

NO. 48166-9

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

STATE OF WASHINGTON, RESPONDENT

v.

MARCUS THORNTON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Jerry Costello

No. 14-1-03813-7

BRIEF OF RESPONDENT

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

1. Was defendant rightly precluded from misusing speculative evidence of gang affiliation to disparage his murder victim and a witness to his conduct after committing that crime?
2. Did the jury properly receive the Supreme Court approved first aggressor instruction since evidence proved defendant initiated a violent confrontation that took the victim's life?
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B. STATEMENT OF THE CASE.

1. Procedure

Defendant proceeded to trial charged with first degree murder and deadly weapon enhanced second degree murder predicated on assault. CP 1-2. The court precluded defendant from attempting to depict the victim and a witness as bound by gang ties defendant failed to prove. RP (9/8) 28-30. Nineteen witnesses testified over a two week trial; during which,

one hundred forty seven exhibits were admitted. CP 193-206. A first aggressor instruction was given over defendant's evidentiary objection, as it was supported by the testimony of four witnesses. RP(9/21) 883-942; CP 106-08, 110, 112 (Instr. 21-23, 25, 27).

The case proceeded to argument. RP(9/22) 951. Without objection, the State projected a slide captioned with: "What Does Murder Really Look Like" over two admitted photographs of the victim during discussion about the hazard of relying on preconceived notions formed from exposure to crime shows. CP 171; Ex. 37, 129; RP (9/22) 966-67. Later, without objection, the State paraphrased the plain lethal import of threats attributed to defendant. RP (9/8) 91; (9/14) 432-33; (9/22) 980-81.

The jury convicted defendant of deadly weapon enhanced second degree murder. RP(9/24) 1081-82; CP 119, 121. Discretionary LFOs were waived. RP(10/1) 1096. The court expressed concern about defendant's manifest lack of remorse:

[Defendant] is no stranger to assaultive behavior. This is not the first time he's been convicted of a violent crime. I continue to be greatly troubled by [his] testimony where he tried to persuade the jury, unsuccessfully, that it was [the victim] that held the knife [T]he jury clearly did not believe that. If they believed that, [he] would have been acquitted. I didn't believe it either.

What I have is [defendant] being sentenced for a crime that was proven and [defendant] not telling the jury the truth about what happened. I see that ... as a person who is not just claiming self-defense. A person who concocted a

story about what happened that was just not believable. That is a person ... who is not accepting any level of responsibility for what happened. ...

RP (10/1) 1105. A 224 month prison sentence was imposed. *Id.* at 1098, 1104. Defendant's notice of appeal was timely filed. CP 144.

2. Facts

Defendant¹ pulled a knife on victim John Ware² a few days before the murder. RP (9/14) 428. When asked why he did not just fight Ware, defendant said "he wouldn't have pulled a knife if he wanted to fight...." RP (9/14) 427-28. Defendant was angry at Ware for stealing a Blue-Tooth speaker from him. RP (9/14) 428-30. Unfortunately for Ware, defendant's anger persisted; he was still looking to settle the score on the afternoon of September 22, 2014. RP (9/8) 35; (9/14) 426.

Defendant rode out on his bike looking for Ware in the Hilltop area of Tacoma. RP(9/16) 629. There, defendant encountered Ware's girlfriend, and defendant's one-time sex partner, Rayniesha Gardner. RP (9/14) 422, 426.-27. Defendant asked for Ware's location. RP (9/14) 426-27, 447-48; (9/15) 602. Gardner offered to pay for the speaker on Ware's behalf. RP (9/14) 429. Defendant refused, stating it was about more than the speaker. He contemplated following her, thinking she would lead him to Ware. RP (9/14) 429-32. When she told him not to hurt Ware; he "chuckle[d] and

¹ Defendant is sometimes referred to as "HP", "Chicago," or "Chi."

² The victim is sometimes referred to as "monster."

said: "Oh, I'm not going to hurt him." RP (9/14) 432-33. Defendant was clear he planned to stab him. RP (9/8) 71-73; (9/14) 428. In context, his statements implied he intended to kill him. *Id*; RP (9/8) 91. Defendant soon turned up outside a house Gardner was visiting. RP (9/14) 433-34. He sat there on his bike, looking around as if for Ware. RP (9/14) 435-36. Defendant left after a few minutes. *Id*. Gardner was told of Ware's death about two hours later. RP (9/14) 436, 438,

Between abandoning the lookout near Gardner and fatally stabbing Ware, defendant ran into Patrice Sims and Anthony Thomas.³ RP (9/15) 492-500; (9/16) 628-38. But the moment defendant caught sight of Ware, he "took off" after him. RP (9/15) 500, 505-06; (9/16) 637. Sims and Thomas followed. RP (9/15) 501; (9/16) 637. Their activities immediately before and after the murder were captured on surveillance video. RP(9/15) 497-502; (9/16) 632-37; (9/21) 850-51; Ex. 49, 53-56, 86-A. At trial Sims said Ware had a bat, which was inconsistent with her statement to police and video, which showed Ware was not armed with a bat just before the incident. RP (9/15) 506-07, 509, 543-45; (9/16) 640-41. Defendant conceded as much at trial. RP (9/21) 868-69.

Thomas saw a bat fly into the air as he came within visual range of defendant and Ware fighting. RP (9/16) 641-42. Defendant "slammed" Ware to the ground. RP (9/16) 642-45. Ware landed on his back, where he twisted about trying to stand. RP (9/15) 510-12; (9/16) 642-45. Defendant

straddled Ware's torso while delivering blows to his ribs. RP (9/15) 510-11. Sims called out: "Baby, he has a knife." RP (9/16) 645-46. Thomas looked to see a knife in defendant's hand. RP (9/16) 646-47. At the time, defendant had Ware pinned by the neck with one arm as he stabbed Ware with the other. RP (9/16) 647-48. Ware "yelled out." RP (9/16) 649. From Sims vantage, it appeared he stabbed Ware three or four times with a four inch knife while repeatedly directing Ware to "beg for his life." RP (9/15) 513-14, 538, 549-50. A neighbor heard someone say: "no, no. no." RP (9/8) 101, 104-05.

