FILED
Court of Appeals
Division II
State of Washington
6/19/2018 2:14 PM

NO. 50415-4

No. 97183-8

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT GROTT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 16-1-00509-0

Brief of Respondent

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40. Should this case be remanded so that an adult defendant can present mitigating factors in an attempt to avoid the imposition of mandatory consecutive firearm enhancement sentences?

41. Has appellant demonstrated cumulative error in this case?

B. STATEMENT OF THE CASE.

1. Procedure

Robert Grott, hereinafter defendant, was charged with one count of murder in the first degree and seven counts of assault in the first degree. CP 721-24. Defendant was convicted of one count of murder in the second degree and seven counts of assault in the first degree. Each of defendant's convictions was firearm enhanced. *Id.* CP 1092-1106.

Defense presented Dr. Kevin Moore's testimony regarding post-traumatic stress disorder. 15 VRP 1890-2012, 16 VRP 2018-2048. Before Dr. Moore testified, the State advised the Court that it would seek a limiting instruction "with respect to what the defendant told the doctor with respect to what happened on February 1st." 15 VRP 1850. Defendant never made an offer of proof that described the statements he made to Dr. Moore relating the events of February 1, 2016. 15, 16 VRP. Some of defendant's statements to Dr. Moore were related in the State's motion in limine:[1]

> Dr. Moore states at page 10 of his report that after the murder, the defendant "believed that he was in danger from other gang members." When the defendant's brother came home and asked what happened, the defendant "told him that he had to defend himself."
>
> Dr. Moore's report contains repeated insistences from the defendant that what he did was lawful self-defense. From page 10: "He felt that his self-defense was justified." From page 11: "Grott continues to insist he fired in self-defense." From page 13: "He feels that he had no alternative but to defend himself on 1FEB16. Grott is convinced that if he had not shot first, he would have died." From page 13: [Grott] feels his actions were justified. On the day of the shooting, Grott had not planned to shoot Thomas. He was prepared, as he had been, to defend himself from Thomas and his associates, due to recurrent death threats he received from Thomas." From page 14: "Grott believes that he acted in

[1] CP 748-49.

> self-defense when he shot Thomas, fearing for his life. Grott insisted that he acted in self-defense when he shot Thomas on 1 February 2016.

CP 748.

> Using a pistol purchased and registered to him that was being legally carried concealed to shoot someone in broad daylight with numerous witnesses does not support an individual, who logically planned or inteded [sic] to commit murder. Returning to his home and remain there while trying to cope with anxiety and hyperarousal with cannabis, alcohol, and Netflix also does not appear consistent with someone who had committed a premeditated murder.
>
> . . . .
>
> When Grott "locked eyes" with Thomas on 1 February 2016, Grott was fearful that Thomas was going to kill him as he had repeatedly threatened. After three months of repeated homicidal threats by Thomas, he reacted in self-defense by unholstering his handgun when he saw Thomas bend over in an apparent move to retrieve something from his car. Trained as a Marine, Grott drew and fired the pistol he carried. The pistol was registered, and he had obtained a permit for concealed carry after he became increasingly concerned for his safety and that of his family.

CP 749.

When arguing against the State's motion, defendant's trial counsel implicitly informed the trial court of defendant's statements sought to be admitted through Dr. Moore:

> Unless I can just hypothetically say, let's assume Subject A is on a skateboard and rides in front of the AM/PM and locks eyes with this gentleman, that he has a long negative history with him, violent history, threatening history with him. He sees the guy suddenly dart into the car. How can PTSD affect his interpretation of that individual's actions? I mean,

> unless I can do a hypothetical and say that is closely related, then I could get to where his opinion is.

15 VRP 1879.

Defendant's trial lawyer expressed the reasoning behind his desire to introduce this material into evidence: "He can't express an opinion as to Mr. Grott's mental state on February 1st, 2016, without hearing Mr. Grott's version of events. That is necessary in order for him to express that opinion." 15 VRP 1854. That argument was not borne out by Dr. Moore's trial testimony. Dr. Moore was able to express an opinion as to defendant's fear. 15 VRP 1963, and he also rendered an opinion as to the what defendant was feeling:

> Q. Now, in your opinion, how do you think Rob's understanding of the circumstances -- again, this is all based on the conversation that you had with him. How do you think Rob's understanding of the circumstances affected his belief and the need to defend himself on February 1st?"
>
> [objection overruled]
>
> A. I don't think that Mr. Grott felt that he had any other alternative but to defend himself.

15 VRP 1964.

Dr. Moore's opinions regarding defendant's state of mind on the day of the shooting were not a diagnosis:

> Q. If one suffers from PTSD, are the symptoms constantly present?

> A. No. That is one thing that we know very well, is that -- I will use the words "waxes" and "wanes." It comes and goes. It tends to be worse -- the symptoms tend to be worse if the person is exposed to similar sorts of stimuli, trauma. It is like diabetes and other conditions. Once you have it, your system is considered to always be different. Even though you may be in a situation that is safe, doesn't remind you, you have been in treatment, you may have them well controlled, still, as a psychiatrist, I would say once you have that condition, you will always have it.

15 VRP 1918.

Dr. Moore rendered another opinion at trial which was an opinion on a mixed question of law and fact—not a medical diagnosis:

> Q. Under those circumstances, do you believe that Mr. Grott had the ability to form premeditated criminal intent?
>
> . . .
>
> A. If I premeditated, there is a reflection, a careful weighing -- I mean, again, that is a legal term and not a psychiatric term. I think there would be impairment on processing information. Cognitive evaluating, being able to look at and weigh options, we know that people under stress in general see a narrowing of their options. In an immediate situation with a history of PTSD, I think that it is even more severe.

15 VRP 1964-65.

The trial court granted the State's motion in limine and denied defendant's attempt to use Dr. Moore as a conduit for defendant's statements relating what happened on February 1, 2016. 15 VRP 1885-89. The trial court did not limit Dr. Moore's ability to present expert testimony, or to relate facts occurring prior to February 1, 2016. *Id.*

Defendant made no objections to the State's closing arguments.[2]

Defendant took no exception to the trial court's proposed jury instructions. 17 VRP 2218.

Defendant was sentenced on May 26, 2017. 20 VRP; CP 1092-1106. The trial court imposed an exceptional sentence downward. CP 1118-1120. The trial court explicitly determined that it did not have discretion to impose an exceptional sentence on the firearm enhancements. CP 1119.

2. Facts

Verna Thomas testified that her son, Julian Thomas died on February 1, 2016. 6 VRP 659.

John Oliver testified that he was in his car, at the AM/PM store, getting ready to pull out, when he witnessed a shooting. 6 VRP 671-72. Mr. Oliver had to "back up, pull around" another car. 6 VRP 675. As he pulled around "the gentleman came walking up the sidewalk right there on the south end of the lot and pulled out a gun and started shooting, walking towards the car. He was right in front of me." 6 VRP 675. Mr. Oliver testified that the shooter was "I don't know. 20, 25 feet" away. 6 VRP 678. Mr. Oliver described what he saw:

[2] 18 VRP 2225-2251 (closing); 18 VRP 2297-2232 (rebuttal).

> He just kept firing and firing at the car. About the third round, as I looked over at the car, the guy in -- the bullet -- about the third bullet went through the back window of the car, and he -- the guy in the car slumped over, and then he just kept shooting and shooting. He emptied that first clip. He pulled out the clip, put it in his pocket, pulled out another clip, put it into the gun, and continued on firing. When he got done with the second clip, he was clear to the right of the car, the back right of the car, the Chevy, and he was loading another clip to go around, and that's when he was going around -- kind of dodging around to the other side of the Chevy, still firing. He got on the other side of the Chevy, which then was over by a blue car, a little blue car. I don't remember the make or model. It was a little blue car. I know that it had Oregon plates on it. He leaned over that car shooting into the car. He then, you know, just kept going until he was out. Then he kind of just -- it was kind of a fast-paced walked off to the little bus stop, picked up a skateboard, and left.

6 VRP 678-79. Mr. Oliver testified that he saw the shooter load three clips into the weapon and could not see him loading a fourth clip because he was on the other side of a car. 6 VRP 680. Mr. Oliver testified that the shooter looked right at him and smiled. 6 VRP 680. The shooter's third shot went through the back of the glass of a car, and the person seated in the driver's seat in the car slumped down. 6 VRP 689-90. It didn't look like he just ducked down. 6 VRP 689. After the person slumped over, Mr. Oliver saw no subsequent movement from the person. 6 VRP 692-93.

During the shooting, Mr. Oliver heard the shooter speak:

> Saying. During the course of it, yes. I heard the gentleman that was shooting says -- he said, "Did I get the nigger?" "Did I get the nigger?" And "I'm going to fucking kill the nigger."

6 VRP 691-92. The shooter was yelling as he said those words. 6 VRP 692.

Mr. Oliver testified that he saw a woman running away from the car into the store when the shooting started. 6 VRP 690. That woman was outside the car when the shooting started. 6 VRP 690.

Mr. Oliver was the first person to get to the person who had been shot. 6 VRP 695. He saw bullet wounds in the head and in the arm. 6 VRP 696. The person appeared dead to him. *Id.*

Tannisha McCollum testified that she drove with Petra Smith to meet Julian Thomas at the AM/PM store on February, 1, 2016,[3] and that their car was parked nose to nose with Mr. Thomas' car at the AM/PM store. 6 VRP 732. Ms. McCollum said she was inside the car and Petra Smith was outside the car, talking with Mr. Thomas when the shooting started. 6 VRP 736. Ms. McCollum said that she laid flat across the front of the car, on the inside after she heard gunshots. 6 VRP 736. Ms. McCollum said that about a minute before the shooting started, she saw Ms. Smith standing between the cars, outside, and Mr. Thomas was sitting

[3] The date is stated at 6 VRP 725.

in the driver's seat of his car with his feet out and they were talking. 6 VRP 737. Ms. McCollum saw the shooter shoot and change a magazine. 739-45. Ms. McCollum said that she stopped counting after fifteen shots. 6 VRP 741. Ms. McCollum heard the shooter say: "Where is he? Where is he? Where is that nigger?" 6 VRP 749. Petra Smith, Ms. McCollum's friend, testified that Ms. McCollum screamed "[d]uring the whole thing. I don't think that she stopped screaming at all." 7 VRP 801.

Petra Smith testified about the events of February 1, 2016. 6 VRP 759. She and Ms. McCollum had been at the gas station for "maybe like ten minutes" before gunshots started ringing out. 7 VRP 783. Both Ms. Smith and Mr. Thomas were initially standing between the two cars, conversing. 7 VRP 783-84. Mr. Thomas prepared a marijuana blunt to smoke, and the two smoked it and conversed. 7 VRP 785-86. When they finished smoking the blunt, Mr. Thomas starts to look in the car for some change.[4] 7 VRP 786-87. Ms. Smith said that she said that she wasn't giving him any change, and they laughed. 7 VRP 787. Mr. Thomas put his seat back, got in the front seat, and told Ms. Smith that he was going to leave. 7 VRP 786-87. Ms. Smith leaned in and gave him a hug. 7 VRP 787. She told Mr. Thomas that she loved him, and the bullets started

[4] He looked for change for about a minute. 7 VRP 787.

hitting the store. 7 VRP 787. Mr. Thomas was probably sitting in the car "for maybe 30 seconds or less before the bullets hit." 7 VRP 787. Ms. Smith said that she didn't have time to even pull her body back out of the car. 7 VRP 787-88.

Ms. Smith testified that the bullets started to hit above the car. 7 VRP 789. She said that she could see the windows going out of the store. 7 VRP 789. She said that Mr. Thomas slid down and he told her to lay. 7 VRP 789. Ms. Smith said:

> I looked at him. I asked him what was going on. Julian told me not to move. He said it was probably a drive-by and it would end. And then the bullets started hitting the car. They kept hitting the seat. And then the driver's side door was open, and Jay, by now -- he had squeezed himself to the floor of the car, so his head by the passenger seat. He was, basically, on the middle of the car on the ground. His feet were by the gas pedal. As we are laying there, the bullets start coming towards the passenger side of the car, and I can hear somebody yelling that Jay wasn't going to get away with shooting at his house and he promised that. He kept talking. As he kept talking slower, he kept pulling the trigger slower. Jay looked at me and told me to move because it didn't have nothing to do with me. I slid out of the car, and I ran in front of the Yaris. As I ran in front of the Yaris, he started shooting the building. I tried to run into the garbage area they have behind the AM/PM. The gate was locked. I hid underneath Ms. Debbie's car, the store owner's car. Grott walked up. I had just seen his feet. All I heard was, where the nigger go? And then he walked in between the truck I was under and the car that Tannisha McCollum was in, and he looked at her and he said it again.

7 VRP 790-91. Ms. Smith testified that Mr. Thomas had not been hit when he told her that this had nothing to do with her. 7 VRP 801-02.

Ms. Smith compared Mr. Thomas's positioning after he was shot dead with his positioning when she left him: "The way that I found him shot was the way that I left him. . . . The only difference his leg was hanging out of the car." 7 VRP 804.

Ms. Smith testified that after she got underneath the car, she could only see the shooter's feet. 7 VRP 800. She heard:

> I hear -- I hear him say, where the nigger go? And then he -- his feet walk in between the car that I was under and the car that Tannisha was inside of. I heard him say that he had got him. I just heard him reload the gun, and I heard his hand go on top of Tannisha's car, and then he just kept shooting.

