENT

v.

TODD DWAYNE ROGERS, APPELLANT

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DIVISION II
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Appeal from the Superior Court of Pierce County
The Honorable Frederick Fleming, Judge

No. 06-1-02460-7

BRIEF OF RESPONDENT

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

1. Whether the State proved defendant premeditated the killing of victim Jackson when defendant shot Jackson three times; chased him through the living room; and inflicted the mortal wound by reaching behind somebody else's shoulder and shooting Jackson point-blank in the back of his head (Appellant's Assignment of Error 1).

2. Whether this Court should affirm the jury's finding that the State proved, beyond a reasonable doubt, that defendant did not shoot victim Jackson in self-defense (Appellant's Assignment of Error 2).

3. Whether the trial court properly found that defendant's custodial statements were voluntary and admissible for the purposes of impeachment (Appellant's Assignments of Error 3 and 4).

B. STATEMENT OF THE CASE.

1. Procedure

On June 2, 2006, the State charged defendant with murder in the first degree of Timothy Jackson (Count I), contrary to RCW 9A.32.030(1)(a), murder in the second degree of Jason Johnson (Count II), contrary to RCW 9A.32.050(1)(a), and unlawful possession of a firearm in

the first degree (Count III), contrary to RCW 9.41.040(1)(a). CP 322-323. Defendant entered a plea of not guilty on all counts. Defendant asserted self-defense to Count I and II charges. RP2 217.

The defense moved to sever Count III, unlawful possession of a firearm, and try it in a bench trial after the jury received the evidence on homicides. CP 76-86; RP2 196-206. The court denied the motion. RP2 206. Subsequently, defendant pleaded guilty to the crime of unlawful possession of a firearm. CP 101-104; RP2 261, 265-266.

The court held a 3.5 hearing. RP1 19-120. At the hearing, Detective Bunton and Sergeant Lawler testified to the following.

After defendant was brought to the Lakewood Police Department, he was placed in a holding cell. RP1 25. Defendant remained in a holding cell for a few hours while the police interviewed his girlfriend, Sharry Caulder. RP1 58-59. Caulder's taped interview ended at 2:20 a.m., and Detective Bunton concluded the contact with her at about 2:40 a.m. RP1 59, 71.

At about 2:50 a.m., defendant was taken to an interview room. RP1 26, 63-64, 80. Because of the nature of the charges, defendant's left hand was cuffed to the chair. RP1 26, 60, 61. The police officers introduced themselves, told defendant that they needed to discuss with him what had happened on May 13, and read defendant his rights. RP1

27, 61, 81-82. Defendant acknowledged that he understood those rights. RP1 27, 82.

Defendant also responded that he had nothing to say because he did not see “any light at the end of the stick” and how “that’s gonna help” him. RP1 28, 83. The officers did not perceive defendant’s statements as invocation of his right to remain silent, but rather as meaning that defendant “didn’t want to give any information about why he was there.” RP1 28. The officers indicated to defendant that they wanted to get his side of the story. RP1 67, 83. Defendant responded to the police questioning. RP1 29, 67. Thereafter, at no point during the interview did defendant indicate that he wanted to stop talking. RP1 29-30. At no point did defendant ask for an attorney. RP1 29, 84.

Detective Bunton and Sergeant Lawler testified that defendant did not appear under the influence and that he seemed aware of his surroundings. RP1 29, 84. Moreover, the officers built rapport with defendant to the point where he was laughing and chuckling during the conversation. RP1 30. Detective Bunton described his contact with defendant as non-accusatory until a few minutes before the interview went on tape. RP1 47, 48-49.

Detective Bunton and Sergeant Lawler spoke with defendant for only about 45 minutes to an hour before getting to the facts of the case. RP1 28. After that, the officers indicated to defendant that it appeared he had “slaughtered these guys.” RP1 30. At that point, defendant indicated

to the officers that he was ready to tell them what had happened and asked them to tape his statement. RP1 30; *see* Exhibit 15.

At the time, it was about 3:48 in the morning; however, according to Detective Bunton and Sergeant Lawler, defendant appeared alert. RP1 33, 84. Detective Bunton read defendant his rights again. RP1 85. Defendant acknowledged he understood his rights. RP1 85. At no point during the taping of the statement, did defendant indicate that he wanted to stop the questioning or request an attorney. RP1 33, 84-85. At the end of the taping, defendant requested water, which was given to him one minute later. RP1 34.