Thomas pleaded: "Man, you don't got to do this ... RP (9/15) 514; (9/16) 649. Defendant got up and threw a bat at Ware. RP (9/15) 517, 519-21. It bounced off Ware's chest on its way to the ground where it was found by police. RP (9/8) 124-25; (9/15) 52. A knife was not found, undermining defendant's claim Ware stabbed himself. A neighbor saw defendant stand, projecting: "Fear. Flight. Pretty much, oh, shit, I have to get the hell out of here." RP 291-300, (9/10) 308. He fled on his bike. RP (9/15) 522.

Ware rose holding his side. RP (9/16) 650. He looked at Thomas, called out, turned, took a few steps up a porch ramp, fell and died. RP(9/8) 39, 120; (9/16) 650-62; Ex. 26, 37, 126, 129. There were stab wounds to his left chest, left-rear shoulder as well as his left hip. RP (9/8) 130. Thomas and Sims briefly followed defendant. RP (9/15) 522-25; (9/16) 651-52; Ex. 86-A. They stopped to tell Ware's ex-girlfriend about the

³ Thomas is sometimes referred to as "Frisco" or "Sco."

stabbing. RP (9/16) 654. Thomas initially refrained from identifying defendant to police because:

[] you don't tell nobody. ... That's what you don't do. No matter how bad the situation is, you just handle it in the streets when you get around to handling it.

RP (9/16) 657. Such sentiments pervaded the case. RP (9/8) 252-53.

Defendant made his way to a drug house where he encountered Scales, one of defendant's acquaintances who knew Ware since he dated Scales' niece. RP (9/15) 554-55, 559, 562, 573. Defendant ran in as if chased by police. RP (9/15) 562. He told Scales about the fight with Ware, boasting he "jugged" Ware, which means stabbed. RP (9/15) 563-65. Defendant did it because Ware "burned him." RP (9/15) 564-65. He said he "got [Ware] good;" the injury would send Ware to the hospital; and Ware had it coming. RP (9/15) 565. Defendant said Ware was "yelling for help" as he was stabbed. RP 568-69. Defendant asked Scales for help disposing of his bloody shirt, for a ride out of the area, and for some drugs. RP (9/15) 566-67. Shirtless, defendant did not appear injured, nor did he complain about injuries or suggest he was attacked by or feared retaliation from Ware. RP (9/15) 570-71.

Failing to find a ride at the drug house, defendant hit the streets. RP (9/15) 606; (9/16) 764-88. His text messages to friends were admitted at trial. RP (9/16) 764-88; (9/21) 852-53; Ex. 194. He sought help from the his children's mother:

Baby, I'm in trouble. Help me please. [] I got to leave Washington ASAP. Can't say much more, but got to go now. [] Babe ... really got into some shit [] Gotta go just know that.

RP (9/16) 765-77; (9/21) 837-38. Similar texts were sent to others:

[] I need aid in a jam need a ride.[] need to get away.[] I'm in a jam and if I don't move around I'm fucked.[]

RP (9/21) 852-53. At trial, defendant said he was fleeing from Ware and Ware's friends. RP (9/21) 840-43.

Defendant testified Ware attacked him with a bat and knife. RP (9/21) 825-27. He alleged Ware stabbed himself in the back of his left shoulder up toward his neck, left hip toward his torso and under his ribs slightly up then straight back into his own heart.⁴ That account could not be reconciled with the knife's absence from the same scene where Ware died shortly after the attack.⁵ Defendant conceded he approached Ware and did not seek police assistance. RP (9/21) 871-73.

An autopsy followed. Two linear abrasions ran down Ware's left flank. RP (9/14) 347; Ex. 119-20. The left hip injury tracked under the fatty tissue toward Ware's underarm. RP (9/14) 329-30; Ex. 108, 111-12; CP 181. The stab wound on the back of Ware's left shoulder ascended to the right toward the back of Ware's neck. RP (9/14) 333-34; Ex 108, 113; CP 181. But the chest wound killed him. RP (9/14) 336. It entered straight in below the ribcage angling upward to the right. RP (9/14) 335-36; Ex. 108,

⁴ RP (9/21)827-29, 842; CP 181-83; Ex. 108, 112, 113, 119, 137, 140, 167, 169.

167, 169. It passed through the bottom of the left lung, through his pericardium (a fibrous sack holding the heart), and tore through the bottom of his heart. RP (9/14) 336-39, 341; Ex. 114-18.

Ware's left lung collapsed under the weight of blood that poured into surrounding space. RP (9/14) 343, 345. Meanwhile, 100 mls of blood collected around the pericardium, slowly crushing his heart. RP (9/14) 343, 345-46. Then there was all the blood Ware spilt at the scene, which likely caused antemortem shock as his oxygen starved organs shut down. RP (9/14) 343. And so he died, alone, outside, bleeding, with his heart and one lung slowly collapsing under the weight of his own blood. The victim of a senseless knife attack motivated by defendant's pride-offending loss of a used Bluetooth portable speaker.

C. ARGUMENT.

1. DEFENDANT WAS RIGHTLY PRECLUDED FROM MISUSING SPECULATIVE EVIDENCE OF GANG TIES TO DISPARAGE HIS MURDER VICTIM AND A WITNESS TO HIS CONDUCT AFTER THAT CRIME.

