NO. 39038-1-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOEL ALLAN HANSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable L. Candace Hooper, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Joel Hanson, the appellant below, asks this Court to review his case.

B. COURT OF APPEALS DECISION

Hanson requests review of the Court of Appeals decision in State v. Hanson, COA No. 39038-1-III, filed October 8, 2024, and the Order Denying Motion For Reconsideration And Motion To Supplement Record, filed November 26, 2024. The decision and order are attached to this petition as appendices A and B, respectively.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review under RAP 13.4(b)(3) to determine whether a trial court's refusal to instruct jurors using WPIC 16.03 ("Justifiable Homicide – Resistance To Felony) violates a defendant's constitutional rights to due process and to present a defense?

2. Should this Court grant review under RAP 13.4(b)(1) where the Court of Appeals decision that petitioner was not entitled to a "no duty to retreat" instruction conflicts with this Court's prior precent?

3. Should this Court also review the Court of Appeals decision that petitioner waived a legal argument – presented as part of his pro se statement of additional grounds for review – because petitioner did not designate an exhibit as part of the record on appeal?

D. STATEMENT OF THE CASE

1. Trial Evidence And Charges

Hanson's opening brief and the Court of Appeals opinion discuss the trial evidence extensively. See AOB, at 4-20; Slip Op., at 2-11.

In summary, Hanson met the decedent, Anthony St. John, in Yakima when Hanson gave people rides to buy drugs at a hotel room that appeared to involve drug trafficking and sex work. RP 1260-61. From the first

meeting, Hanson said St. John made him uncomfortable, telling Hanson to leave the hotel room while he picked up a gun and moved toward Hanson with it. RP 1261.

A mutual friend, Andrea Ammons, brought St. John over to Hanson's Ellensburg apartment in early April 2020. RP 510, 1261-62. Hanson explained he was trying to sell his Dodge Durango and to find a roommate. RP 1261-62. Hanson testified that St. John offered to pay half the rent and a deposit, as well as $1800 for the Durango. RP 1262. As collateral for the car, St. John gave Hanson multiple guns. RP 510-11, 1264-65. St. John and Ammons took the Durango for a test drive but did not return with the car until two days later. RP 1262, 1264-65.

When St. John came back to Hanson's apartment, he came alone. RP 1265. Hanson attempted to return the guns used as collateral, asked for his keys back, and told St. John never to come back, rescinding the offer to live at the apartment. RP 1265. In response, St. John "beat

the crap out of" Hanson, robbed him by taking all his money and the collateral. RP 1265. Hanson explained that he was left with no money, no keys, no car, and could not even lock his front door. RP 1265.

In the following days, Hanson saw St. John off and on. RP 1266. Hanson said St. John would come by and "had this weird manipulation thing, possession and control, where he would come in[to the apartment] and set his gun down by me and just leave it there, like it was okay," pretending that it was normal and "[l]ike he lived there." RP 1268. Hanson slid a shell into a gun, St. John took it from him, and fired a gun in the apartment right past his face in the bedroom. RP 1268-69. A detective testified there was a hole in the bedroom wall, which had been covered by a Jesus picture, as shown in exhibits admitted into evidence. RP 1176, 1182-83.

On April 7, 2020, St. John came over to Hanson's apartment and demanded that Hanson accompany him to

the bank to deposit a check. RP 1271-72. Based on having previously been beaten up, Hanson said he went along with it. RP 1272-73. Hanson and St. John drove through the bank's drive thru station, where Hanson deposited a check and then withdrew funds from his bank account. RP 416, 1273. Out of fear St. John was going to kill him, Hanson gave St. John his debit card and PIN. RP 1273-74, 1312. St. John returned to the bank alone and withdrew additional funds, as surveillance video from the bank established. RP 416, 420-21. Hanson testified that during the bank transactions, St. John had a shotgun. RP 1274. He later saw that the shotgun was not loaded. RP 1274-75. When St. John dropped Hanson off at his apartment, Hanson took the unloaded gun from St. John. RP 1275.

Ammons reported that she saw Hanson on the morning of April 8, 2020, and that he was upset. RP 520-21. Hanson accused St. John of cleaning out his father's

bank account. RP 521-22. Hanson said he was "on his way to Walmart to buy shotgun shells. And he was going to blow that fucking n*****'s head off," which she did not perceive as a serious threat. RP 522. Hanson bought shotgun ammunition. RP 761.

Hanson also purportedly sent several texts that were admitted into evidence and read into the record by the lead detective. RP 784-99. Among other things, he purportedly texted, "I got the shoty back. I'm about to get some ammo and go handle him and Dre." RP 784. He also stated he needed his "truck back. I need my money. They stole, like 600 bucks . . . [f]rom me last night. I lost 1100 the last two nights." RP 784-85. He also said that St. John stole his debit card and had not paid for his truck, and had stolen other items from his apartment, purportedly saying "I would rather get him handled." RP 791. He purportedly texted, "I'll take care of the fucking 'N' word" and "I'm going to shoot me an 'N' word thief." RP

784-85. The texts also include that Hanson purportedly took Percocet pills off St. John's drug runner from a man named Billy who was at the apartment; Hanson purportedly claimed that the pills were his ostensibly because of the money St. John took from and owed him. RP 794-95.

Hanson stated that Billy came over and sold him the Percocet pills for $20, indicating that he believed Billy was afraid of St. John. RP 1293-94. He acknowledged he was texting people to try to get the truck and trying to sell the pills. RP 1289, 1294-95.

When Billy was there, Hanson said he heard a knock on the door, which Billy opened and let St. John in. 1295-96. Hanson testified he "was like, What the fuck? I went and grabbed the gun. And I got back in my bedroom door, and I look. And I see Billy standing holding the door open, and St. John is talking to him." RP 1296. Hanson said, "I cocked the gun. I stepped out and I showed him

that there was shells in it. And I loaded it and I cocked the gun. And I told him, I was like, Don't move." RP 1296. Hanson said that St. John laughed at him and said, "You're not going to shoot me," and then that St. John turned around and left the apartment. RP 1296.