The whole taping lasted a mere 30 minutes, RP1 34, which means that defendant's whole interview with the police took no more than an hour and a half. *See supra*.

After listening to the officers' testimony and the arguments of the parties, the court ruled that, during his custodial interview with the police, defendant effectively invoked his right to remain silent. CP 95-100; RP1 1-120. Defendant's subsequent statements were inadmissible to establish the State's case in chief. RP1 121.

After the State rested, defense moved to prohibit use of defendant's suppressed statements for impeachment purposes. CP 189-192. Upon hearing the parties' arguments, the court ruled that the State could use defendant's custodial statements for impeachment purposes. CP 198-202; RP9 1186, 1207. The State later used the statements during

defendant's cross-examination. RP9 1274-1292; RP10 1314-1359, 1374-1378.

After hearing the evidence, the jury found defendant guilty of murder in the first degree of Timothy Jackson. CP 314; RP13 1538. The jury also found, in a special verdict, that defendant was armed with a firearm at the time of the commission of the crime. CP 315; RP13 1539. The jury, however, was unable to reach a verdict on Count II, murder in the second degree of Jason Johnson. RP13 1536. The court declared a mistrial as to Count II. RP13 1541. Subsequently, defendant pleaded guilty to manslaughter in the second degree of Jason Johnson. CP 324-331; RP14 1556.

At the sentencing, defendant stipulated to his prior record and that he had an offender score of six. CP 332-334. The court sentenced defendant to a total of 512 months of confinement, the high end of the sentencing range. CP 335-348; RP14 1572. Defendant was sentenced to 416 months on Count I, 89 months on Count II, and 48 months on Count III, to be served concurrently; defendant also received deadly weapon sentence enhancements of 60 months on Count I, and 36 months of Count II, to be served consecutively with each other and the base sentence. CP 335-348; RP14 1572.

Defendant filed a timely notice of appeal. CP 318.

2. Facts

On May 13, 2006, at 3:07 a.m., Officer Jeff Martin was finishing his patrol shift when he heard multiple gun shots coming from the area of McChord Tudor House apartment complex in Lakewood, Washington. RP7 809. After receiving a dispatch, a few units, including Officer Martin, responded to the scene. RP7 810. The police began arriving at the scene at about 3:15 a.m. RP4 400, 447; RP7 812-813.

Upon entering apartment 22, the police found the lifeless body of Timothy "Sky" Jackson, a 24-year-old male, lying face up near the entryway. RP4 407, 451; RP7 815, 973.

At trial, Doctor Roberto Ramoso, a medical examiner, testified that Jackson had been shot three times: once in the left side of his chest, once in the back of his right shoulder, and once in the back of his head, above his ear. RP8 1129. Doctor Ramoso opined that the bullet that had entered the chest caused only soft-tissue injuries that would most likely not cause death. RP9 1147-1148. Further, Doctor Ramoso stated that, although the shot to the back of the right shoulder damaged the bone of the joint, "movement" was still possible. RP9 1155-1156.

In contrast to the shoulder and chest wounds, the head wound would "cause practically an immediate death." RP9 1142-1143, 1154. A person with such a head wound, according to Doctor Ramoso, would be immediately incapacitated and not able to walk across the room. RP9 1174. The head wound had a right to left downward trajectory. RP9

1142-1143, 1154. Doctor Ramoso concluded that, when he was shot, the muzzle of the weapon was within 18 inches of Jackson's head. RP9 1158.

In the kitchen of apartment 22, the police found Karisha Pierce, the tenant of the apartment. RP7 816. She told the officers that there was another body off the balcony. RP7 817. The officers found the second victim upon looking over the balcony railing. RP7 816, 817. Jason "Jake" Johnson was lying face down on the ground, about 12 feet below. RP4 408-409; RP7 818, 922.

According to Doctor Ramoso, Johnson had been shot four times: once in the upper right side of the chest, once in the left shoulder, once in his hip, and once in the mid-thigh. RP8 1102.

Both Johnson and Jackson died as a result of the gunshot wounds. RP8 1127, 1159. Jackson was pronounced dead at the scene. RP4 484. Johnson was pronounced dead in Madigan Army Medical Center at 4:10 a.m. RP7 925. Johnson and Jackson were best friends. RP4 354.

Although a few of the State's witnesses were less than cooperative, at trial, the State established the following chain of events.