A defendant's right to present a defense must yield to established rules of evidence to assure fairness and reliability in the ascertainment of guilt. *State v. Donald*, 178 Wn. App. 250, 663, 316 P.3d 1081 (2013);

⁵ E.g., RP (9/8) 39, 120; Ex. 26, 37, 126, 129.

United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261 (1998); *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (1999)); *State v. Acosta*, 123 Wn. App. 424, 441, 98 P.3d 503 (2004); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). Exclusion of evidence will be affirmed absent a manifest abuse of discretion. *Rehak*, 67 Wn. App. at 162; *State v. Kilgore*, 107 Wn. App. 160, 185, 26, P.3d 308 (2001); *State v. Mak*, 105 Wn.2d 692, 710, 718 P.2d 407 (1986)); *State v. Kunze*, 97 Wn. App. 832, 859, 988 P.2d 977 (1999); *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

Defendant sought to show the victim and Scales were bound by Crip ties despite his admitted inability to prove their active participation in a Tacoma Crip gang. RP (9/8) 28-29. Defendant said he *thought* Scales said Ware was a California Crip and said he was no longer involved with a gang. *Id.* at 29. Defendant conceded he did not have an expert to explain any allegiance one might expect of an inactive Tacoma Crip and Crip from California. *Id.* at 29. The evidence was consequently excluded through an ER 404(b) balancing test. *Id.* at 29-30. Its "great risk of unfair prejudice" outweighed the low probative value of bias capable of being inferred from the speculative evidence of Crip affiliation. *Id.*

- a. This issue should not be reviewed as the Confrontation Clause claim raised on appeal was not asserted below and the evidentiary objection preserved is not reasserted.

Defendants are obliged to assert Confrontation Clause violations at or before trial to preserve them for review. *State v. O'Cain*, 169 Wn. App. 228, 235-36, 279 P.3d 926 (2012); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326, 129 S. Ct. 2527 (2009); *State v. Saunders*, 132 Wn. App. 592, 607, 132 P.3d 743, 750 (2006); RAP 2.5(3). Defendant did not object under the Confrontation Clause below, so review on that basis is improper. *O'Cain*, 169 Wn. App. at 235-36; *Melendez-Diaz*, 557 U.S. at 326. Only an evidentiary objection was interposed, yet defendant does not challenge the ruling on that ground. RP (9/8) 28-30. The failure should bar review on the evidentiary ground as well, for this Court should decline to consider an unasserted claim, especially one unsupported by analysis or authority. *Cowiche Canyon Conservancy v. Bosely*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *Raum v. City of Bellevue*, 171 Wn. App. 124, 149, 286 P.3d 695 (2012).

- b. The evidentiary objection defendant fails to reassert was meritless due to his inadequate offer of proof.

Irrelevant evidence is inadmissible. ER 401-402. Evidence of prior bad acts to prove conduct in conformity is typically barred. ER 404(a). Evidence of alleged gang bias should also be excluded if its prejudicial

effect outweighs its probative value. *State v. Yarbrough*, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009); 404(b); *see also* ER 403.

There were significant problems with defendant's proffer, each of which provided a reasonable basis to exclude the speculative theory of a Crip bond between Ware, a rumored California Crip, and Scales, a former Crip affiliate from Tacoma. Defendant did not show active Crip affiliation when the offense or testimony occurred. He also did not have a gang expert to explain the significance of the alleged connection. Such an expert would have likely exposed the unsound assumption underlying his theory of bias, *i.e.*, Crips from different regions and sets see themselves as members of the same gang. In reality, different Crip sets are often rivals. *E.g.*, *State v. Embry*, 171 Wn. App. 714, 768, 287 P.3d 648 (2012) (Tacoma Hilltop Crip fought Young Gangster Crip); *State v. Asaeli*, 150 Wn. App. 543, 561, 208 P.3d 1136, 1148 (2009); *People v. Ward*, 36 Cal. 4th 186, 195, 114 P.3d 717 (2005)("area ... associated with ... Lynwood ... Crips ... rivals of the Ghost Town Crips."); *United States v. Banks*, 506 F.3d 756, 759 (9th Cir. 2008).

Based on defendant's proffer there is no way to know if Ware and Scales developed a relationship in spite of a rivalry between the Crip sets with which they were allegedly aligned. Without a connection able to support a reasonable inference of bias, admitting the gang evidence would have only served to unduly cast Ware as a Crip unworthy of justice and Scales as a Crip undeserving of belief. At the same time, defendant cast

himself as a veteran, plainly to curry favor with jurors. The gang evidence was reasonably excluded.

- c. The exclusion was harmless if error as Scales potential bias was made clear through proof of his familial connection to Ware.

Exclusion of evidence is not reversible error if it is cumulative or of speculative probative value. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994). Unlike the speculative gang evidence, the familial connection between Scales and Ware was correctly admitted. Jurors learned defendant and Scales were acquaintances; whereas, Scales perceived Ware like a nephew-in-law due to Ware's prior relationship with Scales' niece. RP(9/15) 559, 597-99. It was the familial relationship which motivated Scales to testify despite the State's refusal to give him a deal in an unrelated case. RP(9/15) 581-82. That evidence permitted defendant to argue his "them against me" theory of bias in closing. RP (9/22) 990. Since the gang evidence was speculative and cumulative on the issue of Scale's bias, error attributable to its exclusion was harmless.

2. THE SUPREME COURT APPROVED FIRST AGGRESSOR INSTRUCTION WAS PROPERLY GIVEN AS EVIDENCE PROVED DEFENDANT INITIATED THE VIOLENT ENCOUNTER THAT ENDED HIS VICTIM'S LIFE.