Hanson reported knowing that St. John carried another gun in his vehicle and was afraid that weapon would be used against him. RP 621, 1300. Hanson testified that he told St. John not to go to the truck, following him out of the apartment and down the stairs. RP 1297. Hanson said, "I tried to aim where . . . I could just put a warning shot across the top of the truck and show him that I'm not kidding. That . . . I'm not fucking around. Don't go for a gun. And it hit him." RP 1297. He stated again, "I meant to fire a warning shot, scare him away from the truck. And it hit him. It was an accident. It really was." RP 1298.

Police arrived and found Hanson sitting on the stairwell. RP 857, 897, 902. Responding officers indicated that St. John was still alive when they arrived, but was engaged in agonal breathing, gasping for breath. RP 862, 901. The medical examiner testified that the cause of death was a gunshot wound to the head, classifying the manner of death as a homicide. RP 967.

Police spoke to Hanson several times. At the scene, Hanson told officers that "he was the victim of a home invasions . . . . That he said that he had been having issues with the victim for a few days." RP 610. At the station, Hanson explained "he had disarmed the victim on April 7th. And that he was afraid if he had told us that, he would have been in trouble for being a felon in possession of a firearm. And that he had heard that the victim carried another gun in the vehicle, and that he was afraid that the victim was going to use the second weapon against him." RP 621. According to the lead detective,

Hanson's "initial statement was that he had disarmed [St. John] after [Anthony] had come into his apartment. And that he had then turned the gun on [St. John] and shot him while he was at the top of the stairs and [St. John] was near the bottom of the stairs." RP 700.

The state charged Hanson with first degree murder, second degree unlawful possession of a firearm, and second degree robbery, proceeding to trial on these charges by way of second amended information.[1]

2. Instructional Errors

The defense proposed an instruction for justifiable homicide—resistance to felony based off WPIC 16.03.[2] CP 93. The proposed instruction read:

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[1] The trial court dismissed the second degree robbery charge with prejudice based on insufficient evidence. See RP 1371-72; CP 43. Hanson does not dispute the second degree unlawful possession of a firearm conviction on appeal or discuss it further.

[2] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS—CRIMINAL § 16.03 (5th ed. & Dec. 2021 update).

> It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony upon the slayer or upon or in a dwelling or other place of abode in which the slayer is present.
>
> The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 93.

The trial court, after hearing argument of the parties, was initially inclined to give the proposed resistance to felony instruction, acknowledging that Hanson testified about prior robberies, thefts, and assaults that occurred in his home. RP 1348, 1352-53. Defense counsel argued,

"there was testimony that my client believed he was going for a gun after coming into his house. There was a previous incident where he was robbed. There was a previous incident where he was beaten. And the instruction is appropriate." RP 1350. The court agreed, indicating it was inclined to it. RP 1352.

However, the next day, the court refused the instruction. It reasoned that "everything that Mr. Hanson wants to argue can be argued specifically on the other jury instruction about committing a felony," referring to WPIC 16.02,[3] which stated "the slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury . . . ." CP 68, 92.

The defense also proposed other instructions on self-defense, including the general "defense of self and others" instruction contained in WPIC 16.02 and the

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[3] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS—CRIMINAL § 16.02 (5th ed. & Dec. 2021 update).

"actual danger not necessary" instruction contained in WPIC 16.07.[4] However, the defense did not request, and the trial court did not give, a "no duty to retreat instruction." See CP 44-89 (absence of instruction in court's instructions to jury), 91-104 (absence of instruction in defense's proposed instructions).

3. Verdicts, judgment, sentence, and appeal

The jury returned guilty verdicts for murder in the first degree and unlawful possession of a firearm in the second degree. CP 106, 114; RP 1527-31. By special verdict, the jury also found Hanson was armed with a firearm when committing the offense. CP 107; RP 1527.

The trial court sentenced Hanson to 360 months for the murder, including a 60-month firearm enhancement. CP 154; RP 1568.

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[4] 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS—CRIMINAL § 16.07 (5th ed. & Dec. 2021 update).

4. Court of Appeals

On appeal, counsel for Hanson made two arguments relevant to this petition.

First, counsel argued that due process had entitled Hanson to a self-defense jury instruction on resisting a felony (WPIC 16.03) and that, under the circumstances of his case, the general self-defense instruction for justifiable homicide (WPIC 16.02) did not suffice. See AOB, at 4-14. Second, counsel argued Hanson's trial attorney was ineffective for failing to request an instruction indicating he had the right to stand his ground and had no duty to retreat at the time of the shooting. See AOB, at 14-23.

In a pro se statement of additional grounds, Hanson argued his trial attorney was ineffective for failing to challenge admission of a video recording – made while police transported him – containing Hanson's pre-Miranda admission that he shot St. John. See SAG, filed 11/14/23.

The Court of Appeals rejected both claims made by counsel. Slip Op., at *11-*18. Moreover, the Court declined to address Hanson's pro se challenge to admission of the car video because the video (admitted as trial exhibit 196A) had not been designated as part of the appellate record. Slip Op., at *19-*20.

Appellate counsel filed a Motion For Reconsideration and Motion To Supplement The Record, asking the Court for leave to supplement the record with exhibit 196A. See Motion (filed 10/28/24). The motion was denied. See Order (filed 11/26/24).

E. ARGUMENT

1. HANSON WAS ENTITLED TO A SELF-DEFENSE INSTRUCTION ON RESISTING A FELONY.

"'To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case.'"

State v. Weaver, 198 Wn.2d 459, 465-66, 496 P.3d 1183 (2021) (quoting State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009)).

The instructions did not make the legal standard manifestly apparent in this case because they omitted the legal standard that Hanson was justified in committing homicide if the homicide was committed "in the actual resistance of an attempt to commit a felony" upon him, in his presence, or upon or in a dwelling or abode where he was present.

Hanson's statements to police and neighbors shortly after the shooting and his testimony at trial establish that he was attempting to resist St. John's attempt to commit a felony against him, in his presence and/or in his dwelling. He reported to one officer that he had been the victim of home invasions, which had been an issue with St. John for the last few days. RP 610. He also told several neighbors that St. John had previously

robbed him and had come back on the night in question to rob him again. RP 493, 496, 1006.