Jackson and Johnson first met defendant in 2001, but their contact was intermittent. RP9 1217. They reconnected in April of 2006. RP4 360-361; RP9 1217, 1219.

Jessica¹, Johnson's girlfriend, testified that a few days before the shooting, on May 8 or 9, defendant and Johnson had a confrontation at a barbecue. RP4 368. Defendant and Johnson exchanged words and, according to Jessica, defendant "exploded." RP4 368. He appeared outraged, yelled, and gestured. RP4 368-369.

At some point during the confrontation, Jessica heard defendant say to Johnson, "Watch. Watch. I'm gonna show you," and saw defendant make a gesture pointing at Johnson with his pointer finger out and his thumb up in the air. RP4 369, 381. The argument got so uncomfortable that Jessica stepped in and put a stop to it. RP4 369, 380. Timothy Jackson was not present at the barbecue. RP9 1280.

On the night of May 13, 2006, Johnson and Jackson were at a party at Karisha Pierce's apartment. RP5 520, 521. Defendant and his girlfriend, Sharry Caulder, came to the party as well. RP9 1237. Before entering the apartment, defendant handed his girlfriend the car keys in anticipation of a fight with Johnson and Jackson. RP9 1288. Defendant had a fully loaded gun in the pocket of his jacket. RP9 1238; RP10 1316, 1346.

Soon after defendant and Ms. Caulder entered, Johnson and Jackson approached defendant and suggested that they needed to talk.

¹ To avoid name confusion, Jessica Jackson will be referred to as Jessica.

RP9 1245. The three men went out onto the apartment balcony. RP6 642, 697. The balcony door remained opened. RP6 646. According to Ms. Caulder, while the men were talking outside, defendant stood in or next to the doorway. RP6 647.

At trial, Caulder denied previously telling the police that defendant had not been cornered by Johnson and Jackson.² RP6 652. Detective Bunton, however, testified that during her taped interview on May 31, 2006, Caulder unequivocally stated that defendant had not been cornered on the balcony. RP8 1077.

Caulder, who was sitting on the sofa in the living room, testified that she observed Johnson step toward defendant while talking in an animated manner with his “hands in [defendant’s] face.” RP6 640, 647. On direct examination, Caulder testified that Jackson patted defendant’s shoulder with one hand. RP6 647. Then, on redirect and recross, Caulder maintained that Jackson actually patted defendant down. RP6 725, 729. Caulder, however, was forced to admit that it was “pretty dark” on the balcony, and that she could only see the men mid-stomach up. RP6 703, 727.

² At trial, Caulder did not deny she still cared for defendant and stated that she did not want “to see nothing bad happen to him.” RP6 726. She also admitted that she had initiated an exchange of letters with him after the shooting and before the trial. RP6 726. Defendant wrote to Caulder as well, and the State introduced his letters into evidence. CP (Exhibits 193A, 194A, 195A); RP6 673, 676.

Shortly after the three men went out onto the balcony, Ms. Pierce, who at the time was sitting at the table inside the apartment, heard about five to six “pops” coming from the balcony. RP5 52, 539.

Next, Jackson ran inside the apartment, moving across the living room to the front door. RP5 529; RP9 1257. According to Ms. Pierce, he did not have a gun in his hands. RP5 529.

Pierce testified that, when Jackson was running to the front door, his back was to the defendant; defendant, who had been following Jackson from the balcony, continued to fire at him. RP5 532, 540.

Caulder testified that when she had heard the shots, she got up from the sofa and went towards the front door in order to leave. RP6 652, 656. When Jackson reached the front door, Caulder was there. RP5 541.

According to Caulder, Jackson “grabbed ahold of [her] jacket from behind and pulled.” RP6 657. She ended up between Jackson and defendant. RP6 659. As Jackson was pulling on her jacket from behind and crouching down, Caulder heard him say, “I got nothing to do with this” a few times. RP6 660, 661-662. She also heard defendant say something like, “You’ve got your hands on my girl.” RP6 712.

Finally, defendant reached around Caulder’s shoulder and shot the crouching Jackson in the back of the head. RP6 660. Defendant did not attempt to punch Jackson or pull his girlfriend away from him prior to shooting. RP10 1353.

At the time of his death, Timothy was five feet 11 inches tall, and weighed 109 and a half pounds. RP8 1128. Defendant's height is about six feet, and during the shooting, he weighed approximately 200 pounds. RP10 1316.