"[G]eneral[ly] ... self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation..." *State v. Riley*, 137

Wn.2d 904, 909, 976 P.2d 624 (1999). "An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant's conduct precipitated a fight." *Id.* at 910 (citing *State v. Davis*, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)). Claimed instructional error is reviewed for an abuse of discretion. *See State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 833 (1998). *De novo* review is applied to determine if there was sufficient evidence for an aggressor instruction. *Riley*, 137 Wn.2d at 909.

- a. Defendant's unpreserved challenge to the aggressor instruction should not be reviewed.

Preservation of instructional error requires a specific objection. *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 310, 372 P.3d 111 (2016); *State v. Thorp*, 133 Wash. 61, 64, 233 P. 297, 298 (1925); *State v. Sanders*, 66 Wn. App. 878, 888, 833 P.2d 452, 458 (1992); RAP 2.5. This gives trial courts ability to remedy perceived errors, which reduces unnecessary appeals and retrials. *Id.* An unpreserved claim of instructional error should not be reviewed unless it is shown to be a manifest error affecting a constitutional right. *Id.*

The State proposed the pattern aggressor instruction, WPIC 16.04, approved by the Supreme Court in *Riley* and the Court of Appeals in *State v. Cyrus*, 66 Wn. App. 502, 509–10, 832 P.2d 142 (1992). CP 190-92; *Riley*, 137 Wn.2d at 908, 913-14. Defendant's objection to it was limited

to his claim it was not supported by the evidence. RP (9/21) 926-30. The trial court disagreed:

[T]here [wa]s substantial evidence in th[e] record that a reasonable jury could infer [defendant's] actions in pursuing ... Ware were intentional acts ... likely to provoke a belligerent response.

RP (9/21) 932.⁶ Defendant never objected to the instruction's form. RP (9/22) 948-51; CP 110 (Instr.25). So it should not be reviewed on appeal as he has not explained how giving a Supreme Court approved instruction could be manifest error effecting a constitutional right. *Riley*, 137 Wn.2d at 908, 913-14; *Cyrus*, 66 Wn. App. at 509–10; see *State v. Besabe*, 166 Wn. App. 872, 881, 271 P.3d 387 (2012). Failure to request defendant's *novel* revisions could not even support an ineffective assistance of counsel claim. *State v. Slighte*, 157 Wn. App. 618, 625, 238 P.3d 1112 (2011) *remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1112 (2011); *State v. Brown*, 159 Wn. App. 336, 371, 245 P.3d 776 (2011). Review of the instruction should be limited to the preserved evidentiary objection.

b. The proposed revision runs afoul with the doctrine of *stare decisis*.

Appellate courts are duty bound to apply a valid statement of state law pronounced by the State Supreme Court. *Matia Contractors, Inc. v. City of Bellingham*, 144 Wn. App. 445, 452, 183 P.3d 1082 (2008). Our

⁶ His objection to the "necessity" instruction was an extension of his objection to the aggressor instruction. *Id.* at 948-51 (Inst. 26).

Supreme Court approved WPIC 16.04 as an accurate statement of state first aggressor law. *Riley*, 137 Wn.2d at 908, 913-14. Washington courts only overturn precedent if it is clearly shown to be incorrect and harmful. *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599, 604 (2006). Those constraints prevent incautious action. *Id.* Courts typically will not reach core questions of judicial business "unless ... indispensably involved in a ... litigation. And then, only to the extent ... so involved." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594, 72 S. Ct. 863 (1952).

Defendant's challenge should be rejected without consideration as it asks this Court to overturn well established precedent without making a clear showing prevailing understanding of first aggressor law is incorrect and harmful. Even if this Court perceived itself empowered to modify the Supreme Court's pronouncement of first aggressor law, it should refrain from doing so as the facts of this case do not require either of defendant's proposed revisions. Any tinkering required to address the hypotheticals he offers in support of his claim should await the day those scenarios actually appear in a record on review.

- c. Defendant misreads first aggressor doctrine to require the provoking act to be unlawful.

In accordance with Washington law, the trial court's challenged aggressor instruction advised the jury that:

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 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 self-defense is not available as a defense.

CP 110 (Inst. No. 25); *Riley*, 137 Wn.2d at 908, 913-14. "[T]he initial aggressor doctrine is based upon the principle ... the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force." *Riley*, 137 at 912. It is not necessary for the victim to be confronted with a criminal act. As far back as 1916, it was understood one could be an initial aggressor through a wrongful act of aggression that was not unlawful:

Any *wrongful or* unlawful act of the accused which is reasonably calculated to lead to an affray or deadly conflict, and which provokes the difficulty, is an act of aggression or provocation which deprives him of the right of self-defense, although he does not strike the first blow.

State v. Hawkins, 89 Wash. 449, 455-56, 154 P. 827 (1916); *State v. Heath*, 35 Wn. App. 269, 271-72, 666 P.2d 922 (1983)("Heath blocked a doorway, refusing to let Weagley pass, and said ... very coarse words before Weagley hit him."); *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011); *State v. Cuellar*, 164 Wn. App. 701, 704, 262 P.3d 1251 (2011)("Cuellar began shouting and challenging the officers' actions ... then approached ... in an aggressive manner."). Whether "aggressive conduct" is provocative enough is left for jurors charged with deciding

when an act would be reasonably likely to start a fight according to that community's norms. *State v. Bartholomew*, 104 Wn. 2d 844, 849, 710 P.2d 196, 200 (1985); *State v. Wingate*, 155 Wn.2d 817, 823, 122 P.3d 122 P.3d 908 (2005) (WPIC 16.04 properly directs jury to decide whether defendant's acts precipitated the confrontation); *Green v. Am. Broad. Co., Inc.*, 647 F.Supp. 1359, 1365 (D.D.C. 1986).