7 VRP 800.

Ms. Smith noticed the shooter before he started shooting:

> I had seen Grott roll up to the bus stop on his skateboard. I did not realize that it was Grott until I had seen the picture of him from behind. It hit the news. But I had seen him -- about five minutes after we arrived to the store, I had seen him roll up on his skateboard. I watched -- I didn't pay him any attention because I didn't know who he was, but I had seen him roll up because he also -- as he stood at the bus stop, he was acting as though he was on some type of drug. He was taking his jacket off. Like, I could see him in the street acting -- like, by the sidewalk, acting weird, but I didn't pay him any attention because I don't know the man.

7 VRP 793.[5] Ms. Smith said that she watched the man who did the shooting for "[p]robably maybe, like, two to three minutes." 7 VRP 795.

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[5] During cross-examination, Ms. Smith said that "it was about ten minutes" from the time she first saw defendant until the shooting started. 7 VRP 828.

Jeannette Basher was a customer at the AM/PM market on February 1, 2016. 8 VRP 979-80. Ms. Basher and her two friends, Robin Lyons and Shawn Chargualaf, visited the store, then left and got back into their car. 8 VRP 980, 982. Ms. Basher testified that she "saw movement on her left-hand side, and a person shooting at another person in the car next to me." 8 VRP 986. When the doors were closed, she heard shots start ringing out. 8 VRP 982. Ms. Basher, referencing a photograph that showed her car and where a bullet had struck the AM/PM window, testified about her feelings at the time she saw the bullet connect with the window:

> Q. I honestly don't know what first crossed my mind. All I knew is that there was a high level of danger. I didn't know why. I didn't know if I was being targeted, if it was somebody in my car, if it was someone around me, close, far. I had no idea if it was random, if it was someone specific. All I knew is that there was reason for me to be scared.
>
> Q. And were you?
>
> A. Yes.

8 VRP 984-85. The shots came from behind Ms. Basher. 8 VRP 984.

Robin Lyons was in the car with Mr. Chargualaf and Ms. Basher. 8 VRP 968. As soon as the doors to the car closed, the shooting started. 8 VRP 970. She ducked down, she heard the bullets hitting, and she was scared—she froze. 8 VRP 971-73. She "was really terrified for [her] life

at the time." 8 VRP 974. Mr. Thomas' car was beside the car Ms. Lyons was in. 8 VRP 975. After the shooting, she went over to the car and saw Mr. Thomas, apparently dead. 8 VRP 976.

Mr. Chargualaf was the third person in Ms. Basher's car parked next to Mr. Thomas' car. Mr. Chargualaf heard what sounded like a gunshot and he "just panicked." 10 VRP 1248. He looked back and saw the shooter. *Id.* He heard "quite a few" gunshots. 10 VRP 1250. Mr. Chargualaf testified that he held the car door closed "I guess for him to not try to kill me in there, you know. I thought it was random or whatever." 8 VRP 1250. Mr. Chargualaf testified that he asked the driver to "get out of there" to get out of the way of the shooter. *Id.*

Debora Green was a store manager working the register at the AM/PM market on February 1, 2016. 8 VRP 927. She ducked down after the window broke and the glass went flying. *Id.* Ms. Green can be observed taking cover in the AM/PM store video. Exhibit 137. At one point she sticks her head to look up, the glass shatters again, and she ducks back down. *Id.* Ms. Green testified that she did not realize that it was gunfire until a girl came running through the door saying, "he is dead, he is dead, he is dead." 8 VRP 929. However, Ms. Green said that while she was on the floor, she was trying to find a phone to call 9-1-1. 8 VRP 928.

Karmanita Vaca was the other clerk in the store at the time of the shooting. 8 VRP 928. Ms. Vaca did not testify in this trial. Her response to the glass shattering into the store was to immediately get down on all fours and crawl away. *Id.* Exhibit 137.

Donald Pettie testified that he was driving past the AM/PM on Center St. on February 1, 2016. 7 VRP 840. He was stopped at the intersection a ways back. 7 VRP 841. He saw the shooter standing on the sidewalk of Center St. shooting up towards a car parked at the AM/PM, parked in front of the building. *Id.* Mr. Pettie described what he saw:

> The light was red, and the cars weren't able to go anywhere. My first reaction was to look and see is the shooting anywhere? Where is it at? He was shooting that way. I remember the –
>
> I think -- things that I remember was the guy was kind of -- he started shooting from the sidewalk, and he started walking through the grass median towards the vehicle, I guess. I remember a young lady jumping out of the driver's side of the car, ducking and running between -- I think there was another car next to where he was parked.
>
> The shooter, he seemed to have a target. He was very calm. He was walking through the median, up to the parking lot, toward the car, is what I remember.

7 VRP 842. This suggests Mr. Pettie saw the beginning of the shooting and saw Ms. Smith get out of the car as she testified. 7 VRP 790-91.

When the light turned green, Mr. Pettie drove through the intersection, turned around at the battery store on the other side of the

intersection, then waited at the light again. 7 VRP 843; Exhibit 120. Mr. Pettie couldn't see anything then, but he could still hear shooting. *Id.* Mr. Pettie was close enough to see that defendant's pistol had an extended magazine. 7 VRP 848.

Joseph Gulliford testified that on February 1, 2016 he was at the AM/PM at Union and Center, pulled up at pump number eight. 7 VRP 853. He was pumping gas when he heard rounds going off. 7 VRP 853. He testified:

> I had an angle of the shooting, and so it was quite a bit of ammunition rounds. He kept going off, bing, bing, bing, bing, and then it stopped for a little bit, and then it went on and it stopped for a little bit and went on.

7 VRP 854. Mr. Gulliford testified that he saw the shooter behind the car. 7 VRP 856; Exhibit 130. Mr. Gulliford described what he saw in the car that was being shot at: "I can see into this window, right here, on a diagonal, and I saw a person lie down and then head into -- his head was here and his legs were there." 7 VRP 858. Mr. Gulliford testified that he twice heard the "[y]elling, where is that nigger at?" coming from the direction of the shooting 7 VRP 863, 866. Mr. Gulliford saw the shooter run off afterward, with the skateboard and the hat. 7 VRP 856. Exhibit 130 was used to illustrate his observations. Mr. Gulliford saw the person in the car being shot at lie down. 7 VRP 858.

Vitaliy Zaychenko created the video contained in Exhibit 127. 7 VRP 875. He saw the shooter commence shooting "somewhere close to the road." 7 VRP 874. The short video shows defendant shooting at Mr. Thomas' car. 7 VRP 874. He saw a woman fleeing the car. 7 VRP 875. He testified that law enforcement showed up at the scene within about three to five minutes. 7 VRP 854-55.

Jessica Stewart witnessed the shooting from her car stopped at the intersection. 7 VRP 880. Exhibit 131 is her diagram of defendant's movements. 7 VRP 883. As the shooter left, he picked up his skateboard on the bench described in Exhibit 124 and Exhibit 2, photograph 3. 7 VRP 886-87. Ms. Stewart described the number of gunshots: "Endless. Multiple. I wouldn't even be able to count, to be honest." 7 VRP 887. She watched the shooter "just shoot at the AM/PM and approach the silver Impala and shoot into it." 7 VRP 880. She testified that the shooter picked up his skateboard and ran away. 7 VRP 881. The skateboard was around where the bench was near the sidewalk. 7 VRP 886; Exhibit 124.

Scott Lanning was pumping gasoline at the AM/PM market on February 1, 2016. 7 VRP 892. He described the shooter's movements on Exhibit 133. 7 VRP 894-95. He observed the shooter reloading. 7 VRP 894.

Irina Orlova, from inside a store across the street, saw a man with a handgun firing gunshots into a car. 7 VRP 901. She saw the shooter reload his gun a few times. 7 VRP 905. She saw the shooter leave. 7 VRP 909-10. She saw the deceased person inside the car. 7 VRP 910. Ms. Orlova is a nurse. 7 VRP 900. She could tell that the person in the car was dead. 7 VRP 911.

Dawn Meeds was driving past as the shooting occurred. 7 VRP 912. She described the shooter as he was shooting at a small silver compact vehicle parked in front of the AM/PM market. 7 VRP 913. She used exhibit 135 to describe what she saw. 7 VRP 914.

Tiffany Condon witnessed the shooting from an automobile 7 VRP 953-65. Exhibit 136 aided her testimony. *Id.* at 960.

William Miller testified that he was at the "Yes cabinet place," across the street from Union and Center when the shooting happened on February 1, 2016. 8 VRP 1019-20.

> We was standing there and the popping started. Me and Brian commented about it how it just continued to go. Then a few minutes later, we ran up the street and stood behind him at the Asian food store. He was still shooting. He had already unloaded one clip, and he was shooting on both sides of the car and in the back window. He came out in the middle parking lot, dropped a clip, walked around and circled and kind of looked like he was kind of out there and stuff. I did have a gun in my pocket. I started to pull it out when he was loading up to walk across the street. I was going to stop him, but people asked me not to. I turned

> around and got back up on the sidewalk. I had walked halfway across the street. And then I walked down to my car. I got in my car shortly afterwards. He was still shooting and walking back and forth from the car. I got in my car and drove down to the U-Haul, which is down on Adams Street. I'm facing my car then. He walked back, picked up his skateboard, and gently just skateboarded down the street, turned at the first corner to the right. I was sitting at the U-Haul telling people at the U-Haul to call the police at that time.

8 VRP 1020-21. When the prosecutor suggested to Mr. Miller that his attention was diverted, Mr. Miller responded:

> No. Actually, I was looking over my shoulder a couple of times as I was running down the street because I didn't -- he was shooting so crazy. That's the only reason that I was going to go up and stop him is because bullets was flying into the stores and stuff. It was hitting the walls, bouncing off. There was people at the gas pumps over there.

8 VRP 1023-24. Mr. Miller testified: "There was people all over here, all over the gas pumps. There was people inside. You could see them ducking down when the first bullets started flying." 8 VRP 1026. Mr. Miller testified how the shooter was "all over that parking lot,"[6] and was shooting at the car from many directions. 8 VRP 1024-1026. When asked "Could you tell what he was shooting at?" Mr. Miller responded: "The driver. The driver had slumped over trying to get away and stuff." 7 VRP 1025. Mr. Miller testified that it appeared to him that the shooter

[6] 8 VRP 1026.

was using the rear pillars of the car as cover. 8 VRP 1049. Mr. Miller testified that he

> watched him unload that clip, and it all entered into the driver's side and the back window, and then he turned, blew up, got really mad again, loaded it back up again, and went for the car again.

8 VRP 1068. Mr. Miller also testified that the shooter's demeanor was very calm that day. Both these latter two assertions were statements made on the day of the shooting. *Id.*

Mr. Miller testified that following the shooting, the shooter "walked back, picked up his skateboard, and gently just skateboarded down the street, turned at the first corner to the right." 8 VRP 1021. Mr. Miller testified that he went to get his car. 8 VRP 1028. Mr. Miller followed the shooter in his car, along with Brian Soros. 8 VRP 1029-34. Exhibit 122 described the path they took. 8 VRP 1031, 1033. He described the pursuit at 8 VRP 1034-1039. Mr. Miller testified that the shooter, and the person he chased, was the defendant. 8 VRP 1046-47.

Brian Soros observed the shooting from across the street. 8 VRP 1070. He described the shooter's activity:

> He walked from where he was at the bus stop, where the majority of the shots had been taken, and he walked up and closed the gap on to the car and put his hand inside the window and finished off what he started.

8 VRP 1075; *Id.* 1075-1076. Mr. Soros testified of his pursuit of the shooter. Exhibit 145 was used to illustrate the direction taken. 9 VRP 1086-87.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED HEARSAY STATEMENTS RELATED BY DEFENDANT TO THE PSYCHIATRIST WHO EXAMINED HIM FOR FORENSIC PURPOSES.

Defendant sought to have Dr. Moore, defendant's expert witness, relate defendant's hearsay statements pertaining to February 1, 2016 (the day of the shooting). 15 VRP 1850-1889. The trial court correctly concluded that neither ER 803(a)(4) nor ER 705 authorized the admission of those statements through defendant's expert.

a. Defendant's statements to Dr. Moore fell outside ER 803(a)(4).

i. ER 803(a)(4) does not apply to diagnoses made for the sole purpose of courtroom testimony.

Dr. Moore was a forensic psychiatrist retained to assist the defense attorney in this case. 15 VRP 1969-1971. Defendant made "statements" to Dr. Moore regarding what happened on the morning he killed Mr.

Thomas.[7] ER 801(a). Defendant's statements are hearsay because they are statements about what happened that morning that were offered to prove what happened that morning. ER 803(c).

ER 803(a)(4) provides a hearsay exception for

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4). ER 803(a)(4) "is meant to apply to statements made by a patient in the course of the doctor's diagnosis, and pursuant to the doctor's diagnostic procedures . . ." ***Bertsch v. Brewer***, 97 Wn.2d 83, 87, 640 P.2d 711, 713 (1982).

> The medical diagnosis exception applies only to statements that are "reasonably pertinent to diagnosis or treatment." ER 803(a)(4). A party demonstrates a statement to be reasonably pertinent when (1) the declarant's motive in making the statement is to promote treatment, and (2) the medical professional reasonably relied on the statement for purposes of treatment. ***State v. Butler***, 53 Wn.App. 214, 220, 766 P.2d 505 (1989).

