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S. Ct. No. E CRF
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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASEN LAINE BERTRAM,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Jasen Laine Bertram asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished decision of the Court of Appeals, filed on November 10, 2015. A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

1. Did the trial court err by refusing to instruct the jury in Instruction 21, the aggressor instruction, that "words alone are not sufficient provocation to cause another person to respond belligerently" because it was a correct statement of the law that applied to the particular facts of this case?

D. STATEMENT OF THE CASE

Mr. Bertram was charged with count 1: first degree murder; count 2: first degree robbery; and count 3: unlawful possession of a stolen firearm. (CP 1). The case proceeded to jury trial.

Just after midnight on June 4, 2012, Chelan County Deputies Mark Hegberg and Bryan Jones responded to a

report about a possible shooting in Dryden. (4/11/13 RP 181, 224). In a small RV trailer, they found Cody Johnson lying dead on the floor. (*Id.* at 182, 226-27). A couch cushion and black jacket covered his head. (*Id.* at 183). On a counter were a whiskey bottle and drug paraphernalia. (*Id.* at 183).

Detective Mitchell Matheson was at the scene and found a Glock .40 handgun underneath Mr. Johnson's body. (4/12/13 RP 461). He also discovered a wallet with ID belonging to Bridgett Bo Jack-Lee. (*Id.* at 466-67). Three shots had been fired. (*Id.* at 468). The detective learned the Glock .40 was stolen at the Gorge in Grant County and Mr. Bertram worked there at the time. (*Id.* at 475, 476). A pipe bomb was also in the trailer. (*Id.* at 481). The pipe bomb was operable when it was found. (4/12/13 RP 496).

Anthony Duffy knew Mr. Johnson and that he was a drug dealer. (4/15/13 RP 500, 505). Around 8 to 8:30 p.m. on June 3, 2012, he met up with Ms. Lee to head out to Mr. Johnson's trailer in Dryden so he could return a TV left at his house. (*Id.*). Mr. Johnson had asked him to bring her up since it was on the way. (*Id.* at 504). Ms. Lee had been involved with Mr. Johnson for about three months. (*Id.* at 563). The TV

was returned. Mr. Duffy left the trailer about 10 to 10:30 p.m. (*Id.* at 502). He saw a Springfield .45 handgun and a .22 in plain sight. (*Id.* at 505-06). Ms. Lee stayed. (*Id.*).

Deputy Jeff Middleton assisted in the homicide investigation. (4/11/13 RP 232). He tried to locate a possible witness, Ms. Lee, and found her in the early morning hours of June 5, 2012, at the Moonlight Motel. (*Id.* at 233). On June 10, the deputy had contact with a Mr. Cleek, who had found a backpack at the edge of his back yard. (*Id.* at 236). In it were two firearms, miscellaneous clothes, drug paraphernalia, and hospital booties and gloves. (*Id.*). Mr. Cleek's house was at 1111 Brown Street in Wenatchee; Mr. Bertram lived at 1119 Brown Street. (*Id.* at 237).

On June 6, 2012, Sergeant Kent Sisson was called out to do an evidence search, specifically for a Springfield 1911 semiautomatic, around the area of the homicide. (4/11/13 RP 191- 92). A volunteer searcher found a Maglite flashlight and Deputy Eugene Ellis found a handgun with its hammer back and safety on. (*Id.* at 204, 207, 211). The weapon was a Springfield .45 with four rounds in the magazine and one in the chamber. (*Id.* at 221-22). The gun belonged to Cody Johnson.

(4/15/13 RP 567).

Detective Randy Grant obtained a search warrant for the trailer. (4/11/13 RP 247-48). He observed a blood trail indicating the body was moved and Mr. Johnson's head had been only 3' to 4' off the floor. (*Id.* at 253, 254). The detective found a camouflage mask on the bed with a Glock .40 handgun underneath it. (*Id.* at 255).