- d. Defendant's unfounded paraphrase of the instruction is the only version containing the subjective test he wants removed.

Defendant claims a subjective test capable of creating an irrational-person standard is created by the aggressor instruction's phrase:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self[-]defense[,]

CP 110 (Inst. No. 25). Without analysis of this text's syntax or citation to authority, he claims the phrase means:

No person may, by any intentional act reasonably likely to provoke *the alleged victim*.

App.Br. at 14. After creating his strawman-subjective standard, he restores the original objective standard with the revision:

No person may, by any intentional act reasonably likely to provoke *a reasonable person*.

Id. at 14-15.

The flaw in his argument is one of missing content. Unlike his paraphrase, the instruction does not link the likelihood of provocation to perceptions by the person provoked, for it neither expressly nor impliedly mentions the person provoked, much less makes application dependent on the idiosyncratic temperament of that person. It exclusively speaks in terms of acts reasonably likely to provoke, making it an objective test devoid of consideration for the target of the provocative act. *See Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1996).

Meaning is discerned through rules of grammar. *See Planned Parenthood of Great Northwest v. Boedow*, 187 Wn. App. 606, 621, 350 P.3d 660 (2015). Such an analysis proves the error in defendant's reading. The adverbs "reasonably likely" modify the verb phrase "to provoke;" this extends an objective test to the act's provocative quality. *See e.g., State v. Killingsworth*, 166 Wn. App. 283, 289, 269 P.3d 1064 (2012). Meanwhile, the instruction has the structure of a conditional sentence. There is a causal relationship between the conditional clause that describes the triggering event of an intentional act reasonably likely to provoke a belligerent response and the main clause's consequent inability to claim self-defense. This familiar structure is used when only an objective quality of the subject or subject's conduct is relevant. *E.g., Sherman*, 128 Wn.2d at 205. *Huebner v. Sales Promotion, Inc.*, 38 Wn. App. 66, 73, 684 P.2d 752 (1984). Defendant's reading of the first aggressor instruction cannot be reconciled with its text.

- e. The instruction was also harmless if error as the alleged overinclusiveness had no bearing on this case.

Issuance of an overinclusive aggressor instruction is harmless if the error had no application to the evidence. *State v. Thomas*, 47 Wn. App. 1, 7-9, 733 P.2d 584 (1987). Defendant claims the instruction enables people to attack irrationally feared mail carriers for approaching. He also worries it might permit vagrant drug dealers to assault concerned citizens for approaching as part of a neighborhood watch. App.Br. at 11-12. While defendant's concern for the safety of law abiding members of the public is encouraging, the only aggressive conduct at issue in this case is the violent retaliatory attack he initiated after hunting Ware for the better part of an afternoon. So the way in which defendant claims the aggressor instruction can be overinclusive has no bearing on this case as his conduct was plainly an assaultive act that would support giving an aggressor instruction under even his unduly narrow concept of its application.

Defendant's argument also mistakenly focuses on the aggressor instruction in isolation instead of reading it with the other instructions. *See State v. Herman*, 11 Wn. App. 465, 469, 526 P.2d 1221 (1974). In this case the aggressor instruction's use of "intentionally" was qualified by the jury's instruction on criminal intent:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 94 (Inst. 9). Together the relevant intentional act of charging at Ware would be intentional conduct purposed to accomplish a crime, placing defendant even further from the law abiding citizens he worries might be deprived self-defense by aggressor instructions without the qualification.

f. The preserved evidentiary challenge is meritless.

Aggressor instructions are properly given when there is conflicting evidence regarding whether the defendant's conduct precipitated the fight. *Davis*, 119 Wn.2d at 665-66. That evidence is reviewed *de novo*, but in the light most favorable to the party who sought the instruction. *Id.* There need only be some evidence a defendant was the aggressor to meet this burden. *Id.* The act of provocation need not be the striking of a blow, so long as it was related to the assault to which self-defense was claimed. *Id.* A defendant's history of assaultive behavior toward the victim provides relevant context from which to assess whether an intentional act at issue was reasonably likely to provoke a belligerent response. *Id.*; *see also State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984).

There was conflicting evidence of whether defendant started the fight. Defendant claimed Ware charged him with a bat and knife when he civilly approached Ware to discuss the stolen speaker. RP (9/21) 822-30. Four witnesses gave a much different account. One in which defendant

was hunting for Ware several days after pulling a knife on him, making it clear defendant did not merely intend to hurt him. Defendant raced toward Ware the moment he caught up with him. That aggressive approach in the context of his previous threat was enough to reasonably provoke defensive violence on Ware's part. Within moments, Thomas saw defendant slam Ware to the ground. Jurors could have reasonably inferred that was part of one fluid attack beginning the moment the bike brought defendant within range. Defendant exploited that early advantage by stabbing Ware to death with a four inch knife as defendant kept Ware pinned on his back while directing him to beg for his life.⁷

The fatal beating would have defeated self-defense without the aggressor instruction, for no reasonable person would stab Ware three times, including once in the chest, while directing him to beg for his life once the danger posed by Ware's alleged wielding of a bat was neutralized by defendant's success in slamming, then pinning, Ware to the ground. CP 105. Giving the aggressor instruction was harmless if error.

⁷ RP (9/8) 71-73; (9/14) 427-36; (9/15) 500-14, 538, 549-50; 629, 637, 641-48; Ex. 108.

3. DEFENDANT FAILED TO PROVE THERE WAS FLAGRANT ILL-INTENTIONED ERROR IN THE STATE'S LEGITIMATE USE OF A SLIDE TO RECALL JURORS TO ADMITTED FACTS OR THE REASONABLY ARGUED INFERENCE FROM HIS THINLY VEILED THREAT TO KILL WARE.