All bullets and casings recovered from the scene and the victims' bodies were 380 auto/nine millimeter caliber. RP8 1176 – 1181. Officer Nick McClelland testified that he had not located or seen any weapons around Jason Johnson. RP7 923. Officer Martin testified that he had not found any weapons around Timothy Jackson or anywhere in the apartment. RP7 851.

After killing Jackson, defendant and his girlfriend immediately left the apartment, threw away the gun, and went to a motel in Fife. RP6 663; RP9 1262, 1264. There, defendant cut his hair short and shaved his face clean. RP6 668. In addition, Caulder switched their vehicle for another one. RP6 670. Over the next couple of weeks, defendant and Caulder hid out, staying with different people at different places. RP6 671; RP8 1076.

On May 31, 2006, the police detained Caulder. RP7 934-935; RP8 1065. Defendant was apprehended just a few hours later. RP1 55-56.

At trial, defendant testified in his defense. RP9 1216-1290; RP10 1314-1380. Much of defendant's testimony was inconsistent with his prior statements to the police. *See, e.g.*, RP9 1264; RP10 1316-1317, 1328-1330, 1331-1332, 1337, 1345, 1356. On the stand, defendant

admitted that “half [of the story he had told the police] was the truth, half was a lie.” RP9 1287.

Defendant testified that, on the balcony, while Johnson was talking to him, Jackson started patting defendant’s jacket with one hand. RP9 1246-1247. At the same time, Jackson allegedly kept the other hand inside his jacket. RP9 1247. Defendant found it troubling because, in 2001, he had known Jackson to carry a gun. RP9 1250, 1275-1276. Defendant further alleged that, during the confrontation, he had been standing to the side of the balcony door, holding onto the door handle, while Jackson was in or next to the doorway. RP9 1251; RP10 1341.

At some point, Johnson stepped closer in defendant’s face and said, “give me your shit,” which defendant understood as a demand to surrender his jacket, gold chain, and money. RP9 1253, 1254. After that, both Johnson and Jackson allegedly pulled defendant by his shoulders toward the right side of the balcony as if they intended to throw him over it. RP9 1255. Defendant testified that he had wrestled with Johnson and Jackson for a few seconds, shook loose of their grip, pulled a gun out of his pocket, and fired without aiming. RP9 1256. After seeing Johnson fall or jump over the balcony, defendant shot at Jackson. RP9 1256.

Jackson ran from the balcony, and, as he was running through the living room, his hand was allegedly in his pocket as if reaching for a gun.

RP9 1257. Defendant kept shooting at fleeing Jackson because he thought Jackson was going to take cover and return fire. RP9 1257. On cross-examination, defendant admitted that he had not mentioned this important fact to the police. RP10 1374.

During his direct examination, defendant said that, when he saw Jackson grab Caulder, he “didn’t know if [Jackson] was trying to hurt her.” RP9 1258. Only when defendant’s attorney asked him whether he had felt Caulder was in danger, defendant answered affirmatively. RP9 1259. Again, on cross-examination, defendant was forced to admit that he had never mentioned his fear for his girlfriend’s welfare to the police, or that he had shot Jackson in an attempt to free Caulder from his grip. RP10 1351, 1353.

Defendant claimed that he had carried the gun for protection. RP9 1237. He also denied aiming at Jackson’s head or hearing Jackson say anything to him. RP9 1259; RP10 1352.

Defendant also admitted that neither Johnson nor Jackson had shot at him or pulled a gun during the alleged altercation. RP10 1348.

At trial, defendant admitted to lying to Detective Bunton and Sergeant Lawler when, during his custodial interview, he asserted that, on the balcony, Jackson had pulled a gun on him, and he wrestled it away from Jackson. RP9 1269, 1287; RP10 1349-1350. According to defendant, he lied because he did not want the police to think that he had

gone to the party to kill Johnson and Jackson, and because the truth about the gun “was making [defendant] look in a bad light.” RP9 1270.