Hanson testified that when he attempted to get his car back and rescinded the offer for St. John to stay at his apartment, St. John "beat the crap out of" him and took all his money, the guns St. John had provided as collateral for the car, and the car. RP 1265. Hanson said that St. John would repeatedly intrude into his home, threaten him with a gun, and had fired a gun right by his face into his bedroom wall. RP 1268-69. St. John also demanded that Hanson withdraw money from an ATM at gunpoint, obtained Hanson's PIN through fear, and had independently withdrawn additional cash from Hanson's accounts. RP 416, 1273-74, 1312.

On the night in question, Hanson testified that not only did St. John enter his apartment, but that he left the apartment to retrieve a gun from the Durango in order to commit additional felonies against him. RP 621, 1297,

1300. There was ample evidence to conclude that, when St. John came to Hanson's apartment on April 8, 2020, Hanson was engaged in the actual resistance of St. John's attempt to commit a felony upon him, in his presence, or upon or in his dwelling in which he was present. As such, WPIC 16.03, which justifies homicide where it is committed to resist a felony, was amply supported by the evidence and would have made manifestly clear to the jury that Hanson was justified if his force was resistive to a felony attempt against him. It was error not to give the defense's proposed instruction on resistance to a felony.

The Court of Appeals reasoned that the instruction was unnecessary because the other, general self-defense instruction, WPIC 16.02, was given. Slip Op., at 13-14. That instruction states that a homicide is justified when "the slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great

personal injury" and "the slayer reasonably believed that there was imminent danger of such harm being accomplished." CP 68 (emphasis added). As the emphasized language establishes, unlike the resistance-to-felony instruction, this instruction requires a reasonable belief of intent to commit a felony in conjunction with a reasonable belief that there was imminent danger of "such harm being accomplished" by the felony intended.

Hanson acknowledges authority indicating that, where the resistance-to-felony instruction is given, the felony in question must be one of violence that threatens personal injury or human life. State v. Griffith, 91 Wn.2d 572, 576, 589 P.2d 799 (1979); State v. Nyland, 47 Wn.2d 240, 243, 287 P.2d 345 (1955); State v. Brenner, 53 Wn. App. 367, 376, 768 P.2d 509 (1989), overruled on other grounds by State v. Wentz, 149 Wn.2d 342, 68 P.3d 282 (2003). He also acknowledges that the Brenner court held that a resistance-to-felony instruction was not

necessary because the defense could argue its theory of the case with the general self-defense instruction. See Brenner, 53 Wn. App. at 376-77; accord State v. Boisselle, 3 Wn. App. 2d 266, 291, 415 P.3d 621 (2018) (holding that WPIC 16.02 and WPIC 16.03 are merely "repetitious" instructions), rev'd on other grounds by State v. Boisselle, 194 Wn.2d 1, 448 P.3d 19 (2019).

These authorities, however, fail to account for differences in the language of each instruction.

The resistance-to-felony instruction does not require a reasonable belief about an intent to commit a felony or a reasonable belief about the harm that will follow. Instead, it merely requires that the slayer be actually resisting an attempt to commit a felony. The resistance-to-felony instruction thus provides a different burden for disproving self-defense.

In this case, WPIC 16.03, the resistance-to-felony instruction, would have permitted Hanson to fully argue

his chosen self-defense theory. Based on everything Hanson had been through with St. John, being repeatedly robbed and beaten prior to the shooting as the victim of St. John's other felonies, Hanson wished to present a defense to the jury that he was resisting yet another attempt to commit a felony against him and therefore his actions were justified. The trial court's denial of his proposed instruction deprived him of this central defense theory and failed to make the law manifestly apparent to the jury. The State cannot demonstrate this constitutional error was harmless beyond a reasonable doubt. See State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Because the legal distinction between these two instructions presents significant constitutional questions of due process and the right to present a defense, review is appropriate under RAP 13.4(b)(3).

2. COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A "NO DUTY TO RETREAT" INSTRUCTION.

The state and federal constitutions guarantee effective assistance of counsel. U.S. CONST. amend. VI; ST. JOHN 668, 686-87, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). The "defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim." Estes, 188 Wn.2d at 457-58.

Performance is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. Id. at 458. Prejudice is established if there is a reasonable probability that '"but for counsel's deficient performance, the outcome of the proceedings would have been different.'" Id. (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A reasonable probability is lower than the preponderance

standard; "it is a probability sufficient to undermine confidence in the outcome." Id.

The duty to provide effective assistance includes the duty to research and be aware of relevant legal authorities. Id. at 460 (citing In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 188 (2015)). Failing to apprise oneself of controlling law falls below an objective standard of reasonableness. Id.; Kyllo, 166 Wn.2d at 868.

Here, counsel was objectively deficient by failing to propose a no duty to retreat instruction. Competent counsel would have requested this instruction, particularly given the dispute about whether Hanson or St. John was the first aggressor during the incident and the state's position that Hanson should not have followed St. John out of his apartment to address what he perceived as an ongoing assault by St. John.

Had counsel requested the instruction, it would have been given. "The law is well settled that there is no duty to retreat when a person is assaulted in a place where he or she has a right to be." State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). "An instruction should be given to this affect when sufficient evidence is presented to support it." Id. (citing State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1994)).

The Court of Appeals rejected this claim, reasoning:

> The instruction is inappropriate when there is no evidence anyone other than the slayer was the first aggressor. *See State v. Benn*, 120 Wn.2d 631, 659, 845 P.2d 289 (1993); *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Slip Op., at 16-17.

Contrary to the Court of Appeals conclusion, Hanson was not clearly the first aggressor. St. John came uninvited into Hanson's apartment, resulting in Hanson feeling threatened and causing him to get his gun. RP

1295-96. Hanson said he displayed the gun, showing it was loaded, and St. John laughed, told Hanson he would not shoot him, and left the apartment. RP 1296. Hanson followed St. John down the stairs, afraid that St. John was going to retrieve a gun in the Durango, telling St. John not to go to the truck. RP 1297. He said he knew that St. John carried another gun in the vehicle and thought that the weapon would be used against him. RP 621, 1300. When he saw St. John going to the truck, he fired what he intended as a warning shot to scare St. John away from the truck, which hit and killed St. John. RP 1297-98.