Prosecutors are afforded wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Militate*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995)(citing *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991)); *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). Defendants must prove the impropriety of a prosecutor's remarks in addition to resulting prejudice. *Brett*, 126 Wn.2d at 175. Remarks must be reviewed in the context of the entire argument, the issues involved, the evidence addressed and the instructions given. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *State v. Warren*, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008). Appellate courts only review unobjected to argument to decide whether it was so flagrant and ill-intentioned proven prejudice could not have been cured by a timely instruction. *State v. McChristian*, 158 Wn. App. 392, 400, 241 P.3d 468 (2010); *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Argument is flagrant when it contains a flauntingly or purposely conspicuous error of law. See *Warren*, 165 Wn.2d at 28; *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (citing Webster's Third New

International Dictionary 862-63, 1126 (2002)). Whereas argument is "ill-intentioned" when it evinces malicious disregard for a defendant's right to due process. *See e.g., Warren*, 165 Wn.2d at 29.

- a. Defendant failed to prove the unobjected to slide was flagrant and ill-intentioned.

"[M]odern visual aids can and should be utilized" "to help the jury more easily understand [the] evidence" *State v. Walker*, 182 Wn.2d 463, 480, 341 P.3d 976 (2015); *State v. Strandy*, 49 Wn. App. 537, 541-42, 745 P.2d 43 (1987). Prosecutors "may use multimedia resources in closing arguments to summarize and highlight evidence, and good trial advocacy encourages creative use of such tools []. [C]losing arguments are an opportunity for counsel to argue reasonable inferences from the evidence." *Walker*, 182 Wn.2d at 476-77. But visual aids must only be used for a proper purpose. *Walker*, 182 Wn.2d at 480. They should not be used "more for their shock value than to educate." *Id.* And they cannot be altered in a manner that transforms them into the equivalent of unadmitted evidence. *Id.* at 480.

Error is assigned to an unobjected to caption of a closing argument slide used to publish two admitted postmortem photographs of the victim. The caption read: What Does Murder Really Look Like[?]" CP 171; Ex. 37, 129; Apx. A. The slide was accompanied by a reminder not to evaluate death based on exposure to crime dramas:

Now, forgive me. I don't mean to embarrass or make anyone uncomfortable, but I do often make reference to TV. I do often make reference to movies because we all watch or are affected to some degree by it. That's where we get a lot of our opinions. That's where we form a lot of our understanding. Frankly, one of the most frequently – the most frequent type of genre or topic you see is law enforcement on television. Frankly, we never really see what it really truly looks like. And Exhibits 37 and 129, which are admitted into evidence, this is what it looks like.

RP (9/22) 966-67. These remarks transitioned the argument from several slides and extensive discussion about instructions, the elements, defined terms, the State's burden, several pertinent facts, direct and circumstantial evidence, and Instruction No. 1's admonition it was for the jury to decide each element. CP 166-71; RP (9/22) 952- 66. The challenged slide was followed by argument and slides recalling the jury to where the incident occurred to frame discussion about events leading to defendant's decision to stab Ware to death over the pride-offending loss of a portable speaker. CP 172-82.

Defendant challenges the slide caption under *In re Glassmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). There the slide was deemed to have altered an admitted booking photograph with words "GUILTY, GUILTY, GUILTY" *superimposed* across the face. *Id.* at 706. *Glassman* said photographs captioned with "DO YOU BELIEVE HIM? ... "WHY SHOULD YOU BELIEVE ANYTHING HE SAYS ABOUT THE ASSAULT?" were the equivalent of unadmitted evidence. *Id.* The error was framed in terms of the slides' inflammatory affect. *Id.* In that context,

the captions were perceived to express the prosecutor's opinion that *Glasmann* was not credible. *Id.* at 706-07.

Walker clarified *Glasmann* had not pronounced a bright line rule against including subject-orientating text in the header of slides facilitating discussion of admitted evidence in summation. Such gross generalizations were deemed unworthy of consideration, *i.e.*:

Glasmann does not hold ... the color red is inherently prejudicial, ... use of all capital letters always constitutes shouting, or ... the word "guilty," when presented as a written word in a visual aid, always constitutes an improper expression of the prosecutor's opinion on guilt."

Walker, 182 Wn.2d at 480, n.6.

Slide text deemed problematic in *Walker* was like the *Glasmann* slides: "DEFENDANT WALKER GUILTY OF ... MURDER;" one slide depicted a booking photo with: "GUILTY BEYOND A REASONABLE DOUBT," "superimposed" over the face. *Id.* at 468. The Court held those slides juxtaposed admitted photos with "inflammatory text." *Id.* at 474, 478 (they "included ... exhibits ... altered with inflammatory captions and superimposed text[]").⁸

Review of the *Walker* slides adds clarity to the holding by showing what the Supreme Court meant by "altered," *i.e.*, text superimposed onto admitted photographs or juxtaposed to admitted photographs in a way that

⁸ Care was taken by concurring justices to explain it was the "vouching, prejudice, and inflammatory imagery" that created the error. *Walker*, 182 Wn.2d at 485 (Stephens, J. concurring); 486 (Wiggins, J. concurring), 489.

projected onto them the text's thematic affect, which was found to make them the equivalent of unadmitted exhibits. *Id.* at 472-75. Alteration in the latter sense is one of impression, where context vests images with meaning they could not bear in their original form.

Considered in the context of altered meaning or impression, the heading: "What Does Murder Really Look Like" challenged in this case cannot be fairly characterized as altering the attached photographs through the addition of a phrase calculated to influence assessment of defendant's guilt. See *Walker*, 182 Wn.2d at 480; *Glasmann*, 175 Wn.2d at 705. The caption served the legitimate purpose of introducing the State's legitimate point that the decision about whether Ware was murdered should be based on the admitted evidence and not pretrial exposure to dramatized images of murder depicted on TV.