State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322, 328 (2007). Statements made only for trial purposes fall outside the hearsay exception

[7] Defendant never made an offer of proof as to what those statements were. The State's motion in limine referenced the statements that the State sought to exclude. *See* CP 748-49; 15 VRP 1850-1889. Those must be the statements that are at issue in this appeal (because respondent cannot identify any others).

of ER 803(a)(4). ***State v. Lopez***, 95 Wn. App. 842, 850, 980 P.2d 224, 228 (1999).

There is tension between ***Bertsch***, ***Butler***, ***Williams***, and ***Lopez*** on the one hand, and ***In re Personal Restraint of Penelope B.***, 104 Wn.2d 643, 709 P.2d 1185 (1985) on the other. ***In re Penelope B.*** held that ER 803 applies equally to treating physicians and physicians who are consulted for the purpose of enabling the physician to testify. ***In re Penelope B.***, 104 Wn.2d at 656. However, ***In re Penelope B***. is confusing because, in support of this position, in addition to citing 5A K. TEGLAND, WASHINGTON PRACTICE § 367, at 224 (2d ed.1982), the Supreme Court cited ***Kennedy v. Monroe***, 15 Wn. App. 39, 47, 547 P.2d 899 (1976). ***Kennedy*** is a pre-rule case which provided for the admissibility of the statements, but not for the truth of the matter asserted—only to establish the factual basis for the expert's opinion. ***Kennedy***, 15 Wn. App. 48-49 (including note 4). Furthermore, the Court noted that the statements in question were not hearsay in that case, so any discussion regarding the applicability of a hearsay "*exception*" to a non-hearsay statement could only be dicta. (Emphasis not added). ***In re Penelope B.***, 104 Wn.2d at 656. Respondent suggests that in the face of this confusion, this Court should adhere to the reasoning of ***Bertsch***, ***Butler***, ***Williams***, and ***Lopez***.

ii. Alternatively, defendant never made an offer of proof to the trial court sufficient to demonstrate that defendant's hearsay statements relating to the day of the shooting were "reasonably pertinent" to his PTSD diagnosis.

Defendant claims that the trial court should have admitted his statements made to Dr. Moore, relating to the day of the shooting, pursuant to ER 803(a)(4). ER 803(a)(4) permits certain testimony reasonably pertinent to diagnosis or treatment. Because Dr. Moore served only as a forensic expert and not a treating physician,[8] defendant had the burden of demonstrating that his statements to Dr. Moore were reasonably pertinent to Dr. Moore's medical diagnosis of Mr. Thomas. ER 803(a)(4).

To claim evidentiary error in the exclusion of evidence, the proponent must make an adequate and timely offer of proof as required by ER 103(a)(2).

> An offer of proof serves three purposes when a trial judge is considering the exclusion of evidence: It informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.

(indentation, and braces omitted) ***Adcox v. Children's Orthopedic Hospital & Medical Center***, 123 Wn.2d 15, 26, 864 P.2d 921, 929 (1993)

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[8] 15 VRP 1969-1971.

(citing ***State v. Ray***, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991)). "It is the duty of a party offering evidence to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. An offer of proof is not required, however, if the substance of the excluded evidence is apparent from the record." ***Ray***, 116 Wn.2d at 539.

Dr. Moore presented a medical diagnosis of PTSD at trial. 15 VRP 1953. Appellant's Brief does not identify any particular statement that was erroneously excluded and presents no factual support why any such statement or statements were reasonably pertinent to Dr. Moore's PTSD diagnosis. Appellant's Brief at 29-41.

The following argument from defense counsel presents the best opportunity to inventory defendant's hearsay statements that defense counsel sought to introduce through Dr. Moore:

> Unless I can just hypothetically say, let's assume Subject A is on a skateboard and rides in front of the AM/PM and locks eyes with this gentleman, that he has a long negative history with him, violent history, threatening history with him. He sees the guy suddenly dart into the car. How can PTSD affect his interpretation of that individual's actions? I mean, unless I can do a hypothetical and say that is closely related, then I could get to where his opinion is.

15 VRP 1879. *See also* 15 VRP 1885-86.

The "skateboard . . . in front of the AM/PM" statement would have been merely cumulative hearsay. 6 VRP 677-679 ; 7 VRP 793-96, 827; 13 VRP 1618; 13 VRP 1653 (Exhibit 167); Exhibits 151-154; Exhibit 161. The skateboard statements were also uncontroverted—the prosecutor talked about defendant's skateboarding to the scene in his opening statement. 6 VRP 627-28. There is no showing that defendant's skateboarding was relevant to the PTSD defense, and there is no possible way that exclusion of one more piece of cumulative skateboarding evidence could possibly be prejudicial.

Dr. Moore's ability to relate Julian Thomas' "long," "negative," "violent," and "threatening" history with defendant was not constrained by the trial court's ruling. 15 VRP 1876-77. No opinion testimony was constrained; only defendant's hearsay relating to the day of the killing was excluded. *Id.*

The "locks eyes" and "suddenly dart into the car" statements appear to be the hearsay statements by defendant that defendant's trial counsel was trying to get into evidence via Dr. Moore, and their exclusion appears to form the basis for defendant's claim of appellate error.[9]

[9] This is respondent's best guess as to what defendant argues.

Defendant had his opportunity to make an offer of proof on this point, but either did not, or could not, take advantage:

> MR. FRANS: I don't know that there is any exception in the case that clearly indicates that it applies equally to the treating physicians and when a physician consulted for the purpose of forensic evaluation or psychological treatment and diagnosis. There isn't any distinction.
>
> THE COURT: I have permitted it for purposes of him diagnosing the PTSD.
>
> MR. FRANS: You haven't permitted him talking about Mr. Grott's version of 2/1.
>
> THE COURT: That's right. He can diagnose PTSD without that.

15 VRP 1887. This was a clear moment in the proceedings when defendant could have presented an offer of proof from Dr. Moore to demonstrate that Dr. Moore did rely upon defendant's "locked eyes" or "suddenly darts into the car" statements in rendering his PTSD diagnosis. That opportunity was not taken. Appellant failed to demonstrate to the trial court that any particular excluded statement made by defendant was "reasonably pertinent" to Dr. Moore's PTSD diagnosis.

Dr. Moore rendered other expert opinion testimony, but that expert testimony was not medical diagnosis testimony, and thus could not be admissible pursuant to ER 803(a)(4). 15 VRP 1959-1965. That testimony related the effect of PTSD upon a person's level of fear,[10] the effect of

[10] 15 VRP 1959-60.

PTSD upon a person's perception of threats or risks,[11] the effect of PTSD upon a person's ability to interpret another person's actions,[12] the global impairment of a person with PTSD's "ability to go step-wise go through perception, processing, and then taking an action,"[13] the immediate fear that defendant felt and reasons for that fear,[14] defendant's feeling that he had no alternative but to defend himself,[15] and the severe impairment of defendant's ability to premeditate.[16] Such opinions are expert opinions, but they are not medical diagnoses, and thus fall outside ER 803(a)(4).

b. The trial court did not abuse its discretion when it excluded defendant's statements to Dr. Moore relating to the events of February 1, 2016 pursuant to ER 705.

"A trial court may allow an expert to reveal the underlying basis for her opinion if doing so will help the jury understand the expert's opinion. ER 705. The disclosure is permissible even if the information would be inadmissible as substantive evidence." ***In re Personal Restraint of Coe***, 175 Wn.2d 482, 513, 286 P.3d 29 (2012) (citing ***In re Personal Restraint of Marshall***, 156 Wn.2d 150, 163, 125 P.3d 111 (2005)). "The trial court need only give an appropriate limiting instruction explaining

[11] 15 VRP 1960.
[12] 15 VRP 1960-61.
[13] 15 VRP 1961-62.
[14] 15 VRP 1962-63.
[15] 15 VRP 1964.
[16] 15 VRP 1964-65.

that the jury is not to consider this revealed information as substantive evidence." *Id.*, 175 Wn.2d at 513-14. However, hearsay may not be introduced into evidence through ER 705 unless the expert relied upon that hearsay to formulate her own opinion. ***Washington Irrigation & Development Co. v. Sherman***, 106 Wn.2d 685, 688, 724 P.2d 997 (1986). In this case, defendant presented no offer of proof that Dr. Moore relied upon any particular excluded statement in the formation of his expert opinion. The trial court did not err in excluding such testimony.

Alternatively, defendant has not demonstrated that the trial court abused its discretion by declining to admit inadmissible hearsay through Dr. Moore.

> [W]hen an expert is allowed to testify to a[n] . . . opinion which is in part based on facts which would normally be hearsay and inadmissible as independent evidence, the trial court may in its discretion allow the expert to state such facts for the purpose of showing the basis of the opinion. The exclusion of such evidence, however, must be based on a sound exercise of discretion and not on an erroneous application of the hearsay and best evidence rules.

State v. Wineberg, 74 Wn.2d 372, 384, 444 P.2d 787, 794 (1968). Given that defendant's statements relating the events of February 1, 2016 were inadmissible hearsay,[17] the trial court did not abuse its discretion by

[17] The inapplicability of ER 803(a)(4) is addressed *infra*.

denying defendant the opportunity to relate them through expert testimony.

2. THE SIXTH AMENDMENT OPENED NO NEW EVIDENTIARY GATEWAYS IN THIS CASE.

Defendant asserts that his hearsay statements made to his expert witness were admissible pursuant to the Sixth Amendment. Appellant's Brief at 29-35. Three reasons are advanced: (a) "Grott should have been permitted to allow Dr. Moore to explain that Grott was unable to formulate the intent to murder based on his subjective fear that was influenced by his PTSD;"[18] (b) "Grott's experience prior to and during the shooting formed the basis of the expert opinion...;"[19] (c) defendant should have been permitted to use the Dr. Moore as a conduit to present defendant's hearsay testimony.[20]

a. Dr. Moore was never going to testify that defendant was unable to "formulate the intent to murder."

Defendant's post-traumatic stress disorder (PTSD) testimony was presented to rebut the charge of premeditated criminal intent—not to rebut

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[18] Appellant's Brief at 31.
[19] Appellant's Brief at 34.
[20] "The critical information the trial court refused to permit Grott to discuss was his experience prior to and during the shooting incident. Appellant's Brief at 33. "...Grott's experience was essential to Grott's ability to present a meaningful defense." Appellant's Brief at 34.

generalized intent. 15 VRP 1964; 16 VRP 2029-31. Defendant's contrary assertions at Appellant's Brief at 31 are false and should be rejected.[21] Dr. Moore's response to the trial court's question was unambiguous:

> Q. In this case, there is essentially two sort of specific intents or two kinds of intents. One is a general intent to kill. Another is the capacity to premeditate. As I understood your report, you didn't think that the defendant in our case had the capacity to do either one of those things.
>
> A. No, sir. I would apologize if my writing was not clear enough. I do not think that the general intent of killing was affected per se. To me, that would be more of an insanity defense. It was more of the premeditation and the specific aspect of that.

5 VRP 582. Dr. Moore was never going to testify that defendant "was unable to formulate the intent to murder."

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[21]Defendant states "Grott should have been permitted to allow Dr. Moore to explain that Grott was unable to formulate the intent to murder based on his subjective fear that was influenced by his PTSD." Appellant's Brief at 31. Respondent cannot find any of Dr. Moore's testimony even remotely consistent with what defendant claims. *See* 15 VRP 1890-2012, 16 VRP 2018-2048. Dr. Moore, when asked if PTSD could rise "to the level of somebody not being able to appreciate general intent or their actions therefrom," responded: "You know, PTSD can or I should say has been accepted in legal communities as rising to that level. It has been within most of the time when someone has a flashback where they have lost any contact with reality. <u>That is more of an insanity or one might even call a psychotic episode instead of posttraumatic stress disorder in and of itself</u>. (Emphasis added). 16 VRP 2029-30. Defendant claimed neither insanity nor psychotic episode in this case. Dr. Moore never opined that defendant lost contact with reality. *See* 15 VRP 1890-2012, 16 VRP 2018-2048.

b. Defendant has not demonstrated that application of the Rules of Evidence infringed his Sixth Amendment rights.

As discussed above, neither ER 803(a)(4) nor ER 705 provided defendant with a means to could introduce his self serving hearsay statements through Dr. Moore. The Confrontation Clause does not provide defendant with an alternative evidentiary gateway.

Defendant's assertion that the Rules of Evidence are constitutionally deficient "assumes no light burden." ***Clark v. Arizona***, 548 U.S. 735, 747, 126 S. Ct. 2709, 2719, 165 L. Ed. 2d 842 (2006) (citing ***Montana v. Egelhoff***, 518 U.S. 37, 43, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996)). This claim should fail because defendant does not even attempt to demonstrate that the exclusion of defendant's self-serving hearsay "offends a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." ***Clark***, 548 U.S. at 748.

Alternatively, defendant has demonstrated no prejudice in the presentation of his defense. Defendant's claims of prejudice relating to

the presentation of his mental state evidence are baseless.[22] Defendant's ability to use self-serving inadmissible hearsay to prove self defense was limited, but as Justice Alito wrote in ***Williams v. Illinois***, 567 U.S. 50, 132 S. Ct. 2221, 2225, 183 L. Ed. 2d 89 (2012): "[I]f such evidence is disclosed, a trial judge may instruct the jury that the statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence establishing its underlying premises." ***Williams***, 567 U.S. at 81.

c. Defendant had no Sixth Amendment right to use Dr. Moore as his hearsay conduit.