Under these circumstances, a no duty to retreat instruction was necessary. Hanson had the right to be where he was, inside his apartment and on the grounds of his apartment complex. He believed St. John was attacking him and he was entitled to argue that he could stand his ground and defend against the attack by the use of lawful force. The law did not require him to meekly stay

in his apartment while St. John went down to obtain a weapon and attack him.

Counsel performed deficiently by failing to request the instruction. Counsel should be aware that the law imposed no duty for Hanson to "retreat" by remaining in his apartment after St. John left, particularly where he believed St. John was getting a gun to assault him. Without the instruction, the jury, as in Redmond, was left to speculate that Hanson was not entitled to stand his ground and defend himself against what he perceived as St. John's continuing attack after St. John left his apartment. Cf. Redmond, 150 Wn.2d at 494-95.

Moreover, there is a reasonable probability the outcome of the trial would have differed. The prosecution repeatedly asserted that it was improper for Hanson to leave his apartment and follow St. John downstairs, that it negated Hanson's claim of self-defense and instead showed premeditated murder. RP 1426, 1462-63, 1467-

68, 1497. Had the jury received proper instruction that Hanson was entitled to stand his ground—including standing his ground in the parking area of his own apartment building—the prosecution could not have established that Hanson did anything improper by exiting his apartment. Instead, jurors would have properly understood that Hanson was entitled to stand his ground and respond with reasonable force to the ongoing attack he perceived from St. John.

Defense counsel's failure to request a no duty to retreat instruction was prejudicial. Review is appropriate under RAP 13.4(b)(1) because the Court of Appeals decision conflicts with this Court's decision in Redmond.

3. THE COURT OF APPEALS SHOULD HAVE DECIDED HANSON'S PRO SE CLAIM ON THE MERITS.

The Court of Appeals refused to review Hanson's claim raised in a statement of additional grounds for review pertaining to Exhibit 196A because it "was not

designated as a part of the record on appeal." Slip op. at 20. Hanson, however, filed this claim as a pro se litigant from jail and had no ability to "provide a sufficient record to review the issue[] raised on appeal. RAP 9.2(b)." Slip op. at 20.

Due to his former counsel's oversight, this exhibit, which could have easily been designated as part of the record on review, was not designated. Rather than preclude review altogether, the Court of Appeals should have allowed Hanson's counsel to supplement the record with Exhibit 196A.

Generally speaking, "'[a]n insufficient appellate record precludes review of the alleged errors.'" Slip op. at 20 (quoting Stiles v. Kearney, 168 Wn. App. 250, 259, 277 P.3d 9 (2012)). But the Court overlooked that the Rules of Appellate Procedure provide a mechanism to correct an insufficient appellate record supplementation under RAP 9.10.

As the opinion acknowledges, "The video(s) Mr. Hanson complains of were admitted as exhibit 196A." Slip op. at 20. RAP 9.10 provides, "the appellate court will not ordinarily dismiss a review proceeding or affirm[or] reverse ... because of the failure of the party to provide the appellate court with a complete record of the proceedings below." Instead, if the record is not complete "to permit a decision on the merits of the issues presented for review, the appellate court may, on its own initiative or on the motion of the party (1) direct the transmitted of additional clerk's papers and exhibits .... " RAP 9.10. Consistent with RAP 9.10, RAP 1.2(a) directs that the rules "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands" subject to restrictions not at issue here.

The Court's refusal to consider Hanson's pro se claims regarding Exhibit 196A is inconsistent with RAP I.2(a) and RAP 9.10. Had the Court alerted Hanson to the deficiency in the record, his counsel would have corrected it by promptly filing a supplemental designation of clerk's papers and exhibits to ensure that a sufficient record was available for review. This would have been an easy, quick, and simple solution that would not need to result in additional litigation, such as filing a personal restraint petition to raise this claim. Hanson asks for permission to supplement the record with Exhibit 196A. See RAP 9.6 (permitting a party to supplement the record after the filing of the party's last brief "only by order of the appellate court, upon motion").

This solution would also comport with Hanson's constitutional right to effective appellate counsel under the Sixth Amendment and article I, section 22. As Hanson's former counsel on appeal indicated, counsel

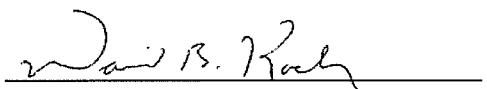
completely overlooked the need to supplement the record with Exhibit 196A, despite Hanson's clear request that he do so. Rather than punish Hanson for his counsel's failure, the Court of Appeals should have honored Hanson's constitutional rights by permitting counsel to promptly file a supplemental designation of clerk's papers and exhibits to include Exhibit 196A. Although this might have resulted in additional delay, that delay would have been minimal. In this digital age, transferring an exhibit to the Court of Appeals can be accomplished very quickly.

F. CONCLUSION

This Court should accept review and reverse.

I certify that this petition contains 4,868 words excluding those portions exempt under RAP 18.17.

DATED this 24th day of December, 2024.
Respectfully Submitted
NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JOEL ALLEN HANSON, Appellant.	)	No. 39038-1-III UNPUBLISHED OPINION

COONEY, J. — Joel Hanson was convicted of first degree murder and unlawful possession of a firearm after he shot and killed Anthony St. John.

Mr. Hanson appeals, arguing that: (1) the trial court erred by refusing to give a self-defense jury instruction based on WPIC[1] 16.03, (2) that his trial counsel was ineffective for failing to request a jury instruction that he did not have a duty to retreat, (3) that cumulative errors deprived him of a fair trial, and (4) that the trial court improperly ordered him to pay the victim penalty assessment (VPA). In a statement of

[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS—CRIMINAL (5TH ED.)

additional grounds for review (SAG), Mr. Hanson alleges his trial counsel was ineffective for allowing his video recorded statements to be admitted and in not requesting that the firearm enhancement run concurrent with his sentence for first degree murder.

We affirm Mr. Hanson's convictions and sentences and remand for the limited purpose of striking the VPA from the judgment and sentence.

BACKGROUND

Mr. Hanson and Mr. St. John first met when Mr. Hanson drove to Yakima, Washington, to "get drugs." Rep. of Proc. (RP) at 1260. The two were reintroduced to each other by a mutual friend, Andrea Ammons, in early April 2020. Mr. Hanson was attempting to sell his Dodge Durango and find a roommate to share his apartment with in Ellensburg, Washington. Mr. St. John offered to purchase the Durango and pay half of Mr. Hanson's rent as his roommate. Mr. Hanson considered this a "be-all/win-all situation" and agreed to both offers. RP at 1262.