This type of argument was consistent with Instruction No. 1's admonition to decide the case based on the admitted evidence and was plainly aimed at preempting "The CSI effect;" a term legal authorities use to describe the influence crime scene investigation shows are believed to have on juror behavior. *E.g.*, *United States v. Fields*, 483 F.3d 313, 355 (5th Cir. 2007). Scholarship about this phenomenon shows it can prove disadvantageous to the State and accused alike. Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 Yale L.J. 1050, 1055, 1083-85 (2006). No flagrant or ill-intentioned misconduct can be found in a prosecutor discouraging verdicts

based on bias formed through pretrial exposure to extrinsic evidence.

On a more practical note, it should prove exceedingly difficult to reconcile the *Walker* Court's express endorsement of attorneys making "creative use" of multimedia tools in summation with the proposition it is *per se* misconduct for prosecutors to include subject headings on digital slides used to publish admitted exhibits. Subject headings orient jurors to the publication's purpose. They obviate the attorney's need to rely on separate outlines by keeping each subject to be addressed in view. They enable attorneys to confidently stray from prepared remarks when juror reactions telegraph the need for extemporaneous elaboration. There is no faithful way to read *Walker* as holding prosecutor's alone must commit to memory or create companion notes to prompt recollection of the reason for publishing each exhibit amid oral presentations that typically address a vast array of different legal concepts, times, dates, people, evidence and the like. Fairness in criminal prosecutions cannot be achieved by depriving prosecutors the rudimentary tools of digital presentation in this digital age.

Defendant claims the slide was designed to inflame juror prejudice because Ware's injuries were not disputed, which, according to defendant, obviated the State's need to publish admitted photographs of Ware's body to prove its case. It is difficult to conceive of how that characterization could be more inaccurate. Defendant did not stipulate to any element of the charged offenses, but rather put the State to its full burden to prove his guilt by disproving his hybrid self-defense and undisclosed-11th hour

excusable-homicide defense. The State was entitled to put all the admitted evidence before the jury "as much to tell the story of [defendant's] guiltiness as to support [the] inference of [his] guilt." *See Old Chief v. United States*, 519 U.S. 172, 187-88, 117 S. Ct. 644 (1997). There is rightly no requirement for the State to risk unjust acquittals by assuming jurors do not need or expect an explanation of a victim's fatal injuries from the admitted exhibits. *See Id.*

The State's right to argue its case from admitted evidence aside, defendant's claim Ware stabbed himself made relative position, orientation and number of injuries exceedingly material, for that evidence did much to expose the absurdity of that defense. Ex. 37, 108, 112-13, 119, 129, 137, 140, 167, 169; RP (10/1) 1105. Bloody-brutal crimes cannot be explained in a lily-white manner. For "[a]s much as courts should and do keep a trial clear of potentially prejudicial matter, this obligation, within our concept of a fair trial for an accused, must be applied within the realities of the facts which the State is required to prove." *State v. Adams*, 76 Wn.2d 650, 656, 458 P.2d 558 (1969), *rev'd on other grounds*, 403 U.S. 947, 91 S.Ct. 2273 (1971).

Just as in *Adams*, "[e]ach slide shown had considerable probative value to prove ... material issues in the case." *Id.* In fact, the unchallenged slides depicted in CP 181-82 provide an excellent example of how slides are legitimately used for the educational purpose of explaining sometimes complicated medical facts—like the significance of wound tracks—by

presenting in one slide pertinent expert testimony, illustrative diagrams and pictures of the injury addressed. In law as in life, context matters. Particularly in summation where courts examine any challenged aspect of an argument in the context of the entire argument, the issues involved, the evidence addressed and the instructions given. *Russell*, 125 Wn.2d at 86; *Warren*, 165 Wn.2d at 26-28. Defendant failed to prove the slide depicted in CP 171 was improper, much less flagrant, ill-intended misconduct.

b. Defendant failed to prove the unobjected to remark was flagrant and ill-intentioned.

It is not improper to argue reasonable inferences from the admitted evidence. *State v. Smith*, 104 Wn.2d 497, 509, 707 P.2d 1306 (1985); WPIC 5.01. An inference is "[a] process of reasoning by which a fact ... sought to be established is deduced as a logical consequence from other facts ... proved or admitted." *Dickinson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 457 (1986); *State v. Jackson*, 112 Wn.2d 867, 874, 774 P.2d 1211 (1989). Juries may choose among competing inferences. *Id.*; *State v. Phuong*, 174 Wn. App. 494, 534, 299 P.3d 37 (2013); *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S.Ct. 2781 (1979); *United States v. Morgan*, 385 F.3d 196, 204 (2nd Cir. 2004)). The nature of a threat "depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." *State v. Locke*, 175 Wn. App. 779, 790, 307 P.3d 771, 776 (2013)(citing *State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003)). Statements may "connote

something they do not literally say...." *Id.* (citing *Planned Parenthood of Columbia/Willamette, Inc. v. A.C.L.A.*, 290 F.3d 1058, 1085 (9th Cir.2002)).

Defendant challenges an unobjected to remark, which expressed the implied import of defendant's thinly veiled threat to kill Ware. The remark came during a discussion of defendant's pre-murder encounter with Ware's girlfriend Gardner. RP (9/22) 979-80:

The defendant chuckled when she told him not to hurt Ware, to which he said, Oh, I'm not going to hurt him. I'm going to kill him.

RP(9/22) 980. It is most accurately characterized as an argued inference of intended meaning, drawn from two admitted statements Gardner attributed to defendant. One was adduced from Gardner during her testimony:

[H]e ... asked me – no, he told me he should tag along with me because he knows [Ware] would come to me.... I said no. He told me ... it is okay because he can feel [Ware] in the area. He'll run into him.... I kind of backed up and looked at him. I got a chill when he said that....