"The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." ***Taylor v. Illinois***, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988). "He has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts." (Parentheses omitted). ***Brown v. United States***, 356 U.S. 148, 155, 78 S. Ct. 622, 626, 2 L. Ed. 2d 589 (1958)

[22] Defendant was charged with only one crime requiring proof of premeditated criminal intent—murder in the first degree. CP 721-24. The jury did not find defendant guilty of murder in the first degree. CP 1040. The jury found defendant guilty of the lesser offense of murder in the second degree. CP 1041. Murder in the second degree does not include an element of premeditated criminal intent. RCW 9A.32.050; CP 1009, 1010. Defendant's diminished capacity defense was not prejudiced because it was completely successful.

(quoting ***Fitzpatrick v. United States***, 178 U.S. 304, 315, 20 S. Ct. 944, 949, 44 L. Ed. 1078 (1900)).[23]

3. THE TRIAL COURT DID NOT DENY DEFENDANT THE OPPORTUNITY TO PRESENT EXPERT TESTIMONY.

In ***State v. Bottrell***, 103 Wn. App. 706, 14 P.3d 164 (2000), the issue presented was whether the trial court erroneously denied her expert the opportunity "to testify that she suffered from PTSD and had diminished capacity." ***Bottrell***, 103 Wn. App. at 712. In this case, the defendant's expert was permitted to testify that defendant suffered from PTSD[24] and had diminished capacity.[25] On appeal defendant points to no instance where the trial court denied Dr. Moore an opportunity to present an expert opinion.

4. SUFFICIENT EVIDENCE SUPPORTS THE JURY VERDICT OF MURDER IN THE SECOND DEGREE AND ASSAULT IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. ***State v. McCullum***, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also* ***Seattle***

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[23] ***Brown*** was cited with favor in ***Taylor v. Illinois***, 484 U.S. at 412.
[24] 15 VRP 1953. The confidence in that diagnosis is emphasized at 15 VRP 1958-59.
[25] 15 VRP 1964-1965.

v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); ***State v. Mabry***, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***State v. Joy***, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. ***State v. Barrington***, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing ***State v. Holbrook***, 66 Wn.2d 278, 401 P.2d 971 (1965)); ***State v. Turner***, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *Id.*; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). 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) (citing ***State v. Casbeer***, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

a. Substantial evidence supported the jury verdict of guilt to the charge of murder in the second degree.

The evidence, taken in the light most favorable to the State, was overwhelming. Defendant shot Mr. Thomas dead. 8 VRP 1046-47; 11 VRP 1308, 1310-11. Mr. Thomas suffered nine gunshot wounds.[26] 11 VRP 1298. Defendant fired "lots and lots" of shots. 8 VRP 1073. Defendant

> [j]ust had his feet firmly planted, you know, taking shots towards the building. At the end, I don't know if he was running out of ammunition or what. He walked up to the car to make sure that he finished off what he had started or walked up and used the rest of what he had left inside of the car on whoever was in there.

8 VRP 1023. Defendant contemporaneously and unambiguously expressed his intention to kill by "yelling it out:" "I'm going to kill the nigger. I'm going to kill the nigger." *Id.* Defendant did not suffer from Post Traumatic Stress Disorder at the time of the shooting. 17 VRP 2151-2152. The killing happened within the State of Washington. 13 VRP 1613-14.

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[26] One shot caused a surface wound in the arm likely made by a fragmented bullet. 11 VRP 1304. Another caused an entrance wound in the forehead (11 VRP 1306) and an exit wound near the top of the head (11 VRP 1307). Another caused an entrance wound near the chin (11 VRP 1309), where the bullet traveled up through the mouth and into the base of the skull (11 VRP 1310). Six shots were wounds to the leg. 11 VRP 1313-17. Two of the shots (to Mr. Thomas' head) would have caused the immediate loss of consciousness. 11 VRP 1308, 1310.

Defendant fired his pistol at Mr. Thomas forty eight times in a path that apparently led from near Center Street toward Mr. Thomas.[27] "Proof that a defendant fired a weapon at a victim is, of course, sufficient to justify a finding of intent to kill." ***State v. Hoffman,*** 116 Wn.2d 51, 84–85, 804 P.2d 577 (1991). Sufficient evidence established that defendant, acting with the intent to cause the death of Mr. Thomas, did cause the death of Mr. Thomas. RCW 9A.32.050.

Sufficient evidence also negated self-defense. Petra Smith was talking with Mr. Thomas immediately prior to the shooting about their respective domestic situations. 7 VRP 783-84. They smoked some marijuana outside the car. 7 VRP 785. After looking for some change inside the car, Mr. Thomas sat down in the driver's seat and told Ms. Smith that he was going to leave. 7 VRP 786. Ms. Smith leaned in and gave him a hug. 7 VRP 787. She told him that she loved him, then the bullets started hitting the store. *Id.* Mr. Smith "was probably sitting in the car for maybe 30 seconds or less before the bullets hit." 7 VRP 788.

Ms. Smith saw defendant shortly before the shooting. 7 VRP 793.

> But I had seen him -- about five minutes after we arrived to the store, I had seen him roll up on his skateboard. I watched -- I didn't pay him any attention because I didn't know who he was, but I had seen him roll up because he also -- as he

[27] Forensic Specialist Renae Campbell recovered 48 9mm shell casings from the scene. 9 VRP 1122-1153, 1165, 1181. Detective Vold testified that the pattern of defendant's 48 expended shell casings described a path. 11 VRP 1436.

> stood at the bus stop, he was acting as though he was on some type of drug. He was taking his jacket off. Like, I could see him in the street acting -- like, by the sidewalk, acting weird, but I didn't pay him any attention because I don't know the man. If I don't know you, it is none of my business.

7 VRP 793.

> He was on the skateboard, and then I seen him pick it up. He walked right there. He was cool for a minute. He was okay. And then I seen him start doing weird stuff, taking his jacket off. I was like, what? I didn't pay him attention. I don't know the man. I don't know you, like, so you are not a threat to me. I had never seen it coming. Jay never made any type of mention that he felt like we needed to do anything. Like, he -- I don't even know if he had seen him.

7 VRP 795. She observed defendant for "maybe like two to three minutes" as he walked back and forth on the sidewalk. 7 VRP 795.

Ms. Smith was leaning into Mr. Thomas' car and was over Mr. Thomas' chest, when the bullets started to hit above the car. 7 VRP 789. Mr. Thomas slid down, and told Ms. Smith to lay. *Id.* Mr. Thomas was on the floorboard of the car. 7 VRP 790, 792. Mr. Thomas' feet were by the gas pedal and his head was by the passenger seat. *Id.* As they were laying there, in the car, the heard defendant "yelling that Jay wasn't going to get away with shooting at his house and he promised that." 7 VRP 790. Mr. Thomas, at that time unhit, told Ms. Smith to move because this had nothing to do with her. *Id.* Ms. Smith saw defendant's feet as he walked up. 7 VRP 790. All Ms. Smith heard was "where the nigger go?"

Id. Ms. Smith testified that at the moment Mr. Thomas told her to go "it felt like the closer [defendant] got, the slower [the shots] came because the more [defendant] felt like he needed to talk." 7 VRP 797.

Ample evidence supported the jury's rejection of self defense in this case because defendant faced no actual danger of great personal injury as he violently attacked his victims. Mr. Thomas' behavior while he was conversing with Petra Smith was completely unprovocative. A reasonable jury could have examined that non-provocative situation, disbelieved defendant's mental state evidence, and readily concluded that defendant did not "believe[] in good faith and on reasonable grounds that he [was] in actual danger of great personal injury." CP 1032. Defendant's own statement, "yelling that Jay wasn't going to get away with shooting at his house..."[28] provides revenge as a readily viable alternative to self defense. Furthermore, viewing the evidence in the light most favorable to the State, defendant's "kind of walking back and forth"[29] behavior before the shooting was not the response of a person "who reasonably believes he is about to be injured."[30]

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[28] 7 VRP 790.
[29] 7 VRP 795.
[30] CP 1030.

b. Substantial evidence supported the jury's verdicts of guilty to the seven charges of assault in the first degree.

This case falls squarely within ***State v. Elmi***, 166 Wn.2d 209, 207 P.3d 439 (2009).

> Where a defendant intends to shoot into and to hit someone occupying a house, a tavern, or a car, she or he certainly bears the risk of multiple convictions when several victims are present, regardless of whether the defendant knows of their presence. And, because the intent is the same, criminal culpability should be the same where a number of persons are present but physically unharmed.

State v. Elmi, 166 Wn.2d at 218. "[O]nce the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim." ***State v. Wilson,*** 125 Wn.2d 212, 218, 883 P.2d 320 (1994).

As discussed in the preceding section, the evidence was sufficient to establish that defendant, without legal justification, intended to kill, and did kill, Mr. Thomas with a firearm in the State of Washington. Ms. Smith, Ms. McCollum, Ms. Basher, Ms. Lyons, Mr. Chargualaf, Ms. Green, and Ms. Vaca were innocent bystanders to that murder, and they were each placed in imminent apprehension of bodily harm by defendant's

gunfire. The State was not required to prove more to prove assault in the first degree.[31] ***State v. Elmi***, 166 Wn.2d at 218-19.

Karmanita Vaca's response to the shooting can be seen in the video recording of Exhibit 137. She was clerking in the AM/PM and immediately dropped down to all fours and quickly crawled away after the store's window was blasted by defendant's gunshots. Although Ms. Vaca did not testify, her apprehension of imminent harm is expressed in Exhibit 137. This Court should also consider that the unharmed bystander victims in ***State v. Elmi*** did not testify. S***tate v. Elmi***, 166 Wn.2d at 212-13.

Debora Green, the store manager, was working the registers with Ms. Vaca. *Id.*, 8 VRP 927. She ducked down after the window broke and the glass went flying. *Id.* Exhibit 137 shows Ms. Green taking cover. At one point she sticks her head to look up, the glass shatters again, and she ducks back down. *Id.* Although Ms. Green did not realize that it was gunfire while the shooting was happening, Ms. Green said that while she was on the floor, she was trying to find a phone to call 9-1-1. 8 VRP 928-29. The evidence readily supports the inference that both Ms. Vaca and Ms. Green were placed in imminent apprehension of bodily harm.

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[31] "Whether or not the children comprehended that a gun was being fired, we could infer from this evidence that the children were put in apprehension of bodily harm." ***State v. Elmi***, 166 Wn.2d at 219.

Ms. McCollum, in the car next to Mr. Thomas' car,[32] couldn't stop screaming while the shooting occurred. 6 VRP 740, 7 VRP 801. Ms. McCollum testified that she was scared. 6 VRP 751. Ms. Smith, who was in the car with Mr. Thomas when the shooting started, testified that she ran and hid, once Mr. Thomas told her it wasn't a drive by shooting and that this had nothing to do with her. 7 VRP 790-91. The three occupants in the car on the other side of Mr. Thomas' car each testified to their fear and their fearful reaction.[33]

In addition to the evidence of the actual fear these bystander victims felt, is the evidence presented by defendant's expert witness, Osama Shofani. Mr. Shofani testified that Defendant acted "in accordance with suppression fire and maneuver tactics." 16 VRP 2062-63.
In other words, defendant's behavior was consistent with a person who was trying to scare other people by shooting bullets at them.

Viewed in the light most favorable to the State, the evidence was sufficient to support seven assault in the first degree convictions.

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[32] Exhibit 2, photograph 6; 6 VRP 742.
[33] Ms. Basher testified as to the positioning of her automobile. 8 VRP 986. Ms. Basher testified to her fear at 8 VRP 984-85. Ms. Basher testified to "getting as far down into my car as possible. I was also on my phone trying to call 9-1-1." 8 VRP 986. Ms. Lyons testified to her fear at 8 VRP 976. Ms. Lyons' reaction was to "hide," to duck "right up under to the floorboard." 8 VRP 971. Mr. Chargualaf testified to his fear at 10 VRP 1248-1251. Mr. Chargualaf tried to hold the door to the car closed so the killer could not kill him in there. 10 VRP 1250.

5. JURY INSTRUCTION 34 PROPERLY INSTRUCTED THE JURY ON SELF-DEFENSE.

Jury Instruction 34 (CP 1030) is taken from WPIC 17.02. Defendant claims that the fourth paragraph of that instruction was faulty because it read

> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

when defendant claims it should have read

> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of ***or prior to*** the incident.

(emphasis added) Appellant's Brief at 51-53. Defendant did not take exception to the instruction when given the opportunity. 17 VRP 2218.[34]

a. Jury Instruction 34 was not erroneous.

Appellant has not presented a single fact or circumstance known to defendant prior to the shooting in this case that was not also known to the defendant at the time of the shooting. The language used in Jury Instruction 34—"all of the facts and circumstances known to the person at

[34] The State took exception to the giving of self defense instructions. CP 1029-35; 17 VRP 2212. Defendant proposed an instruction with the "and prior to" language. CP 770.

the time of the incident."—captured every single relevant fact or circumstance. CP 1030. In other words, the jury in this case was "instructed to evaluate self-defense in the light of all circumstances known to the defendant, including those known before the homicide." ***State v. Allery***, 101 Wn.2d 591, 682 P.2d 312 (1984). The "and prior to" language requested by defendant is mere surplusage, given the facts and argument presented in this case.

b. Alternatively, defendant waived any claim of error by failing to take exception to Jury Instruction 34.