Mr. St. John "brought in a bag of guns" as "collateral" so he could take the Durango for a test drive prior to purchase. RP at 1264. Mr. St. John failed to return from the test drive for two days. When he returned, Mr. Hanson told Mr. St. John that both deals were off. Mr. St. John responded by "beat[ing] the crap" out of Mr. Hanson and "robb[ing]" him of all his money and everything he had in his pockets, including his apartment keys. Mr. St. John then took the guns he had given Mr. Hanson as collateral and departed in the Durango.

Mr. St. John returned to the apartment periodically, as if he resided there, and "would take all of [Mr. Hanson's] stuff again." RP at 1266. On these visits, Mr. St. John often possessed guns and would display them as if to threaten Mr. Hanson. Mr. Hanson alleged that Mr. St. John fired a shot "right past my face" on one occasion. RP at 1269.

On April 7, 2020, video cameras at a gas station in Selah, Washington, recorded Mr. St. John driving the Durango with Mr. Hanson in the passenger seat. After the duo entered the convenience store, Mr. Hanson withdrew funds from an ATM[2] and used his debit card to purchase items for Mr. St. John. The two did not appear to be in any "altercation." RP at 565. However, Mr. Hanson testified he was there against his will.

Later that same day, the two were again captured on a video camera depositing a check at an ATM and "fist bump[ing]" when the check cleared. RP at 1432-33. Again, Mr. Hanson testified he only went to the bank with Mr. St. John because he was scared. After leaving the bank and arriving back at his apartment, Mr. Hanson took the shotgun Mr. St. John had with him.

On another occasion, Mr. St. John was seen at the bank using Mr. Hanson's debit card to withdraw money from Mr. Hanson's account without his permission. Mr. St. John also attempted to wire $500 from Mr. Hanson's account, which Mr. Hanson disputed with his bank. The bank rejected Mr. Hanson's disputed transaction due to the

[2] Automated teller machine.

video recording of Mr. St. John accessing Mr. Hanson's account in Mr. Hanson's presence.

Mr. Hanson, angry about Mr. St. John using his account without permission, began to send text messages to other people about his plans to recoup his money. He sent a text message to Erin Kelso, stating, "I got the shotty back. I'm about to get some ammo and go handle him and [Ms. Ammons]." RP at 784-85. He also told her, "I need my truck back. I need my money. They stole, like, 600 bucks from me last night," and "[w]ill you beat the crap out of [Ms. Ammons] for me? I'll take care of the fucking [n—er]." RP at 784-85. Mr. Hanson also text messaged a friend named Brandy: "I'm tired of this motherfucker. I need info and I need ammo, 20-gauge shells." RP at 789-90.

Mr. Hanson then visited Ms. Ammons at the Super 8 Motel where she was residing and told her he was on his way to buy shotgun shells "to blow that fucking n[—]er's head off," referring to Mr. St. John. RP at 522. Mr. Hanson then purchased ammunition for a 20-gauge shotgun.

On the night of April 8, 2020, Mr. Hanson let William Burnham into his apartment. Around the same time, Mr. St. John was driving the Durango to Ellensburg, accompanied by Elia Molina and Jesus Mata. Eboni Baxter, who was in a "romantic relationship" with Mr. St. John, testified she saw Mr. St. John that day, and he was worried about Mr. Hanson because he "was becoming like super paranoid" and "was

getting high a lot and had been up for a couple of days." RP at 655, 664. Ms. Baxter also testified that Mr. St. John wanted to check on Mr. Hanson.

Mr. St. John, Ms. Molina, and Mr. Mata arrived at Mr. Hanson's Ellensburg apartment at about 10:00 p.m. Ms. Molina and Mr. Mata remained in the Durango while Mr. St. John walked up to the apartment alone and unarmed. Mr. St. John knocked on the apartment door and was allowed entry by Mr. Burnham. Mr. Hanson testified that he then grabbed the loaded shotgun he had taken from Mr. St. John the day prior and pointed it at him:

> [MR. HANSON:] [Mr. Burnham] opened the door and let [Mr. St. John] in my house. And I—I was like, What the fuck? I went and grabbed the gun. And I go back in my bedroom door, and I look. And I see [Mr. Burnham] standing holding the door open, and [Mr. St. John] is talking to him.
>
> And I had—it wasn't a shell chambered. It was in the slide. And I cocked the gun. I stepped out and I showed him that there was shells in it. And I loaded it and I cocked the gun. And I told him, I was like, Don't move.
>
> I just panicked. I didn't know what to say. I didn't know what to do. I was standing there like froze. And he starts to laugh at me. He is just like, You're not going to shoot me. He is like, This is—this is—You're not willing to do all of that. You're not going to do that much time. And he just laughs and he turns around.
>
> He is, like: You're not going to pull the trigger. I will. Something like that. He said something like—and he runs out of my house. And I'm like, okay. And I didn't shoot him because he wasn't coming at me.

RP at 1296.

Ms. Molina testified that she saw Mr. St. John come "flying down the stairs" to the parking lot and that he looked scared. RP at 442. Mr. Hanson followed Mr. St. John out

of the apartment, stood at the top of the stairs, and aimed the shotgun towards Mr. St. John who was located near the driver's side door of the Durango. She testified Mr. Hanson was yelling "that [Mr. St. John] had tooken his dad's car, his bank card, and tooken some money and stuff like that. Yelling that to [Mr. St. John] while he was running." RP at 444. Ms. Molina heard a gunshot and saw Mr. St. John fall between the front and rear driver's side doors of the Durango. Ms. Molina exited the vehicle to check on Mr. St. John, who was unresponsive. She fled the scene along with Mr. Burnham and Mr. Mata.