C. ARGUMENT

1. DEFENDANT’S CONVICTION SHOULD BE AFFIRMED BECAUSE THE STATE PRESENTED SUFFICIENT EVIDENCE OF PREMEDITATION.

The evidence is sufficient when, viewed in the light most favorable to the prosecution, it allows a rational trier of fact to find, beyond a reasonable doubt, the essential elements of the crime. *See State v. Gentry*, 125 Wn.2d 570, 596-597, 888 P.2d 1105 (1995); *State v. Amenzola*, 49 Wn. App. 78, 85, 741 P.2d 1024 (1987). However, when this Court reviews the sufficiency of the evidence, it “does not need to be convinced of the defendant’s guilt beyond a reasonable doubt, but must only determine whether substantial evidence supports the State’s case.” *State v. Potts*, 93 Wn. App. 82, 86, 969 P.2d 494 (1998). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff’d, 95 Wn.2d 385, 622 P.2d 1240 (1980). Circumstantial evidence is as reliable as direct evidence. *See State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000).

In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citation omitted). The Supreme Court of Washington said that “great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

The only element challenged by defendant regarding the murder of Timothy Jackson is that of premeditation.

“A person is guilty of murder in the first degree when: (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person...” RCW 9A.32.030(1); *see also* CP 254-313 (Jury Instruction 13(3)).

To establish the element of premeditation, the State must only show that defendant deliberately formed and reflected “upon the intent to take a human life,” “weighing or reasoning for a period of time, *however short.*” *State v. Ollens*, 107 Wn.2d 848, 850, 733 P.2d 984 (1987); *State v. Robtoy*, 98 Wn.2d 30, 43, 653 P.2d 284 (1982) (emphasis added). The only limitation on duration of such reasoning is that it lasts more than a moment in time. RCW 9A.32.020(1).

Premeditation “can be inferred from circumstantial evidence, including evidence of motive, procurement of a weapon, stealth, and the

method of killing.” *State v. Elmi*, 138 Wn. App. 306, 314, 156 P.3d 281 (2007) (internal citations omitted). For example, in *Elmi*, among the factors that influenced the court’s holding that there was sufficient evidence of premeditation was the heated argument, the transportation of a weapon to the scene, and the number of shots – three - fired by the defendant. 138 Wn. App. 306, 314.

In *State v. Allen*, in assessing the evidence of premeditation, the court found it significant that Allen’s altercation with the victim went from one room to another, involved a struggle, and that Allen struck the victim from behind. 159 Wn.2d 1, 8, 147 P.3d 581 (2006). *See also State v. Ollens*, 107 Wn.2d 848, 853 (the evidence was sufficient to submit to a jury the issue of whether defendant premeditated the murder when 1) the victim was stabbed multiple times and appeared to have been attacked from behind; 2) defendant had procured a knife beforehand; and 3) appeared to have a motive); *State v. Boot*, 89 Wn. App. 780, 791-792, 950 P.2d 964 (1998) (the evidence was sufficient to establish premeditation when defendant had possessed and used the weapon two days prior to the murder; when he shot the victim three times point blank; and when he had a motive to kill so as to obtain a high status in his gang).

In this case, the evidence, viewed in the light most favorable to the prosecution, proves that defendant premeditated the murder of Timothy Jackson.

First, defendant prepared for the murder: he brought the weapon to the scene and handed his girlfriend the car keys in anticipation of the confrontation with Jackson and the second victim. RP9 1238, 1288.

Second, the method and the timing of killing proves premeditation. While the killing happened relatively fast, defendant had much longer than a moment in time to reflect upon the intent to kill Jackson. Thus, defendant shot Jackson three times: each shot was separate in time and happened in a different location. RP5 532, 540; RP6 660; RP8 1129.

The evidence shows that after killing Johnson on the balcony in front of Jackson, defendant shot at Jackson, hitting him once in the chest. RP8 1147-1148; RP9 1256. Defendant then methodically pursued Jackson. RP5 532, 540. After Jackson fled the balcony, defendant followed him, walking across the living room all the way to the front door. *Id.* He wounded Jackson again, hitting him in the back of his shoulder. RP8 1147-1148; RP9 1155-56. Defendant then caught up to Jackson and delivered the fatal point-blank shot in the back of defendant's head. RP6 660.

The fact that victim Jackson was crouching and attempting to hide behind defendant's girlfriend, and the fact that defendant had to reach over Caulder's shoulder to kill Jackson, demonstrate that defendant had more than a moment in time to make a decision to take Jackson's life. RP6 559-662.

Third, defendant had a motive to kill Jackson. Jackson was present during the confrontation on the balcony and saw defendant kill Johnson. RP6 642, 697; RP9 1256. Defendant did not murder Timothy Jackson in the heat of the moment; rather, he deliberately and cold-bloodedly pursued and executed a witness.