Defendant's failure to object to Jury Instruction 34 precludes appellate review unless he can demonstrate "manifest constitutional error." RAP 2.5(a)(3); ***State v. O'Hara***, 167 Wn.2d 91, 97-100, 217 P.3d 756, 762 (2009) (citing ***State v. Kirkman,*** 159 Wn.2d 918, 926, 155 P.3d 125 (2007) ***State v. WWJ Corp.,*** 138 Wn.2d 595, 602, 980 P.2d 1257 (1999), and ***State v. Scott,*** 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). "Stated another way, the appellant must identify a constitutional error and show how the alleged error actually affected the appellant's rights at trial." ***O'Hara***, 167 Wn.2d at 98. Defendant does not assume that burden. At Appellant's Brief at 53 defendant argues the probative value of defendant's before-the-fact mental state evidence, but defendant presents no facts or argument to demonstrate how Jury Instruction 34 "actually

affected" his ability to argue that evidence at trial. There is no showing that any error in Jury Instruction 34 "was so obvious on the record that the error warrants appellate review." ***O'Hara***, 167 Wn.2d at 99-100.

> It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

O'Hara, 167 Wn.2d at 100. The record demonstrates that defense counsel was able to freely argue his before-the-fact mental state evidence at trial. This is borne out in defense counsel's closing argument:

> I think what you heard during the course of this trial is a very different picture. You heard and you have seen a picture of a troubled young man, a man who was shot at, a man who was threatened, and a man who lived for three months in fear.

18 VRP 2261. Defense counsel spent a considerable part of his closing argument addressing defendant's experiences before the day in question. 18 VRP 2264-76. Defense counsel then argued:

> This is the evidence produced about the mindset of these two individuals leading up to February 1st. The mindset of Jay Thomas is, when I see Rob, it is him or me. I 'm going to kill him. Mindset of Rob, his fear. Certainly, that is something that we can consider when we start talking about the events of February 1st.

18 VRP 2276. After discussing the events of February 1, defense counsel discussed defendant's prior military training as evidence of his behavior on that day. 18 VRP 2285-86. Just before addressing self defense, defense counsel summed up the before-the-incident mental state evidence:

> We have the history between the two men. We have the mindset of what we know about the mindset of these two men leading up to February 1st, 2016. We know what Jay Thomas' mindset is. He sees Rob. It is me or him. We know what Rob's mindset is. He is scared. His family members testified and told you exactly what his mindset was leading up. We know what Rob's mental state was at the time as he told it to Dr. Moore. He believed that he had no choice but to defend himself.

18 VRP 2287. The prosecution also argued before-the-incident mental state evidence in rebuttal. 18 VRP 2310-14. The prosecution made the same type of argument defense counsel did, only coming to a different conclusion:

> With all of that in mind, was this self-defense on February 1st, 2016? You have zero evidence of it. Zero.

18 VRP 2314. Each participant in this trial recognized that the before-the-fact mental state evidence had to be presented to the jury and addressed.

Alternatively, the record demonstrates beyond a reasonable doubt that "there was no opportunity for the jury to be misled" by Instruction 34. ***State v. Williams-Walker***, 167 Wn.2d 889, 918, 225 P.3d 913, 928 (2010) (citing ***State v. Brown***, 147 Wn.2d 330, 58 P.3d 889 (2012)). If there is constitutional error in Jury Instruction 34, any such error is harmless.

6. THE FIRST AGGRESSOR INSTRUCTION GIVEN IN THIS CASE WAS PROPER.

"[I]n general, the right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action." (Emphasis added). ***State v. Riley***, 137 Wn.2d 904, 909, 976 P.2d 624, 627 (1999).

One may not use force in lawful self defense when one created the need for the use of force in the first place. ***State v. Wingate***, 155 Wn.2d 817, 122 P.3d 908 (2005), ***State v. Riley***, 137 Wn.2d 904, 976 P.2d 624 (1998), ***State v. Davis,*** 119 Wn.2d 657, 835 P.2d 1039 (1993), ***State v. Dennison***, 115 Wn.2d 609, 801 P.2d 193 (1990), and ***State v. Craig***, 82 Wn.2d 777, 514 P.2d 151 (1973). This principle is set forth in Instruction 38. CP 1035.

Whether or not there was sufficient evidence to justify an aggressor instruction is a question of law, and review is therefore *de novo.* ***State v. Anderson***, 144 Wn. App. 85, 89, 180 P.3d 885, 887 (2008), citing ***State v. J–R Distribs., Inc.***, 82 Wn.2d 584, 590, 512 P.2d 1049 (1973).

"An aggressor instruction is appropriate if there is *conflicting* evidence as to whether the defendant's conduct precipitated a fight." ***State v. Riley***, 137 Wn.2d 904, 910, 976 P.2d 624 (1999) (citing ***State v. Davis***,

119 Wn.2d 657, 666, 835 P.2d 1039 (1992)) (emphasis added in ***State v. Wingate***, 155 Wn.2d 817, 822–23, 122 P.3d 908, 911 (2005)). Where an aggressor instruction is proffered by the State, the State need only produce "some evidence that [the defendant] was the aggressor to meet its burden of production." *Id.* at 89, citing ***State v. Riley***, 137 Wn.2d 904, 909–10, 976 P.2d 624 (1999), and ***State v. Hughes***, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). An aggressor instruction is appropriate where "there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense. . . ." ***State v. Riley***, 137 Wn.2d at 909, citing ***State v. Hughes***, 106 Wn.2d 176, 191–92, 721 P.2d 902 (1986) and ***State v. Kidd***, 57 Wn. App. 95, 100, 786 P.2d 847 (1990).

In ***State v. Hughes***, 106 Wn.2d 176, 191, 721 P.2d 902, 910 (1986) it was undisputed at trial that two victim-policemen were acting properly (that is, unprovocatively) when they had their guns drawn in an attempt to arrest the defendant.[35] A 7 minute gun battle erupted. *Id.*, 106 Wn.2d at 178-79. "The aggressor/provoker issue thus turn[ed] on who fired the first shot, and whether it was justified." ***State v. Hughes***, 106 Wn.2d at 192. In

[35] "At trial, however, the defense did not contend that the police acted improperly. The use of force is lawful whenever necessarily used by police officers in the performance of their legal duty. The officers were investigating the defendant in connection with a murder and had a warrant for his arrest. They were justified in drawing their guns in connection with making the arrest." ***State v. Hughes***, 106 Wn.2d at 192.

Hughes, "the jury's attention was directed to the defendant's intentional acts (shooting at two policemen) that allegedly provoked the victim's response (shooting back)." ***State v. Hughes***, 106 Wn.2d at 193. Under these circumstances the aggressor/provoker instruction was properly submitted to the jury. *Id.*, 106 Wn.2d at 193. In ***Hughes***, the aggressor/provoker instruction was given because "there was credible evidence from which the jury could reasonably have concluded that it was the defendant who by shooting first provoked the gun battle." *Id.* at 192.

The only fact-based argument defendant makes in this case against the aggressor instruction in this case is that "there was no [aggressive][36] conduct whatsoever prior to the shooting" and that the first aggressor instruction was unwarranted for that reason. Appellant's Brief at 57. That fact was also true in ***Hughes***, but the first aggressor instruction was appropriate. *Id.*, 106 Wn.2d at 178-79. Defendant has failed to demonstrate that the aggressor instruction should not have been given.

In this case, there was credible evidence that defendant drew his pistol first and started shooting "lots and lots"[37] of bullets at Mr.

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[36] Respondent infers that appellant was referring to aggressive conduct from the context presented on Appellant's Brief at 57.
[37] 8 VRP 1073.

Thomas.[38] That is "credible evidence from which the jury could reasonably have concluded that it was the defendant who by shooting first provoked" the entire violent episode at the AM/PM mini market. ***Hughes***, 106 Wn.2d at 192. Evidence of a prolonged and unprovoked firearm attack warrants a first aggressor instruction under ***Wingate***, ***Riley***, and ***Hughes***. The only difference between the "credible evidence" presented in ***Hughes*** and the "credible evidence" presented in this case is that in this case it is undisputed that the victim did not shoot back once defendant started shooting at him. That distinction is insignificant.

Defendant implicitly asks this Court to consider "the shooting" in this case as a single indivisible act. *See* Appellant's Brief at 57. The jury was not required to examine it that way. There was credible evidence that Mr. Thomas was not killed in the initial barrage of shots. 7 VRP 790-91; 7 VRP 801-02. There was credible evidence that immediately after that initial barrage, defendant was very afraid of Mr. Thomas, defendant believed he had no choice but to shoot Mr. Thomas in self defense,[39] and

[38] The testimony of Petra Smith, who was with Mr. Thomas when defendant's fatal attack commenced provides sufficient evidence that the attack was completely unprovoked. 6 VRP 767-773, 7 VRP 783-796.
[39] 15 VRP 1963, 1964.

defendant intended to kill Mr. Thomas.[40] In other words, defendant's initial barrage, accompanied by his statements, unilaterally announced the commencement of a life or death struggle. After that initial barrage, there was credible evidence that defendant sincerely felt he had no "other alternative but to defend himself," as his expert witness testified. 15 VRP 1964. Every single one of defendant's shots after that point was a ***completely unjustified*** act of self defense. Credible evidence supports the inference that defendant provoked that need to act in self defense. The first aggressor instruction[41] was properly given in this case.

7. ALTERNATIVELY, DEFENSE COUNSEL COMPETENTLY WAIVED ANY OBJECTION TO THE FIRST AGGRESSOR INSTRUCTION.

Defense counsel did not take exception to the first aggressor instruction. 17 VRP 2218. This decision dovetails with defense counsel's

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[40] "As we are laying there, the bullets start coming towards the passenger side of the car, and I can hear somebody yelling that Jay wasn't going to get away with shooting at his house and he promised that. He kept talking. As he kept talking slower, he kept pulling the trigger slower. Jay looked at me and told me to move because it didn't have nothing to do with me." Testimony of Petra Smith. 7 VRP 790. "During the course of it, yes. I heard the gentleman that was shooting says -- he said, 'Did I get the nigger?' 'Did I get the nigger?' And 'I'm going to fucking kill the nigger.'" Testimony of John Oliver. 6 VRP 691-92.

[41] Jury Instruction 39 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 another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense to murder, manslaughter or assault.

CP 1035.

closing argument. In closing argument, defense counsel argued that Mr. Thomas was armed with a gun[42] and that Mr. Thomas was "engaging"[43] with defendant. This argument necessarily raises the question: Who provoked this supposed violent engagement? Given that there was credible evidence that defendant provoked any violent engagement, the price of arguing Mr. Thomas' violent aggression on February 1, 2016, was an aggressor instruction—and that is why defense counsel competently and reasonably did not take exception to Instruction 39. CP 1035. This falls within the category of strategic decisions which are "virtually unchallengeable" on appeal. ***State v. Coristine***, 177 Wn.2d 370, 379, 300 P.3d 400, 404 (2013).

8. ALTERNATIVELY, DEFENDANT CANNOT DEMONSTRATE MANIFEST CONSTITUTIONAL ERROR BECAUSE THE JURY NEVER SHOULD HAVE BEEN INSTRUCTED ON SELF-DEFENSE IN THE FIRST PLACE.

Alternatively, defendant cannot demonstrate manifest constitutional error. Appellate review is precluded unless defendant can demonstrate "manifest constitutional error." RAP 2.5(a)(3); ***State v.***

[42] 18 VRP 2284, 2285, 2286, 2289.
[43] 18 VRP 2284, 2285, 2287. Respondent does not suggest that there was any evidence that Mr. Thomas "engaged" with defendant in any way. Defense counsel had very little to argue in this case, and he needed to make the most with what little he had.

O'Hara, *supra*. Defendant's argument against the first aggressor instruction should fail because defendant has not demonstrated how the alleged error actually affected defendant's rights at trial. ***O'Hara***, 167 Wn.2d at 98. Defendant only argues only that "the first aggressor instruction relieved the state of its burden to disprove self-defense." Appellant's Brief at 57.

This Court can "conclude beyond a reasonable doubt" that the submission of the first aggressor instruction was harmless. ***State v. Bashaw***, 169 Wn.2d 133, 148, 234 P.3d 195, 203 (2010), *overruled in nonpertinent part by* ***State v. Nunez***, 174 Wn.2d 707, 285 P.3d 21 (2012). The first aggressor instruction, by its own terms, has only one prejudicial effect—it renders self-defense unavailable. CP 1035; Appellant's Brief at 57. In this case, the first aggressor instruction merely directed the jury to consider self-defense when self-defense never should have been available in the first place.[44]

Construing the evidence presented in the light most favorable to defendant, defendant's unprovoked pistol attack cannot be considered

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[44] "The State is entitled to argue any grounds to affirm the court's decision that are supported by the record, and is not required to cross appeal." RAP 2.4(a), RAP 5.1(d); ***State v. Bobic***, 140 Wn.2d 250, 257–58, 996 P.2d 610 (2000). *See also* ***In re Arbitration of Doyle***, 93 Wn. App. 120, 123, 966 P.2d 1279 (1998) (notice of cross appeal is essential if the respondent seeks affirmative relief, as distinguished from urging additional grounds for affirmance); 2A Karl B. Tegland, *Washington Practice: Rules Practice* 174–75, cmt. 3 (6th ed.2004)." ***State v. McInally***, 125 Wn. App. 854, 863, 106 P.3d 794 (2005).

"what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." ***State v. Walden***, 131 Wn.2d 469, 474, 932 P.2d 1237, 1239 (1997). Evaluating self defense "from the defendant's point of view as conditions appeared to him . . . at the time of the act," leads only to the conclusion that the application of deadly force in this case was unreasonable.