Police were called by other residents of the apartment complex. Shortly after he shot Mr. St. John, Mr. Hanson sent a message to Ms. Kelso stating, "I just shot a n[—-]er." RP at 786. Police arrived at the scene, and a lingering Mr. Hanson was detained and placed in a police vehicle. Other officers rendered aid to Mr. St. John who had clearly been shot in the head:

> [DEPUTY KYLIE ROMERO SWIFT:] [T]he subject was — basically, he was shot in the head. His skull was in several different pieces. I could feel that, just based upon holding his head. It was very shifty.
>
> So just imagine — I was trying to hold his head together as best as possible. If you could imagine several parts of your skull in different pieces . . . That's what it was like.

RP at 684-85. Mr. St. John later died at the hospital. The cause of death was a gunshot wound to the head.

Mr. Hanson was taken to the police station for an interview where he was provided his *Miranda*[3] rights. Mr. Hanson cooperated with officers throughout the investigation. Mr. Hanson was ultimately charged with murder in the first degree with a firearm enhancement and unlawful possession of a firearm in the second degree.[4] The case proceeded to a jury trial.

At trial, Mr. Hanson maintained that he believed Mr. St. John was going to the Durango to retrieve a gun at the time of the shooting. He also testified he did not mean to shoot Mr. St. John but intended to fire a warning shot instead. However, Corporal Jason Brunk and Detective Ryan Shull testified that no weapons, aside from the shotgun Mr. Hanson used in the shooting, were found on Mr. St. John or in the Durango.

Before jury deliberations, defense counsel proposed a standard justifiable homicide instruction based on WPIC 16.02 and RCW 9A.16.050(1). The State did not object to the inclusion of this instruction, which became jury instruction 22:

> It is a defense to a charge of murder and manslaughter that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable when committed in the lawful defense of the slayer when.
>
> (1) the slayer reasonably believed that the person slain intended to commit a felony or to inflict death or great personal injury,

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[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] Mr. Hanson was also charged with robbery in the first degree with a firearm enhancement. However, this charge was amended to robbery in the second degree and then later dismissed on defense counsel's motion.

> (2) the slayer reasonably believed that there was imminent danger of such harm being accomplished, and
>
> (3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 68.

Defense counsel next requested another self-defense instruction based on WPIC 16.03 and RCW 9A.16.050(2). This instruction would have become instruction 23 (proposed instruction 23):

> It is a defense to a charge of murder or manslaughter that the homicide was justifiable as defined in this instruction.
>
> Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony upon the slayer or upon or in a dwelling or other place of abode in which the slayer is present.
>
> The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP at 93. The State objected to the inclusion of this instruction.

The State contended that Mr. Hanson's theory of the case could be argued under instruction 22, and that there was no basis to argue Mr. St. John was committing a felony

when he was killed. The State argued, "even under the most generous review of any of the defendant's version of events," the evidence showed Mr. St. John had entered Mr. Hanson's apartment with permission from Mr. Burnham, and Mr. St. John had fled to his vehicle when he was shot. RP at 1380-81. The State contended Mr. Hanson could "still argue what [he] thought the victim may have been doing. But I really don't think the evidence supports that the victim was in the process of committing a felony at the time." RP at 1382.

The court pointed out that "if [Mr. Hanson] believed [Mr. St. John] was going to commit the felony, I think the other [instruction] covers that. And then, otherwise, it's 'upon' or 'in.' He is not upon or in a dwelling at th[e] time [of the shooting]." RP at 1382. The defense responded:

> [DEFENSE COUNSEL]: Well, Judge, I would disagree that it wasn't upon a dwelling. He is right outside. And the testimony is that Mr. Hanson thought that he was getting a gun out of the car to, potentially, come back in and rob him.
>
> I take issue with the statement that the victim is lawfully in. Mr. Burnham did not live there. He did not have dominion or control of the place to let anybody in.
>
> THE COURT: Uh-huh.
>
> [DEFENSE COUNSEL]: . . . Just because somebody else lets you into a house that you don't own, rent, or have any control over, does not mean you're lawfully there.
>
> THE COURT: Right. But when Mr. Hanson tells him to leave, he does. Now, Mr. Hanson may have thought he was going to come right back. But —
>
> [DEFENSE COUNSEL]: Correct.
>
> THE COURT: — he does leave . . . .

RP at 1382-83. Defense counsel next contended there was "the ongoing felony that he is committing and taking the motor vehicle." RP at 1384. The court disagreed that any case law supported the proposition that you could shoot somebody "who is taking your car, for example, if they are driving away." RP at 1384.

Ultimately, the court declined to give proposed instruction 23:

> THE COURT: Yeah. The second is actual resistance of an attempt to commit a felony upon a [ ] slayer or upon or in a dwelling. It's not upon a vehicle. It has to be a felony upon the slayer or a felony upon or in a dwelling or place of abode.
>
> So, I don't think taking a motor vehicle works. I have to—I'm agreeing with the state on this one. I don't—I think everything that Mr. Hanson wants to argue can be argued specifically on the other jury instruction about committing a felony.

RP at 1385.

The jury found Mr. Hanson guilty of first degree murder and returned a special verdict finding Mr. Hanson was armed with a firearm during the commission of the crime. The jury additionally found Mr. Hanson guilty of unlawful possession of a firearm.

The court sentenced Mr. Hanson to 300 months of incarceration on the murder charge, plus an additional 60 months for the weapons enhancement. He was also sentenced to eight months for the second degree unlawful possession of a firearm charge to run concurrently to the total 360 months for the murder conviction and enhancement.

Although the trial court found Mr. Hanson to be indigent, it ordered him to pay the then mandatory VPA.

Mr. Hanson timely appeals.

ANALYSIS

SELF-DEFENSE INSTRUCTION

Mr. Hanson argues he was deprived of his right to a fair trial when the court rejected his proposed self-defense jury instruction on resisting a felony (proposed instruction 23). We disagree.

"A defendant is entitled to have his [or her] theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence in the record." *State v. Griffith*, 91 Wn.2d 572, 574, 589 P.2d 799 (1979). "Where a trial court has refused to give a justifiable homicide or self-defense instruction, the standard of review depends upon why the trial court did so." *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005).

> If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo.

State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

Here, defense counsel requested the jury be instructed consistent with proposed instruction 23. In objecting to the proposed instruction, the State contended that Mr. Hanson's theory of the case could be argued under instruction 22, and there was no factual basis to support the argument that Mr. St. John was committing a felony when he was killed. To illustrate this point, the State pointed out that Mr. St. John was given permission to enter Mr. Hanson's apartment from Mr. Burnham, who was inside the apartment at the time, and that Mr. St. John was fleeing from Mr. Hanson when he was shot.