In sum, the State presented substantial evidence establishing, beyond a reasonable doubt, that defendant premeditated the killing of Timothy Jackson. The evidence shows that defendant took deliberate and thought-through actions aimed at taking Jackson's life. The jury evaluated the evidence, agreed that the killing was premeditated, and convicted defendant of the murder in the first degree. Because "this Court must defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence," the defendant's conviction should be affirmed. *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

2. DEFENDANT'S CONVICTION SHOULD BE AFFIRMED BECAUSE THE JURY WAS ENTITLED TO FIND FROM THE EVIDENCE THAT DEFENDANT'S KILLING OF TIMOTHY JACKSON WAS NOT JUSTIFIABLE.

At trial, defendant testified that he acted in self-defense. RP9 1246-1257. Subsequently, the trial court gave the jury multiple instructions on

self-defense. CP 254-313 (Instructions 14, 15, 16, 17, 19).

In these instructions, the court informed the jury that “the State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable.” CP 254-213 (Instruction 14 and 19). Among other things, the jury was instructed that “actual danger is not necessary for a homicide to be justifiable” as long as the defendant reasonably believed death or great personal injury was imminent. *Id.* (see Instructions 14 and 15). Instruction 17 informed the jury that “the law does not impose a duty to retreat” when defendant is in a place where he has a right to be. *Id.*

Defendant does not assign any errors to the trial court’s jury instructions. *See* Opening Brief of Appellant. Therefore, it is presumed the jury was properly instructed on self-defense. It is also presumed that the jury properly executed its duty and followed the court’s instructions. *See State v. Brown*, 132 Wn.2d 529, 618, 940 P.2d 546 (1997).

At trial, the jury evaluated the evidence and the credibility of all the witnesses, including that of the defendant, and convicted defendant of the murder in the first degree of Timothy Jackson. CP 314. Therefore, the jury rejected defendant’s self-defense claim as to Timothy Jackson. Neither the trial court nor this court should substitute the jury’s judgment on factual issues.

Although from the record it is not clear what argument or facts persuaded the jury that defendant did not kill Jackson in self-defense, it is clear that the State met its burden of proof.

Thus, the jury decided that the State proved, beyond a reasonable doubt, either one of the following prongs or a combination thereof: (a) it was unreasonable for defendant to believe that Timothy Jackson was committing or going to commit a felony or inflict death or great personal injury upon defendant or his girlfriend; (b) even if such belief was reasonable, the danger was not imminent; or (c) even if the facts were as defendant believed them to be, shooting Timothy Jackson three times amounted to an objectively unreasonable use of force under the circumstances. In the closing, the State presented arguments in support of all three of the foregoing prongs. *See, e.g.*, RP11 1428, 1432, 1435-1436, 1489-1490.

The evidence supports a finding that, even if Jackson was somehow involved in the alleged confrontation, under the circumstances, shooting him multiple times was not a reasonable use of force.

First, defendant's own girlfriend admitted to the police that defendant had not been cornered. RP6 647; RP8 1077. He was in or near the doorway with his hand on the door handle. RP6 647. While defendant did

not have an obligation to retreat, the fact that retreat was an option could be considered by the jury in evaluating the reasonableness of defendant's use of deadly force under the circumstances.

Second, defendant far exceeded the reasonable amount of force when he chased Jackson through the living room firing into his back. Jackson was running away from defendant; so, even if defendant had been in danger of great bodily harm while on the balcony, such danger ceased to exist or, at the very least, was not imminent. RP5 529; RP9 1257. Thus, shooting helpless Jackson in the head exceeded a reasonable use of force.

Similarly, it was unreasonable for defendant to believe that Jackson presented danger to Caulder. Jackson's conduct was not aggressive, and he was not capable of inflicting great physical harm to defendant's girlfriend. Thus, Jackson was holding onto Caulder's jacket trying to use her as a shield between himself and defendant. RP6 659. He was crouching and saying, "I did not have anything to do with it." RP6 660-662.