With two exceptions, the "conditions as they appeared to the defendant" in this case are found exclusively in the evidence presented by the State. *Id.* One exception is the testimony of Kay Sweeney, a forensic expert. Mr. Sweeney opined that Mr. Thomas did not take either of the shots to his head while he was in his final resting position (16 VRP 2103-04, 2113), and that the shots to Mr. Thomas' legs occurred after he was already dead.[45] 16 VRP 2120. Another expert witness, Osama Shofani testified regarding United States Marine Corps combat tactics and training. 16 VRP 2050-2055, 2063. Mr. Shofani opined that the crime scene evidence showed that defendant acted in accordance with United States Marine Corps fire and maneuver tactics. 16 VRP 2062-63.

Defendant's other expert witness, Dr. Kevin Moore, did not testify about the conditions obtaining on February 1, 2016. Dr. Moore testified

[45] Mr. Sweeney's opinion assumed (based on the medical examiner's testimony) that the two shots to the head would have been "immediately fatal." 16 VRP 2105.

that defendant was afraid that Mr. Thomas intended to kill him[46] and that defendant "felt" he had no alternative but to defend himself.[47] Dr. Moore presented no testimony regarding the circumstances of February 1, 2016 as they appeared to defendant. Defendant's remaining witnesses each testified only to events occurring before February 1, 2016.[48]

In this case, inferences from extrinsic evidence are the only way to determine the "conditions as they appeared to the defendant" on February 1, 2016. Resolving all those inferences in the light most favorable to defendant, the relevant circumstances at the AM/PM on February 1, 2016 are straightforward: Defendant saw Mr. Thomas outside a car talking, then saw him rooting around inside a car looking for something, then saw him sit down in the car with Petra Smith. The evidence does not support an inference that Mr. Thomas acknowledged or even saw defendant before

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[46] 15 VRP 1963.

[47] 15 VRP 1964.

[48] Denzel James testified to the stolen gun issue between defendant and Mr. Thomas in August, 2015 (14 VRP 1767) and interactions between defendant and Mr. Thomas on Halloween, 2015. (14 VRP 1769-1777). Mr. James did not have much contact with defendant after December, 2015. 14 VRP 1779.

Rashaunda James also testified about the incident on Halloween. 14 VRP 1804-1810. She also testified about an incident two weeks later. 14 VRP 1811. Ms. James testified to no interactions after November, 2015. 14 VRP 1811-13.

Alisa Robinson was defendant's aunt. 14 VRP 1815. She testified to an interaction with defendant at a dinner in November, 2016, before Thanksgiving. 14 VRP 1816-17. She testified that she saw defendant again in late January at a birthday party. 14 VRP 1818-19.

Tramaine Battle testified that he had an interaction with defendant in late December, 2015.48 14 VRP 1824-26.

Brianna Moore testified regarding the incident on Halloween. 14 VRP 1830-34.

defendant started shooting. Defendant, just before he commenced his attack, was presented with unambiguously innocuous circumstances. Defendant's good faith belief that his life was in danger, his fear, and his "feeling"[49] that he had no other choice but self-defense were insufficient to justify deadly force when presented with the innocuous circumstances obtaining on February 1, 2016. ***State v. Hughes***, 106 Wn.2d 176, 188, 721 P.2d 902, 908–09 (1986).[50]

Innocuous circumstances, even when paired with great fear and a feeling that self defense is the only choice, could not possibly warrant self defense instructions in this case. The deadly force defendant inflicted upon Mr. Thomas is plainly not "what a reasonably prudent person" could ever "find necessary under the conditions as they appeared to the defendant." ***Walden***, 131 Wn.2d at 474. The threshold for instructing the jury on self defense was not met in this case. No reasonable juror could find that, given these "circumstances as they appeared to the defendant," that a reasonably prudent person would respond with deadly force. In order to successfully argue self-defense, a defendant must demonstrate a reasonable apprehension of imminent harm. ***State v. LeFaber***, 128 Wn.2d

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[49] 15 VRP 1964.

[50] Washington law does not lessen criminal culpability because someone acts in self-defense based on an honest but unreasonable belief. We decline to adopt the doctrine of so-called "imperfect" self-defense. *Id.*

896, 899, 913 P.2d 369 (1996). Taking all the facts in the light most favorable to defendant, defendant never approached that standard. This Court should also conclude, beyond a reasonable doubt, that no reasonable jury could render a self-defense verdict in this case. If the aggressor instruct improperly relieved the State of its burden to disprove self defense, such relief was harmless.

9. THE JURY WAS PROPERLY INSTRUCTED ON THE ELEMENTS OF ASSAULT.

a. The jury was instructed on the charged assault.

Seven counts of assault in the first degree were charged in this case, as follows:

> That ROBERT DESHAWN GROTT, in the State of Washington, on or about the 1st day of February, 2016, did unlawfully and feloniously, with intent to inflict great bodily harm, intentionally assault [the named victim] with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death, contrary to RCW 9A.36.011(1)(a).....

CP 721-24. Defendant argues that the prosecutor "effectively presented to the jury an uncharged means of committing assault." Appellant's Brief at 62. That is false. The State charged assault pursuant to RCW 9A.36.011(1)(a) and each of the "to convict" jury instructions was a RCW 9A.36.011(1)(a) jury instruction. CP 1022-1028. The State did not instruct the jury on the uncharged alternative means of 9A.36.011(1)(b) or

9A.36.011(1)(c). It is settled law that the assault definitional instructions do not create additional alternative means of committing the crime of assault. ***State v. Smith***, 159 Wn.2d 778, 785, 154 P.3d 873, 876 (2007).

b. The prosecutor's arguments relating to fear were rational arguments based upon undisputed facts.

Paragraph four of the assault definition jury instruction states:

> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 1018. This gave the prosecutor ample room to argue "that Grott committed assault with a firearm by intending to and causing fear." Appellant's Brief at 62.

Defendant himself proved that he applied suppressive fire. 16 VRP 2063-64. Suppressive fire is all about causing such a terrible fear of death that no human being will dare present a threat. *See* 16 VRP 2053-54. Defendant's argument that "[t]here was . . . no evidence that Grott intended to cause fear . . .."[51] is incorrect. There was substantial evidence that defendant intended to cause overwhelming, suppressive fear.

[51] Appellant's Brief at 62.

c. The prosecutor did not "misstate[] the law and confuse[] the jury regarding the alternative means of committing assault.

Defendant claims that "the prosecutor used a hypothetical that misstated the law and confused the jury regarding the alternative means of committing assault by arguing:"[52]

> If you think about this in reasonable everyday terms, if somebody shot at you, it really wouldn't matter whether or not they intended to hit you or not. That is your level of fear. You would feel the harm. The harm is your fear. What we have is a situation like this.

RP 2235. This statement was made in furtherance of the transferred intent argument.[53] It expresses the law as stated in the fourth paragraph of Instruction 22. CP 1018. The argument was supported by the evidence presented at trial and the jury instructions.

Defendant claims that the State "argued exclusively that the facts fit within [RCW 9A.36.011(1)(c)], an uncharged alternative means." Appellant's Brief at 62. That is false. The record is devoid of any suggestion that the State made a RCW 9A.36.011(1)(b), or RCW 9A.36.011(1)(c) based argument.

Defendant also claims that error the prosecutor's argument "was compounded by the jury instruction defining assault by alternative

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[52] Appellant's Brief at 63.
[53] The jury was instructed on transferred intent in Instruction 25. CP 1021.

means." Appellant's Brief at 63. In support of this statement, defendant cites RP 2235, 2242 and CP 994-1039." An examination of the record, along with ***State v. Smith***, 159 Wn.2d at 785, dispenses with that argument. This is not an alternative means assault case, and the State did not argue a non-existent alternative means theory.

10. DEFENSE COUNSEL COMPETENTLY DECLINED TO REQUEST A CONDITIONED RESPONSE JURY INSTRUCTION.

Defendant's argument that his lawyer should have requested a "conditioned response" jury instruction is based solely upon this assertion:

> Here, in contrast to [*State v.*] *Utter*, Dr. Moore explained that Grott acted in an automatistic involuntary capacity when he shot at Thompson [sic]. RP 1952-53.

Appellant's Brief at 100. This Court should consider 15 VRP 1952-53. Nothing in that transcript excerpt supports the quoted statement in Appellant's Brief. Defendant's argument should be rejected for lack of evidentiary support.

"Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." (Braces and internal quotation omitted). ***State v. Coristine***, 177 Wn.2d 370, 379, 300 P.3d 400, 404 (2013). (Quoting ***In re Personal Restraint of Hubert***, 138 Wn. App. 924, 928–29, 158 P.3d 1282 (2007) and ***Strickland v.***

Washington, 466 U.S. 668, 690–91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Defense counsel had rational reasons for declining to present a conditional response instruction: Defendant's PTSD expert did not find him incapable of forming intent (5 VRP 582) and his military expert testified that defendant's assault on Mr. Thomas and the AM/PM market was in accordance with military tactics. 16 VRP 2062-63. Failure to present a factually unsupported automaton defense under these circumstances was not deficient performance.

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." ***Strickland***, 466 U.S. at 689. Defendant asks this Court to second-guess defense counsel's strategic trial decisions with an insufficient factual predicate.

11. THE PROSECUTOR'S COMMENT REGARDING DEFENDANT'S FLIGHT FROM THE SCENE OF THE CRIME WAS NOT AN IMPROPER COMMENT UPON PREARREST SILENCE.[54]

a. The State's argument was proper.

In closing argument, the prosecuting attorney argued defendant's flight from his attack site in an attempt to infer guilt:

> He walked out past the fence, here, and out -- around the building next door. What did he leave behind? He left Julian behind, dead. He left scores of people in that AM/PM terrified. Did he stick around to tell the police why he did what he did? No. He left. Did he go straight home? No. He cuts through a business. He cuts through the parking lot behind a building, between two other buildings. He goes up the street. He takes a left, takes a right. He ditches his skateboard. He doesn't just drop the skateboard because it is heavy. The skateboard helps identify him. He dumps the skateboard over a fence. Nobody is going to see that skateboard again, in his mind. Over the fence it goes. He takes off his sweatshirt. Nobody is going to identify him.

(emphasis added)[55] 18 VRP at 2232.

> It is an accepted rule that evidence of the flight of a person, following the commission of a crime, is admissible and may be considered by the jury as a circumstance, along with other circumstances of the case, in determining guilt or innocence. The rationale of the principle is that flight is an instinctive or

[54] An extremely similar fact pattern was addressed in ***State v. Langford***, 152 Wn. App. 1024 (2009). That opinion has no precedential value. It is not binding on any court. It is cited only for such persuasive value as the court deems appropriate. GR 14.1. ***Crosswhite v. DSHS***, 197 Wn. App. 539, 544, 389 P.3d 731, 733, *review denied*, 188 Wn.2d 1009, 394 P.3d 1016 (2017).

[55] Defendant complains about the underlined passage. Appellant's Brief at 66-70.

> impulsive reaction to a consciousness of guilt or is a deliberate attempt to avoid arrest and prosecution.

State v. Blanchey, 75 Wn.2d 926, 936, 454 P.2d 841, 848 (1969). "Furtive gestures, evasive behavior, and flight from the police are circumstantial evidence of guilt." ***State v. Graham***, 130 Wn.2d 711, 726, 927 P.2d 227, 234 (1996) (citing ***State v. Baxter,*** 68 Wn.2d 416, 421–22, 413 P.2d 638 (1966)).

Interpreting ***Jenkins v. Anderson,*** 447 U.S. 231, 232–33, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980), the Washington Supreme Court concluded that a critical issue when it comes to pre-arrest silence "is whether the government compels the exercise of a constitutional right." ***State v. Burke***, 163 Wn.2d 204, 213, 181 P.3d 1 (2008). In this case, government action had nothing to do with defendant's silence. This was determinative in ***United States v. Oplinger***, 150 F.3d 1061 (9th Cir. 1998), *overruled on other grounds*, ***United States v. Contreras***, 593 F.3d 1135 (9th Cir. 2010).

> The fact that a citizen has a constitutional right to remain silent when he is questioned has no bearing on the probative significance of his silence *before he has any contact with the police*. ... When a citizen is under no official compulsion whatever, either to speak or to remain silent, I see no reason why his voluntary decision to do one or the other should raise any issue under the Fifth Amendment. For in determining whether the privilege is applicable, *the question is whether petitioner was in a position to have his testimony compelled* and then asserted his privilege, *not simply*

> *whether he was silent.* A different view ignores the clear words of the Fifth Amendment.

Oplinger, 593 F.3d at 1066 (quoting Justice Stevens concurrence in ***Jenkins v. Anderson***, 477 U.S. at 243-44). *See also* ***United States v. Zanabria***, 74 F.3d 590, 593 (5th Cir.1996); ***United States v. Rivera***, 944 F.2d 1563, 1568, 1568 n. 12 (11th Cir.1991); ***State v. Lopez***, 230 Ariz. 15, 20, 279 P.3d 640, 645 (Ariz. Ct. App. 2012); ***State v. Jones***, 461 So. 2d 97, 99 (Fla. 1984).[56]

"The sole concern of the Fifth Amendment . . . is governmental coercion." ***Colorado v. Connelly***, 479 U.S. 157, 170, 107 S. Ct. 515, 523, 93 L. Ed. 2d 473 (1986). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." ***Colorado v. Connelly***, 479 U.S. at 167.[57]

Salinas v. Texas, 570 U.S. 178, 194, 133 S. Ct. 2174, 2185, 186 L. Ed. 2d 376 (2013) held that prosecutors may use non-custodial silence as

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[56] Defendant's argument depends upon ***State v. Easter***, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) and its progeny. Appellant's Brief at 66-70. *See, e.g.*, ***State v. Burke***, 163 Wn.2d 204,206, 101 P.3d 1 (2008). Defendant's cited pre-arrest silence cases all involve interaction with law enforcement.