I believe I told him, don't hurt [Ware], if he did see him.... He did like a chuckle and said, Oh, I'm not going to hurt him.

RP (9/14) 432-33. Gardner said she did not know what defendant meant by the statement, but perceived the need to tell him if “he did hurt [Ware], [she] would tell”. RP (9/22) 433. Additional context from which to infer defendant's meaning came from his explanation of why he introduced a knife into an altercation he initiated with Ware several nights before.

Gardner asked defendant if he pulled a knife on Ware. Defendant told her: "Yeah." RP (9/14) 427. She asked defendant why he "didn't ... just put the knife down and fight him." RP (9/14) 427. Defendant responded: "[H]e wouldn't have pulled a knife if he wanted to fight [Ware]." RP (9/14) 427.

The other statement attributed to defendant was adduced through Gardner's excited utterance: "[S]he said, [defendant] told her he was going to stab [Ware]." RP (9/8) 71. The trial court shared the State's challenged characterization of the meaning conveyed by defendant's remarks:

[] That is: [defendant] was going to kill [Ware]. He was going to stab him, words to that effect.

RP (9/8) 91. Defendant did not disagree with the Court or State regarding the lethal intent conveyed by the statements attributed to him. RP (9/8) 91-92; (9/22) 980. He claimed they were never made; that they were falsely attributed to him by an unreliable and biased witness aligned with Ware. A witness he disparagingly referred to as "one of the folks from the hood." RP (9/22) 990, 999-1003. Prosecutors have been rebuked for resorting to such degrading rhetoric while referring to similarly situated people. *State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011).

Arguing the reasonably inferred meaning of defendant's thinly veiled threats to kill Ware was neither flagrant nor ill-intentioned. Making express what defendant barely left implied was fair argument from the only rational inference to be drawn from his statements. The challenged remark was not made up by the prosecutor, as demonstrated by the fact the

court shared the State's interpretation. RP (9/8) 91. So there is no validity to the claim the prosecutor testified to facts not in evidence, leaving no validity to defendant's comparison of the challenged remark to the facts in *State v. Pierce*, 169 Wn. App. 533, 555-56, 280 P.3d 1158 (2012).

c. Defendant failed to prove incurable prejudice.

His jury is rightly presumed to have followed the instruction to disregard statements not supported by the evidence. CP 84 (Inst. No. 1); *State v. Gamble*, 168 Wn.2d 161, 178, 225 P.3d 973 (2010). As they would have been presumed to follow an instruction to disregard the two unobjected to aspects of the State's summation being challenged in this appeal. *Id.* It is not rational to assume the challenged argument would have short-circuited the rational decision making capacity of twelve adult jurors from this community, especially once equipped with a curative instruction.

Even if the errors defendant claims are assumed, they amount to two ephemeral moments in a two week case replete with evidence of defendant's guilt. Two minor aspects of argument that otherwise consisted of proper reference to the physical evidence, testimony and admissions attributed to him by four witnesses. Argument that concluded by recalling jurors to their fact finding authority and stressing they should disregard argument unsupported by the evidence. RP(9/22) 987-88. The unfounded claims of prejudice should be rejected.

4. THERE IS NOTHING UNJUST IN A MAN WHO BRUTALLY MURDERED ANOTHER BEING ORDERED TO REIMBURSE THE PUBLIC FOR THE COST OF HIS APPEAL.

RCW 10.73.160(1) empowers appellate courts to impose appellate costs on adult offenders. Imposition of legal financial obligations has been historically perceived to be an appropriate method of ensuring able bodied offenders "repay society for a part of what it lost as a result of [their] commission of a crime." *State v. Barklind*, 87 Wn.2d 814, 820, 557 P.2d 314 (1976). More recently, this community-centric concept of restorative justice has been subordinated to offender-centric concerns focused on the difficulties attending repayment. *E.g. State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015). "Ability to pay is certainly an important factor that may be considered under RCW 10.73.160, but it is not necessarily an indispensable factor." *State v. Sinclair*, 192 Wn. App. 380, 389, 367 P.3d 612 (2016).

According to the record developed in this case, defendant is an able bodied former soldier who sometimes worked, owned some property and combined his capacity of mind with strength of body to hold another relatively large man down as he stabbed him to death. No doubt a murder conviction with its attending imprisonment limits defendant's prospects. But if he directed to payment of costs through prison or post-release labor some of the physical and mental energy he applied to hunting, then

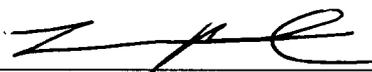
murdering the man who stole his speaker, defendant might, in some small measure, repay the community for the substantial resources it has and continues to expend on his behalf. Prison-based indigency should not be a barrier to appellate costs.

D. CONCLUSION.

Defendant's well proved conviction for murdering Ware should be affirmed as defendant was correctly precluded from misusing speculative gang evidence to disparage others involved in the case. The State properly argued admitted evidence through a noninflammatory slide and plain inference from admitted statements attributed to defendant. Jurors rightly received a Supreme Court approved first aggressor instruction. And the just consequences of defendant's crime should not be deemed a reason to spare him the inconvenience of repaying his full debt to society. Should repayment actually prove a manifest hardship, he will be free to seek relief from the trial court. RCW 10.01.160(4).

DATED: July 19, 2016.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by E-B 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.

7.19.18 Therend Kar
Date Signature

APPENDIX A



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¹ CP 171; Ex. 37, 129.

PIERCE COUNTY PROSECUTOR

July 19, 2016 - 3:26 PM

Transmittal Letter

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