Defendant's assertion that he was trying to protect his girlfriend was not compelling. Defendant initially testified he "didn't know if Timothy was trying to hurt her." RP9 1259. Only after his attorney prompted his response, defendant stated that he was afraid for Caulder's welfare. *Id.*

Even if defendant's subjectively feared for his girlfriend's wellbeing, the amount of force used in response to that fear was objectively unreasonable under the circumstances. Jackson never grabbed Caulder by

the throat or put a gun to her head; he crouched behind her, trying to use her as a shield between himself and defendant. RP6 659-662. Moreover, the evidence shows that, at the time, Jackson was already wounded in his chest and shoulder. RP8 1129, 1147-1156. He weighed a mere 109 pounds and was unarmed. RP7 851; RP8 1128. Defendant, on the other hand, was about 100 pounds heavier and was armed with a gun. RP10 1316. Considering the size difference between the two men and the fact that Jackson was already wounded, a reasonable person, under the circumstances, would simply pull Caulder away from Jackson. Defendant did not do that. RP10 1353.

The facts of this case are similar to the facts in *State v. Read*, 147 Wn.2d 238, 53 P.3d 26 (2002). In *Read*, the defendant came to a party and was talking to his former school mate. 147 Wn.2d 238, 240-241. While the two talked, the victim's brother repeatedly told Read to leave. *Id.* at 241. When Read did not respond, the victim stood up and said something to the defendant. *Id.* Read reacted by pulling his gun from his waistband, shooting, and killing the victim. *Id.*

Read claimed that he shot the victim in self-defense. *Id.* He asserted that the victim "jumped off" the bed, stepped toward him, while moving his arms, and verbally threatened him. *Id.* He believed the victim was angry. *Id.* According to Read, he did not have a clear path to the door, which made him panic because he thought he was going to get hurt. *Id.* at 244. Witnesses testified that the victim raised his arms at his sides, but

that he did not verbally threaten Read or act in a threatening manner. *Id.* at 241. One witness supported the defendant's contention that the victim "jumped" off the bed and stepped toward Read. *Id.*

Despite Read's testimony, the Supreme Court held that he was not entitled to have self-defense instructions. *Id.* The court reasoned that defendant did not meet his burden of showing that "he reasonably believed he was in imminent danger of death or great personal injury," and "even if Read reasonably believed that he could get hurt, that does not excuse the use of deadly force." *Id.* In this case, defendant was given the benefit of self-defense instructions, but the jury rejected his defense.

Finally, defendant's actions after the shooting stood in stark contrast to his self-defense claim. Defendant's conduct indicates guilty conscience and desire to avoid punishment. Thus, defendant fled the scene, got rid of the gun, hid out, and changed his appearance. RP6 663, 668; RP9 1262, 1264. Later, when he was apprehended and questioned by the police, he did not say he had shot Jackson in the head because he was trying to save his girlfriend; instead, he made up a story about Jackson pulling a gun on him. RP9 1269, 1287; RP10 1349-1350. Defendant lied because he did not want to look bad. RP9 1270.

The jury clearly did not believe defendant's justification for his murder of Timothy Jackson, and because "this Court must defer to the trier of fact on issues involving conflicting testimony, credibility of the

witnesses, and the persuasiveness of the evidence,” the defendant’s conviction should be affirmed. *Hernandez*, 85 Wn. App. 672, 675.

3. DEFENDANT’S CONVICTION SHOULD BE AFFIRMED BECAUSE HE VOLUNTARILY MADE THE EXCULPATORY STATEMENTS THAT THE COURT PROPERLY ADMITTED FOR IMPEACHMENT PURPOSES.

- a. Substantial evidence supports Finding of Fact 4; therefore it should be treated as a verity.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts. *State v. Hill*, 123 Wn.2d 641, 644. If there is, then those findings are also binding upon the appellate court. *Id.*

Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court’s conclusions of law are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Defendant assigned error to Finding of Fact 4. *See* Opening Brief of Appellant.

There, the trial court found that:

[T]he officer's conduct while speaking with the defendant did not rise to the level of coercion. The defendant was not intoxicated; the defendant did not appear ill; the defendant did not appear affected by the late hour; officers spoke in a calm tone of voice; officers did not misrepresent the law to the defendant; officers permitted the defendant the opportunity to give his side of the story without interruption; the officers responded to questions posed by the defendant; officers made no promises to the defendant; the defendant had substantial experience with the criminal justice system.

CP 354-355.

The trial court concluded that "the officer's conduct in taking the defendant's statement on June 1, 2006, did not rise to the level of coercion that overcame the defendant's will to resist. The defendant's will to resist was not overborne." CP 354-355.