[57] "The sole form of compulsion targeted by the Fifth Amendment privilege is governmental coercion—not moral and psychological pressures emanating from sources other than official coercion or the absence of free choice in any broader sense of the word." (internal quotation marks and ellipsis omitted) ***People v. Tom***, 59 Cal. 4th 1210, 1223, 331 P.3d 303, 310–11, 176 Cal. Rptr. 3d 148, 157 (2014) (quoting ***Colorado v. Connelly***, 479 U.S. at 170)).

substantive evidence of guilt when an out of custody defendant does not exercise his right to remain silent.[58] In this case, defendant did not exercise his right to remain silent as he fled from his crime scene. There was no constitutional bar against using defendant's pre-arrest, pre-interaction with law enforcement, statements as substantive evidence.[59]

b. Defendant waived any objection to the prosecutor's comments on defendant's flight from the scene of the crime and ineffective assistance of counsel has not been established.

"If counsel does not object at trial, the claim [of prosecutorial misconduct in closing argument] is waived unless conduct is 'so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.'" ***In re Personal Restraint of Caldellis***, 187 Wn.2d 127, 143, 385 P.3d 135 (2016). In this case, there is, at the very least, a very good argument that the prosecutor's argument was supported by the law. There was, for that

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[58] Three justices concluded that absent an express invocation of the right to remain silent, comment on voluntary precustodial silence was constitutionally permissible. ***Salinas***, 570 U.S. at 186. The four dissenting justices agreed that absent an exercise of the Fifth Amendment right, comment on precustodial silence was constitutionally permissible. ***Salinas***, 570 U.S. at 201-02. The dissent, however, would have inferred an exercise of the Fifth Amendment right from the circumstances presented by the defendant's interaction with law enforcement in that case. ***Salinas***, 570 U.S. at 202-04. The two concurring justices would have held that all voluntary precustodial silence falls outside the Fifth Amendment.

[59] Article 1, § 9 of the Washington Constitution is coextensive with the Fifth Amendment to the United States Constitution. ***State v. Earls***, 116 Wn.2d 364, 378, 805 P.2d 211, 218 (1991).

alternative reason, no ineffective assistance of counsel. ***In re Personal Restraint of Cross***, 180 Wn.2d 664, 725, 327 P.3d 660, 694–95 (2014).[60]

12. THE PROSECUTOR FAIRLY ARGUED THE BURDEN OF PROOF.

a. Viewed in context, the prosecutor's argument was proper.

Defendant claims that the prosecutor committed misconduct by "arguing to the jury to follow their gut by stating 'you know that he did it, you have an abiding belief, and you know he's guilty.'" Appellant's Brief at 71. 18 VRP contains no reference to "gut," "guts," or "intuition."[61]

Defendant claims error in the prosecutor's reasonable doubt argument located at 18 VRP 2250-2252. That selection only comprises a part of the prosecutor's reasonable doubt argument. The prosecutor started talking about reasonable doubt at 18 VRP 2248 and concluded at 18 VRP 2251.

The prosecutor's argument briefly discussed the "reasonableness" of reasonable doubt,[62] then discussed "abiding belief."[63] Defendant's

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[60] "Prosecutor's statements were neither flagrant nor ill intentioned. Thus, it was not deficient for counsel to fail to object; we reject this ineffective assistance of counsel claim." *Id.*

[61] The prosecutor explicitly did not advocate an intuitive approach to the law. When discussing assault in the first degree, he suggested that the legal principles involved "seem[] a little counterintuitive." 18 VRP 2305.

[62] 18 VRP 2248-49.

[63] 18 VRP 2249-50.

objection to the prosecutor's argument arose in the context of the discussion over the absence of evidence. In the course of making this argument, the prosecutor reiterated the high burden of "abiding belief:"

> An abiding belief. An abiding belief is, are you confident the decision that you make today will stick with you into the future? Do you have an abiding belief that two years from now you will be as convinced then that the defendant is guilty as you are today? If you have abiding belief in the truth of the charge, you are convinced he is guilty.
>
> At some point, you may be sitting in the jury room thinking to yourself, yeah, I know he is guilty, but... I'm going to ask you to pause and think for a second. I know he is guilty. At that moment, do you have an abiding belief in the truth of the charge? You know. I know he is guilty, but I wish that there is something else. I know he is guilty, but I wish that I could see more video. I wish Karmenita Vaca would come in and testify. Whatever it is. Sure, you would like to see more. If you know that he did it, you have an abiding belief, and you know that he is guilty.
>
> You know Robert Grott assaulted Petra Smith and the six others who lived. You know that he did so while attempting to inflict great bodily harm on Julian. You have an abiding belief that he is guilty of Assault in the First Degree.
>
> If you know Robert Grott killed Julian Thomas intentionally and with premeditation and thought about it just for more than a moment in time, then you know he is guilty of Murder in the First Degree.

18 VRP 2250-51. It is clear, from the context of this argument that when the prosecutor is speaking about "knowing," the prosecutor is speaking about "abiding belief"—in other words, the prosecutor was asking the jury to consider "are you confident the decision that you make today will stick

with you into the future? Do you have an abiding belief that two years from now you will be as convinced then that the defendant is guilty as you are today?" *Id.* at 2250. When viewed in context, the statements were appropriate.

b. <u>If the prosecutor's reasonable doubt argument was misconduct, it was harmless error.</u>

Even if there was misconduct, "[a]bsent an objection by defense counsel to a prosecutor's remarks, the issue of prosecutorial misconduct cannot be raised on appeal unless the misconduct is 'so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" ***State v. Ziegler***, 114 Wn.2d 533, 540, 789 P.2d 79, 83 (1990) (quoting ***State v. Belgarde***, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) and ***State v. Dunaway***, 109 Wn.2d 207, 221, 743 P.2d 1237, 749 P.2d 160 (1987)). Under this standard, defendant has the burden of demonstrating that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. ***State v. Emery***, 174 Wn.2d 741, 761, 278 P.3d 653, 664 (2012) (quoting ***State v. Thorgerson***, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

In this case, the Court's curative instruction, rendered following judicial deliberation and following the prosecuting attorney's closing

statement, was a blunt reminder to the jury that the trial court's written instructions controlled over anything that the prosecutor just said:

> The law is contained in my instructions to you. You should disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

8 VRP 2260. If there was any prejudice caused by the prosecutor's argument it was obviated by that curative instruction.[64]

It is not enough for defendant to demonstrate that the trial court's curative instruction was insufficient. To prevail, defendant must demonstrate that the alleged prosecutorial misconduct was not curable by *any* curative instruction. ***State v. Emery***, 174 Wn.2d at 761. Defendant has not attempted that burden, and the claim of misconduct should be denied for that reason. Appellant's Brief at 70-75, 96-97.

The prosecutor's closing rhetoric had no substantial likelihood of affecting the jury's verdict. As discussed in Section 8, *supra* there was no evidence of self defense presented at trial. Furthermore, the evidence of defendant's hyper-violent pistol assault was overwhelming, and for the most part, unchallenged.

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[64] It may be noted that the trial court did not give a supplemental curative instruction at the close of defense counsel's argument. 18 VRP 2296-97.

Defendant has not demonstrated prosecutorial misconduct requiring reversal. The claim that the prosecutor misstated the law relating to the burden of proof should be denied.

13. THE PROSECUTOR FAIRLY ARGUED THE ELEMENTS OF ASSAULT.

As argued in section 9, *supra*, the jury was properly instructed on assault in this case. ***State v. Elmi***, 166 Wn.2d 209, 218, 207 P.3d 439 (2009); ***State v. Smith***, 159 Wn.2d 778, 785, 154 P.3d 873, 876 (2007).

The State had to prove that defendant "assaulted" each of his assault victims. CP 26-32. Instruction 22 defined assault, *inter alia*, as

> . . . an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 1018. To meet that assault definition the state had to demonstrate (a) defendant's shooting was "unlawful force" (i.e., not self defense), (b) that defendant intended to create apprehension and fear of bodily injury, and (c) that defendant's shooting "***in fact create[d] in another a reasonable apprehension and imminent fear of bodily injury.***" *Id.* Defendant argues that he "was not charged with causing fear or intending to cause fear,"[65]

[65] Appellant's Brief at 75.

but the language "in fact creates a reasonable apprehension and fear of bodily injury" is right there in the jury instructions. CP 1018.

Defendant asserts the prosecutor's argument "directed" the jury to find him guilty of assault based "exclusively" on the alleged victim's fear. Appellant's Brief at 75. This is not correct. The prosecutor did not exclusively argue the victim's fear. The prosecutor also argued assault with a firearm,[66] that the shooting occurred in the State of Washington,[67] and transferred intent.[68] Those factors, taken together, address the elements of RCW 9A.36.011(1) as charged in the assault in the first degree "to convict" instructions. CP 1022-1028 (Jury Instructions 26-32).

The assault victims' fear was necessary, but not sufficient, to support defendant's conviction. The prosecutor obviously recognized that fact by going through all the other elements with the jury. 18 VRP 2234-2236. This claim of prosecutorial misconduct should be rejected.

14. THE PROSECUTOR FAIRLY ARGUED SELF-DEFENSE.

Defendant asserts that the prosecutor argued "that if the victims' [sic] experienced fear, Grott was guilty because he would have been guilty if they had been struck by a bullet." Appellant's Brief at 78. Defendant

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[66] 18 VRP 2234.
[67] *Id.*
[68] 18 VRP 2235.

claims that this argument was made at 18 VRP 2242. No such argument was made. *See* 18 VRP 2241-42. This claim should be rejected for want of factual support.

The prosecutor's argument made at 18 VRP 2241-42 addressed reasonableness in the context of the assault charges. The jury had to decide whether the killing power defendant employed was "such force and means as a reasonably prudent person use under the same or similar conditions as they reasonably appeared to defendant." CP 1029, 1030 (Jury Instructions 33, 34). The record supports the conclusion that defendant was aware of Deborah Green's and Karmanita Vaca's fear because defendant put bullets inside an open AM/PM store where those two happened to be working as clerks. *See* Exhibit 137 (the inside the store video recordings). The record supports the conclusion that defendant was aware of Petra Smith's fear because the defendant saw her run away from the car that he was shooting at. *See* Exhibit 127 (the video taken from across the street). Defendant's own expert witness testified that defendant acted "in accordance with suppression fire and maneuver tactics." 16 VRP 2062-63. This is what that meant:

> A. Suppression fire and maneuver is basically that when you have an enemy or a target in front of you, what you are doing is you are laying down a maximum rate of fire towards that target to keep their head down, and you maneuver to it to destroy it.

> Q. And when you say to keep the head down in conjunction with suppression fire, does that mean that the goal is to pin the enemy down?
>
> A. The goal is to pin them down and not be able to look up or have a chance to fire back at you.

16 VRP 2053-54. In other words, terror is the goal of suppressive fire.

The State fairly argued that the fear defendant put in those three witnesses was part of what the jury needed to consider when deciding self-defense reasonableness. 18 VRP 2242.

> If you have any doubt as to whether or not this was not reasonable, if you think for a moment this was not -- that this was reasonable, look at those videos again. Tell that to Deborah Green. Tell that to Karmenita. Tell it to Petra. Their fear that he put them in is part of whether or not the force that he used was reasonable. We have to conclude that, if they got hit, it was reasonable because that's the force that he used. It was not reasonable. It wasn't self-defense. There is no reason that you should consider it to be self-defense.

18 VRP 2242. That fear was also an element of each count of assault in the first degree. CP 1018, Jury Instruction 22, Definition of Assault.

15. THE PROSECUTOR DID NOT ARGUE SELF-DEFENSE BURDEN SHIFTING.

In the course of arguing the absence of evidence supporting self defense in this case,[69] the prosecutor in closing argument made the following statement:

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[69] 18 VRP 2240-41.

> Absent somebody explaining to us that the defendant -- absent -- there is no evidence that the defendant believed self-defense was necessary.

18 VRP 2241. No objection was taken to that statement. *Id.* Defendant now claims that his lawyer's failure to object to that statement amounted to deficient performance.

Defendant's argument relies very heavily on ***State v. McCreven***, 170 Wn. App. 444, 468-471, 284 P.3d 793 (2012), a case where the jury instructions erroneously misstated the law of self defense,[70] and where the prosecutor explicitly and flagrantly shifted the burden of proof on self-defense.[71] In this appeal, defendant complains about one isolated statement.

Perhaps the fairest interpretation of that statement is that the prosecutor began to express a thought, paused, then expressed a different

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[70] ***State v. McCreven***, 170 Wn.2d at 469.

[71] [STATE]: The defense that is set forth in one of the instructions, that you have that tells you, that each of the Defendants if they want you to believe that they were defending themselves, or defending others, they want to put forth that statutory defense to the murder of Dana Beaudine, have to prove to you by a preponderance of the evidence that it's more likely than not that that particular defendant did not aid in the—

[NOLAN]: I am going to object to the characterization that the defendants have to prove by a preponderance that they acted in self-defense or in defense of others. It's not the law.