Defense counsel countered that Mr. St. John could have been unlawfully in the apartment, even if he was allowed entry by Mr. Burnham, and that Mr. Hanson thought Mr. St. John was returning to the Durango to retrieve a gun. Thus, it was the defense's position that the felony for which it was arguing Mr. St. John committed was "upon" Mr. Hanson's dwelling, and there was "the ongoing felony that he is committing and taking the motor vehicle." RP at 1383-84.

The court ultimately disagreed and declined to give proposed instruction 23 based on its finding that no felony was being committed against Mr. Hanson or his dwelling, and its conclusion of law that taking a vehicle was not a crime for which homicide was justifiable. Consequently, our review is de novo.

"The justifiable homicide defense applies only if the felony which was sought to be prevented threatens life or great bodily harm." *State v. Brenner*, 53 Wn. App. 367,

376, 768 P.2d 509 (1989), *overruled on other grounds by State v. Wentz*, 149 Wn.2d 342, 68 P.3d 282 (2003). In other words, "such a defense is appropriate only if the felony which was sought to be prevented was of a violent nature." *Griffith*, 91 Wn.2d at 576.

Mr. Hanson acknowledges the authorities which indicate the justifiable homicide defense is only appropriate when the felony in question was one of violence which threatened injury or loss of life. However, he argues that those authorities do not account for Mr. Hanson's unique situation in which he alleged Mr. St. John had committed repeated violent felonies against him, such as assault and robbery, which, in turn, influenced Mr. Hanson's behavior on the day of the shooting. Mr. Hanson's argument is unpersuasive.

Mr. Hanson did not produce evidence that Mr. St. John was engaged in a violent felony against Mr. Hanson when he was shot. In fact, Mr. Hanson testified that when he pointed the gun at Mr. St. John, Mr. St. John "laugh[ed]" and said, "You're not going to shoot me," before running out of Mr. Hanson's apartment. RP at 1296. Moreover, Mr. Hanson's argument that the felony was the theft of Mr. Hanson's vehicle before the trial court is similarly unpersuasive; the theft of a motor vehicle is not a violent felony.

Mr. Hanson also states that proposed instruction 23 "does not require a reasonable belief about an intent to commit a felony or a reasonable belief about the harm that will follow or a reasonable belief at all." Br. of Appellant at 27. Mr. Hanson argues that "[t]he resistance-to-felony instruction [ ] provides a higher burden for disproving self-

defense" than instruction 22 does. *Id.* However, he acknowledges that prior cases have held that, where WPIC 16.02 (instruction 22) is given, WPIC 16.03 (instruction 23) is "repetitious." *State v. Boisselle*, 3 Wn. App. 2d 266, 291, 415 P.3d 621 (2018), *overruled on other grounds*, 194 Wn.2d 1, 448 P.3d 19 (2019); *Brenner*, 53 Wn. App. at 376 ("[WPIC 16.02] allows self-defense in almost the same language [as WPIC 16.03]: when the slayer believes the decedent intends to inflict death or great personal injury. Therefore, we find that the instruction given [WPIC 16.02] allows Brenner to argue his theory of the case."). Moreover, both instructions contained language stating that, when analyzing whether such force and means used were that of a reasonably prudent person, all of the facts and circumstances "as they appeared to him, at the time of *and prior to* the incident" should be considered. *Compare* CP at 68 *with* CP at 93 (emphasis added). It is unclear how proposed instruction 23's burden for disproving self-defense was lower than instruction 22's.

Instruction 22 allowed Mr. Hanson to argue his theory of the case and, in any event, proposed instruction 23 was inapplicable because Mr. Hanson did not produce evidence that Mr. St. John was committing a violent felony against him.

INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Hanson argues his counsel was deficient for failing to request an instruction to the jury that Mr. Hanson had no duty to retreat. We disagree.

Defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Ineffective assistance of counsel claims are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

The defendant, Mr. Hanson in this case, bears the burden of showing (1) that his counsel's performance "fell below an objective standard of reasonableness based on consideration of all the circumstances" and, if so, (2) that there is a reasonable probability that but for counsel's poor performance, the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "If either element is [] not satisfied, the inquiry ends." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

A defendant alleging ineffective assistance of counsel bears the burden of showing deficient representation. *McFarland*, 127 Wn.2d at 335. In reviewing the record, there is a strong presumption that counsel's performance was reasonable. *Id.* The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the

alleged error and in light of all the circumstances. *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). When counsel's conduct can be characterized as a legitimate trial strategy or tactic, their performance is not deficient. *Kyllo*, 166 Wn.2d at 863.

Even if we find that counsel's performance was deficient, a defendant must affirmatively prove prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). This requires more than simply showing that "the errors had some conceivable effect on the outcome." *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant demonstrates prejudice by showing that the proceedings would have been different but for counsel's deficient representation. *McFarland*, 127 Wn.2d at 337.

Mr. Hanson argues his counsel was ineffective for failing to request a no duty to retreat instruction because there was a dispute about whether Mr. Hanson or Mr. St. John was the initial aggressor.

"The law is well settled that there is no duty to retreat when a person is assaulted in a place where he or she has a right to be." *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). The no duty to retreat instruction should be given when sufficient evidence is presented to support it. *Id.* The instruction is inappropriate when there is no evidence that anyone other than the slayer was the first aggressor. *See State v. Benn*, 120

Wn.2d 631, 659, 845 P.2d 289 (1993); *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Here, there was no evidence that anyone but Mr. Hanson was the first aggressor, and the instruction was therefore inappropriate. Mr. Hanson's own testimony at trial demonstrated that he was the first aggressor:

> [MR. HANSON]: I hear a knock. I go and look. I see [Mr. Burnham] open the door. I see the guy. Oh, my God.
> [DEFENSE COUNSEL]: Who did you see?
> [MR. HANSON]: *I grabbed the gun.*
> [DEFENSE COUNSEL]: Who did you see at the door?
> [MR. HANSON]: [Mr. Burnham] opened the door and let [Mr. St. John] in my house. And I—I was like, What the fuck? *I went and grabbed the gun.* And I go back in my bedroom door, and I look. And I see [Mr. Burnham] standing holding the door open, and [Mr. St. John] is talking to him. And I had—it wasn't a shell chambered. It was in the slide. *And I cocked the gun. I stepped out and I showed him that there was shells in it. And I loaded it and I cocked the gun. And I told him, I was like, Don't move.*

RP at 1295-96 (emphasis added).