Finding 4 is supported by substantial evidence. Defendant's custodial interview was not unreasonably long: it lasted only an hour and a half. RP1 28, 33-34. Sergeant Lawler and Detective Bunton were not aggressive or intimidating: they introduced themselves and talked to defendant in a calm and friendly manner. RP1 61, 67, 77, 81-83. They described the interview as mostly non-accusatory in character. RP1 47-49. Even when Detective Bunton finally indicated to defendant that he was being accused of a crime, he simply said that it appeared he had murdered two people and let defendant tell his side of the story. RP1 30.

The evidence shows that defendant felt at ease during the interview. Detective Bunton testified that defendant chuckled and laughed at some points during the conversation. RP1 30. Moreover, Detective Bunton and Sergeant Lawler were accommodating to his needs. Defendant was given water only a minute after he asked for it. RP1 34. Finally, defendant was not a credulous novice: the interview was not his first encounter with the police. RP1 101, 102, 103.

While defendant assigned error to Finding of Fact 4, he did not present arguments as to how this finding is unsupported by the evidence. *See* Opening Brief of Appellant. Rather, defendant pointed out the facts the trial court had not relied on and arguments it found unpersuasive. *Id.*

Therefore, because a sufficient quantity of evidence exists that could convince a rational person of the truth of the Finding of Fact 4, and because defendant did not present any evidence to prove otherwise, Finding of Fact 4 should be a verity on appeal.

- b. Defendant's statements were voluntary because defendant made them freely and without coercion.

This Court reviews the record to find whether there is substantial evidence from which the trial court could have found that defendant's statements were voluntary by a preponderance of the evidence. *State v. Broadaway*, 133 Wn.2d 118, 129, 942 P.2d 363 (1997). Defendant's statements are only held to be involuntary if, under the totality of the

circumstances, the statements were coerced. See *State v. Broadway*, 133 Wn.2d 118, 132; *State v. Saunders*, 120 Wn. App. 800, 809, 86 P.3d 232 (2004). “The inquiry is whether the defendant’s will was overborne.” *Broadway*, 133 Wn.2d at 132. In determining voluntaries, the court may consider the defendant’s age, physical condition, mental abilities, physical experience and police conduct. *Saunders*, 120 Wn. App. 800, 809.

This Court has previously held that it would not “disturb a trial court’s determination of voluntariness if there is sufficient evidence in the record to support a finding by a preponderance of the evidence that the confession was voluntary.” *Id.* at 809.

Because the trial court made the Finding of Fact 4 and because it is supported by substantial evidence, it is a verity on appeal. The court’s specific factual findings (*see supra*) present substantial evidence from which the trial court properly found that defendant’s custodial statements were voluntary.

In sum, the trial court’s determination that defendant’s custodial statements were not coerced should be upheld.

- c. The trial court properly admitted defendant’s statements for the purposes of impeachment.

Defendant’s statements inadmissible to make the State’s case in chief because of *Miranda* violation can be used to impeach defendant’s credibility when he makes contrary statements at trial and when “the trustworthiness of the [statements] satisfies legal standards.” See *Harris v.*

New York, 401 U.S. 222, 224, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971); *State v. Davis*, 82 Wn.2d 790, 793, 514 P.2d 149 (1973). In *Harris*, the United States Supreme Court rejected defendant's contention that such impeachment violated the *Fifth Amendment*, holding that:

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.

401 U.S. 222, 225.

Thus, the *Fifth Amendment* guarantees an accused the right to remain silent during his criminal trial, and allows him not to take the witness stand to avoid cross-examination. *Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S. Ct. 2124, 65 L.Ed.2d 86 (1980). However, "[o]nce a defendant decides to testify, the interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination." *Jenkins*, 447 U.S. 231, 238 (internal quotation marks and citation omitted).

In this case, of course, defendant chose to take the witness stand in his own defense. RP9 1216-1290; RP10 1314-1380. Thus, after finding that defendant's custodial statements were voluntary, the trial court

properly held that these statements were admissible for the purposes of impeachment. Accordingly, defendant's conviction must be affirmed.

D. CONCLUSION.

The State respectfully requests that this Court affirm defendant's conviction of murder in the first degree of Timothy Jackson. Defendant's conviction should be affirmed because the State presented sufficient evidence of premeditation and rebutted defendant's claim of self-defense. Finally, defendant's custodial statements were voluntary and admissible at trial for the purposes of impeachment.

DATED: April 28, 2008.

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STATE OF WASHINGTON
BY _____
DEPUTY

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.

4-28-08 
Date Signature