THE COURT: The jury has been instructed on the law.

[STATE]: The defendant has to prove to you by a preponderance that he did not aid in the assault, that he was not personally armed with a deadly weapon, that he had no reason to believe that anyone else was armed with a knife, and that he had no reason to believe that any of his accomplices would engage in conduct that would cause death, or physical injury, to [Beaudine].

State v. McCreven, 170 Wn. App. at 469–70.

thought. Or the statement can be interpreted as ambiguous or incoherent. Either way, defense counsel's decision not to object to the prosecutor's fumbling statement cannot be characterized as deficient performance.

"An argument about the amount or quality of evidence presented by the defense does not necessarily suggest that the burden of proof rests with the defense. However, a prosecutor generally cannot comment on the lack of defense evidence because the defense has no duty to present evidence." ***State v. Thorgerson***, 172 Wn.2d 438, 466-67, 258 P.3d 43, 58 (2011).

The prosecutor's statement in this case exhibits a shift in thought. The nature of that shift in thought is ambiguous. On the one hand, the statement could suggest that the prosecutor realized he was coming up close to a burden shifting argument, then backed away. On the other hand, the statement could suggest that the prosecutor realized that the defense actually did present an "explanation" about the necessity of self defense, as Dr. Moore did,[72] and he wanted to try to refocus the jury on the "evidence" supporting that explanation (which was no evidence). Both explanations are plausible. Neither explanation is misconduct because neither suggests burden shifting.

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[72] "I don't think that Mr. Grott felt that he had any other alternative but to defend himself," Dr. Moore testified. 18 VRP 2241.

Even if there was misconduct, "[a]bsent an objection by defense counsel to a prosecutor's remarks, the issue of prosecutorial misconduct cannot be raised on appeal unless the misconduct is 'so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" ***State v. Ziegler***, 114 Wn.2d 533, 540, 789 P.2d 79, 83 (1990) (quoting ***State v. Belgarde***, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) and ***State v. Dunaway***, 109 Wn.2d 207, 221, 743 P.2d 1237, 749 P.2d 160 (1987)). In this case, like in ***In re Caldellis***, 187 Wn.2d 127, 385 P.3d 135 (2016), there were the same jury instructions to safeguard against burden shifting. CP 1002 (Instruction No 6), CP 996 (Instruction No. 1); ***In re Caldellis***, 187 Wn.2d at 144. The prosecutor's argument in this case was neither flagrant, nor ill-intentioned. At any event, any disruption it might have caused could readily have been remedied by a curative instruction.

Even if defense counsel deficiently failed to object, even if the argument was misconduct, and even if the argument was so flagrant and ill-intentioned that it could not have been addressed by a curative instruction, any error was still harmless beyond a reasonable doubt because defendant was not entitled to self defense in the first place. Respondent has presented that argument in section 8, *supra*.

16. THE PROSECUTOR DID NOT APPEAL TO THE PASSION AND PREJUDICE OF THE JURY.

In this case, like in ***State v. Elmi***, none of the assault in the first degree victims were struck by defendant's bullets. In rebuttal, the prosecutor took care to argue the fact that assault one did not require a bullet strike:

> Let me talk to you briefly about First Degree Assault. I want to focus a little bit on this just because it seems a little counterintuitive. It may seem at first, why are all of these people, Petra Smith, Tannisha McCollum, Jeanette Basher, Robin Lyons, Shawn Chargualaf, Karmanita Vaca, Deborah Green, why are they victims here and why are they victims of First Degree Assault?
>
> Let's be clear about a few things. There is no requirement that any of those people were hit that day to be the victims of First Degree Assault. There is no requirement that the defendant intended to inflict great bodily harm on them that day. There is no requirement that the defendant even knew that they existed that day.

18 VRP 2305. Next, the prosecutor addressed transferred intent. 18 VRP 2306. Finally the prosecutor devoted the bulk of his response to self-defense. 18 VRP 2306-2322.

In the course of the State's argument relating to self-defense, the prosecutor emphasized the gravity of the decision that the jury had to make:

> Something that is extremely important to recognize and acknowledge here is that if you were to conclude that self-defense was lawful here, that conclusion holds no matter how many people could have died that day, because what

> you justify -- when you say that something is a lawful act of self-defense, what you are justifying having a gun out, trained in any given direction, and pulling the trigger. That's what you are justifying is, having the gun trained and pulling the trigger. That act is lawful.
>
> Where that bullet goes after it leaves the chamber of that gun is beyond your control. And so if Deborah Green is hit in the head as she comes back up that second time and the bullet goes right over her head, if her head had been about two inches taller, the conclusion would be the same. Tragic, but collateral damage. The defendant had to do it. He was justified in doing it. We are sorry that Ms. Green lost her life, but the defendant was justified in doing what he was doing. That goes down the line for every one of those people that were there at the gas station that day.

18 VRP 2308-09. The prosecutor is not appealing to passion or prejudice with this argument. The prosecutor is arguing the facts and the law. If the jury was going to find self defense is justified in this case, it had to also find that spraying 48 bullets of suppressive fire into and around an AM/PM market during business hours was "such force and means as a reasonably prudent person use under the same or similar conditions as they reasonably appeared to defendant." CP 1029, 1030 (Jury Instructions 33, 34). An uninvolved bystander could have quite readily died in defendant's hail of bullets, and the prosecutor fairly argued that the jury needed to consider that brutal and ugly condition in the course of its self-defense deliberation. This was a proper and necessary argument.

17. THE PROSECUTOR DID NOT EXPRESS A PERSONAL OPINION ABOUT THE DEFENDANT'S GUILT.

Defendant argues that at 18 VRP 2234, the prosecutor argued that defendant "was guilty based on his personal opinion." The record does not support that assertion. This is the argument presented in context:

> On February 1st, 2016, the defendant assaulted Petra Smith or Karmenita or Deborah or Jeanette. The assault was committed with a firearm. The defendant acted with intent to inflict great bodily harm, and the acts occurred in the state of Washington. There is really not a doubt about any of this.

18 VRP 2234. This is ordinary rhetorical tool, not an expression of the prosecutor's personal opinion.[73] There really was no doubt that defendant intentionally unleashed a killing fusillade of bullets at Mr. Thomas and that certain bystanders in the area he sought to "suppress" were terrified by that fusillade. The only argument presented by the defense to the jury in this case was whether defendant's killing attack was legally justified.

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[73] It is also the kind of expression that an appellate court may use when rendering a legal opinion. *See e.g.*, "Hosier placed two sexually explicit notes on the Smith's lawn, on which he knew M.S. played. Hosier admitted that he intended for M.S. to receive at least one of the notes. There is no doubt that the notes described sexual misconduct or that if M.S. had found and read the notes that the crime would have been completed." (Emphasis added). ***State v. Hosier***, 124 Wn. App. 696, 704, 103 P.3d 217, 220–21 (2004), *affirmed*, 157 Wn.2d 1, 133 P.3d 936 (2006); "There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial." ***State v. Perez-Cervantes***, 141 Wn.2d 468, 490, 6 P.3d 1160, 1171 (2000) (citing ***Herring v. New York***, 422 U.S. 853, 857-58, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)).

Defendant did not object to this argument. 18 VRP 2234. Alternatively, defendant has failed to demonstrate that the argument amounted to manifest constitutional error.

18. DEFENDANT'S CONSECUTIVE FIREARM SENTENCE ENHANCEMENTS CONFORMED TO THE EIGHTH AMENDMENT.[74]

The trial court properly recognized that RCW 9.94A.533(e) precludes an exceptional sentence:

> Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

RCW 9.94A.533(e). ***State v. Brown***, 139 Wn.2d 20, 26, 983 P.2d 608, 612 (1999). "A trial court may only impose a sentence which is authorized by statute." ***State v. Barnett***, 139 Wn.2d 462, 464, 987 P.2d 626, 628 (1999) (citing ***In re Personal Restraint of Carle***, 93 Wn.2d 31, 604 P.2d 1293 (1980)).[75]

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[74] Defendant does not argue Article 11, Section 14. *See* Appellant's Brief at 89-94. Defendant only requests Eighth Amendment-based relief. *Id.* at 93. Defendant does not address the factors of ***State v. Fain,*** 94 Wn.2d 387, 394, 617 P.2d 720 (1980)). This appears to be a considered decision, given ***State v. Witherspoon***, 180 Wn.2d 875, 887-89, 329 P.3d 888 (2014).

[75] *See* ***State v. Pillatos***, 159 Wn.2d 459, 150 P.3d 1130, 1135 (2007) for a recent and harsh application of this rule.

The Supreme Court has deviated from this well-settled rule in only one instance. In ***State v. Houston-Sconiers***, 188 Wn.2d 1, 391 P.3d 409 (2017), after deciding that Washington's adult court sentencing scheme for juvenile defendants was constitutionally deficient, the Supreme Court promulgated its own rule for sentencing juvenile defendants charged in adult court:

> Because "children are different" under the Eighth Amendment and hence "criminal procedure laws" must take the defendants' youthfulness into account, sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there. We affirm all convictions but remand both cases for resentencing.

Houston-Sconiers, 168 Wn.2d at 9.

This case does not involve a child. Defendant was born on March 22, 1986. CP 1094. Defendant committed his offenses on February 1, 2016. CP 1094-95. Defendant was thus twenty-nine years, ten months, and ten days old at the time he committed murder and seven counts of assault in the first degree. *Id.* ***Brown*** and ***Barnett*** control. The trial court properly sentenced the defendant to consecutive firearm enhancements.

Defendant asks this Court to conclude, on the record presented below, that his twenty nine year old brain at the time of his offenses was sufficiently child-like to implicate ***Houston-Sconiers***, and thereby trigger the trial court's absolute discretion to depart below a standard range

sentence. Appellant's Brief at 92-94. All the record below establishes in this regard is that "the evidence presented at trial regarding the defendant's PTSD diagnosis and how it contributed to defendant's conduct was compelling"—not that the PTSD diagnosis was analogous to the child's brain addressed in ***Houston-Sconiers***. CP 1118. The record presented is insufficient to warrant such relief.

Defendant's argument implies that RCW 9.94A.533(e) violates the Eighth Amendment because every defendant, regardless of age, must have the opportunity to prove the mitigating factor that his or her brain is like the child's brain addressed in ***Houston-Sconiers***. The Eighth Amendment does not extend that far. ***Harmelin v. Michigan***, 501 U.S. 957, 994-96, 111 S. Ct. 2680 115 L. Ed. 2d 836 (1991) held that a claim challenging mandatory sentences outside the death penalty context "without any consideration of so-called mitigating factors" had "no support in the text and history of the Eighth Amendment." ***Harmelin***, 501 U.S. at 994. *See also* ***State v. Morin***, 100 Wn. App. 25, 29, 995 P.2d 113, 116 (2000).

19. THIS CASE IS DEVOID OF CUMULATIVE ERROR.

"The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial." ***In re Personal Restraint of Lui***, 188 Wn.2d 525, 564-65, 397 P.3d 90 (2017). "For relief based on the

cumulative error doctrine, the defendant must show that while multiple trial errors, standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial." (Internal quotation omitted). ***State v. Clark***, 187 Wn.2d 641, 649, 389 P.3d 462, 466 (2017). "In other words, petitioner bears the burden of showing multiple trial errors and that the accumulated prejudice affected the outcome of the trial." ***In re Cross***, 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014). Petitioner recites the standard, but does not conduct the necessary factual analysis. Petitioner's claim of cumulative error should be denied for that reason. Alternatively, "[t]here is no prejudicial error under the cumulative error rule if the evidence is overwhelming against a defendant." *Id.*, 180 Wn.2d at 691 (quoting ***State v. Cofield***, 288 Kan. 367, 203 P.3d 1261 (2009)).

D. CONCLUSION.

This is an overwhelming case of murder and assault. Defendant may have sincerely considered himself in a life-or-death struggle with Mr. Thomas, and may have been very fearful of Mr. Thomas. However, the uncontested evidence admitted at trial demonstrates that on February 1, 2016 defendant commenced his killing attack amidst only innocuous and unprovocative circumstances. The first aggressor instruction rightly gave

the jury the opportunity to consider those circumstances and deny defendant the justification of self-defense.

Defendant's post traumatic stress disorder defense was effective. Defendant was acquitted of premeditated murder and he received an exceptional sentence downward. Defendant's expert was allowed to render his medical opinion without any limitation. Defendant's expert was allowed to render the factual bases for those medical opinions without limitation. However, defendant's expert was not permitted to serve as a hearsay conduit for defendant's version of what happened on February 1, 2016. That limitation was fair.

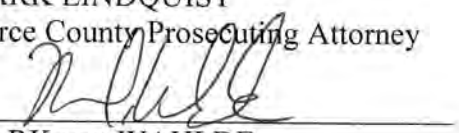
Defendant makes many claims of ineffective assistance of counsel, but defense counsel in this case did a very competent job with very constraining facts. The "automaton" defense proposed on appeal is not supported by the record. The jury instructions were appropriate. The prosecutor's argument was appropriate.

Defendant's sentence complied with the Eighth Amendment.

The judgment and sentence in this case should be affirmed.

DATED: June 19, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney



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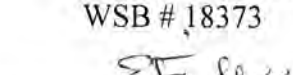

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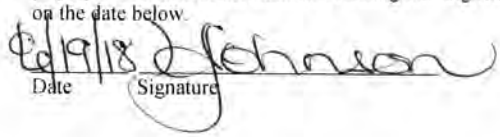

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