Given Mr. Hanson's testimony at trial, there was no dispute regarding who was the first aggressor. Consequently, even if defense counsel had requested the instruction, it would not have been provided to the jury. Because counsel was not deficient, we need not analyze whether Mr. Hanson was prejudiced.

Mr. Hanson's trial counsel was not ineffective.

CUMULATIVE ERRORS

Mr. Hanson argues cumulative error deprived him of a fair trial. He points to his trial counsel's alleged deficient performance as well as the court's denial of his request to include the resisting a felony self-defense instruction. "Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). Finding no error, Mr. Hanson's argument fails.

VICTIM PENALTY ASSESSMENT

Mr. Hanson argues that, due to a recent change in the law, we should remand to the trial court for it to strike the VPA. The State contends that we should remand because a defendant can move in the trial court to strike the VPA. We agree with Mr. Hanson and remand for the court to strike the VPA from the judgment and sentence.

Former RCW 7.68.035(1)(a) (2018) required a VPA be imposed on any individual found guilty of a crime in superior court. In April 2023, the legislature passed Engrossed Substitute House Bill 1169 (H.B. 1169), 68th Leg., Reg. Sess. (Wash. 2023), that amended RCW 7.68.035 to prohibit the imposition of the VPA on indigent defendants. RCW 7.68.035 (as amended); LAWS OF 2023, ch. 449, § 1. H.B. 1169 took effect on July 1, 2023. Amendments to statutes that impose costs upon convictions apply prospectively to cases pending on appeal. *See State v. Ramirez*, 191 Wn.2d 732, 748-49, 426 P.3d 714 (2018).

Mr. Hanson's case is pending on direct appeal, and he was found to be indigent by the trial court. Accordingly, remand for the trial court to strike the VPA is appropriate.

The State argues we should not remand because Mr. Hanson "may make a motion to the trial court for the requested relief at any time." Br. of Resp't at 45; RCW 7.68.035(5)(b) ("Upon motion by a defendant, the court shall waive any crime victim penalty assessment imposed prior to July 1, 2023, if . . . the person does not have the ability to pay the penalty assessment."). The State's argument is unpersuasive. Mr. Hanson's case is pending on direct appeal, and we may therefore remand to have the trial court strike the VPA.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

ADDITIONAL GROUND 1

In his first SAG, Mr. Hanson argues he was afforded ineffective assistance of counsel because his counsel allowed a video of him to be played at trial where he openly told officers he shot Mr. St. John before he was read his *Miranda* rights. Because the video Mr. Hanson complains of is not included in the record before us, we cannot address the issue.

Prior to trial, the State, defense counsel, and the court discussed whether a CrR 3.5 hearing was necessary to ascertain the admissibility of some of Mr. Hanson's statements to law enforcement. Defense counsel stated it did not believe Mr. Hanson's statements were in response to police interrogation, though they were custodial. Defense counsel

recognized, "[l]aw enforcement was busy doing other stuff. They had him in the car because they didn't know what was going on. They weren't questioning him. He was just telling them what happened, as far as my investigation shows." RP at 369. Thus, defense counsel conceded that he could not preclude the State from using the video of Mr. Hanson discussing the shooting with law enforcement.

The video(s) Mr. Hanson complains of were admitted as exhibit 196A. However, exhibit 196A was not designated as a part of the record on appeal. The Rules of Appellate Procedure require an appellant to provide a sufficient record to review the issues raised on appeal. RAP 9.2(b). "An insufficient appellate record precludes review of the alleged errors." *Stiles v. Kearney*, 168 Wn. App. 250, 259, 277 P.3d 9 (2012). We cannot consider matters outside of the record on appeal. *McFarland*, 127 Wn.2d at 335. Mr. Hanson's recourse is to raise this issue in a personal restraint petition, not in a SAG. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

ADDITIONAL GROUND 2

In his second SAG claim, Mr. Hanson argues he was afforded ineffective assistance of counsel because his trial counsel did not request that his 60-month weapon enhancement run concurrent with his sentence for first degree murder.

At sentencing, Mr. Hanson's counsel requested that Mr. Hanson be sentenced to 250 months of confinement, the low end of the standard range, plus 60 months for the

weapon enhancement. Ultimately, the court sentenced Mr. Hanson to 300 months of incarceration, plus an additional 60 months for the weapons enhancement.

RCW 9.94A.533(3)(e) provides, "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." (Emphasis added.) This statutory language deprives the sentencing court of discretion to run a firearms enhancement concurrently with another sentence. *State v. Brown*, 13 Wn. App. 2d 288, 290-91, 466 P.3d 244 (2020); *State v. Brown*, 139 Wn.2d 20, 983 P.2d 608 (1999) *overruled in part by State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017) (overruling *Brown* with regard to juveniles only). Defense counsel was not deficient for failing to request that the court run Mr. Hanson's firearm enhancement concurrent with his sentence for first degree murder because any such request would have been denied.

CONCLUSION

We affirm Mr. Hanson's convictions and sentences but remand for the limited purpose of striking the VPA from the judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Cooney, J.

WE CONCUR:

Fearing, J.

Staab, A.C.J.

APPENDIX B

FILED
NOVEMBER 26, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. JOEL ALLEN HANSON, Appellant.	)	No. 39038-1-III ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO SUPPLEMENT RECORD

THE COURT has considered Appellant's motion to supplement the record and motion for reconsideration of this court's opinion dated October 8, 2024, and record therein, and is of the opinion the motion should be denied.

Therefore, IT IS ORDERED, the motion for reconsideration and motion to supplement is hereby denied.

PANEL: Cooney, Fearing, and Staab.

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT E. LAWRENCE-BERREY
Chief Judge

NIELSEN KOCH & GRANNIS P.L.L.C.

December 24, 2024 - 12:53 PM

Transmittal Information

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