Detective Jerry Moore learned that Ms. Lee had been with Mr. Bertram earlier in the day on June 3, 2012. (4/15/13 RP 517). She had also contacted him after Mr. Johnson was shot. (*Id.*). The detective got in touch with Mr. Bertram, who voluntarily drove down to the station on June 5. (*Id.* at 519, 524). He knew Ms. Lee and her father. Mr. Bertram was going to get her off drugs as she was badly addicted. (*Id.* at 520). She moved in with him for several days and left on June 3. (*Id.*). Ms. Lee was supposed to enter detox on June 5. (*Id.* at 527). Detective Moore later arrested Mr. Bertram at Tree Top, where he worked. (*Id.* at 522).

Bill Jack, Ms. Lee's father, was Mr. Bertram's friend. (4/15/13 RP 539). His daughter had drug problems. (*Id.* at 540). Parent-to-parent, Mr. Jack had talked to Mr. Bertram,

whose daughter was around the same age, about Ms. Lee's drug problems and talked about getting her help about 4-5 years ago. (*Id.* at 567). Ms. Lee, however, never followed through. (*Id.* at 540-41). Mr. Jack did not know his daughter had been at Mr. Bertram's until after the shooting. (*Id.* at 541).

In early June, Ms. Lee told Mr. Bertram she needed help with her drug problems. (4/15/13 RP 563). They met down by the river, where he agreed to let her stay with him until she could get into detox. (*Id.* at 564). Ms. Lee left after Mr. Johnson texted her that he needed her out in Dryden. (*Id.* at 565). She was picked up by one of his friends. (*Id.*). Ms. Lee got high on meth at the trailer. (*Id.* at 566). Mr. Bertram knew where the trailer was because he helped her pick up her belongings when she asked for help and one of the stops was Mr. Johnson's trailer, but no one was there. (*Id.* at 567). She knew Mr. Johnson had drugs and had more than one gun, including the Springfield .45 that was chrome. (*Id.*). The people who had been at the trailer earlier left after awhile. (*Id.* at 568). She was extremely high that night. (*Id.* at 580).

The trailer's bathroom was not hooked up to water so Ms. Lee headed across the street to the community bathroom

that had a shower, toilet, and sink. (4/15/13 RP 569). She took a shower and went back to the trailer where she heard yelling and saw it shaking. (*Id.* at 570). When Ms. Lee heard someone in the trailer yell “get the fuck on the ground,” she took off running back to the community bathroom. (*Id.* at 571). Mr. Bertram appeared and picked her up along the side of the road. (*Id.* at 572). He threw something out of the vehicle. (*Id.*). They drove back to town and went back to his house around 1 or 1:30 a.m. (*Id.* at 573). Ms. Lee testified Mr. Bertram told her he had gone into the trailer, hit Mr. Johnson in the back of the head with a flashlight, and shot him. (*Id.* at 574).

Ms. Lee acknowledged she had changed her story, lied, and withheld information in the investigation. (4/15/13 RP 664). She testified Jason Hansch, Mr. Johnson’s friend and neighbor in Dryden, took the meth off his body. (*Id.* at 677). Ms. Lee knew about the pipe bomb Mr. Hansch had made for another drug dealer. (*Id.* at 681). But he tried to convince Mr. Johnson to get rid of her with the pipe bomb. (*Id.* at 682). A few days before the shooting, Ms. Lee ran scared from the trailer and called Mr. Bertram the next day. (*Id.*). She told him about Mr.

Johnson and the guns, bomb, drugs, and sex. (*Id.* at 683-84).

Mr. Bertram testified in his own defense. (4/15/13 RP 706). He moved to the Wenatchee area around 2003 and became friends with Ms. Lee's father. (*Id.*). He met her through Mr. Jack. (*Id.* at 407). Mr. Bertram talked with Ms. Lee after she took off from Mr. Johnson's trailer and learned about him, including the drugs, guns, sex videos, and using the pipe bomb on her. (*Id.* at 710-12). Ms. Lee told him the .45 was Mr. Johnson's baby and he always had it on or near him. (*Id.* at 713).

She was willing to go to his house for help and she spent Thursday and Friday night there before the June 4 incident. (4/16/13 RP 723). On Saturday, they met up at a barbecue. (*Id.* at 726-27). Mr. Bertram went to sleep around midnight or 1 a.m. (*Id.* at 732). Ms. Lee told him she was going down the street to a friend's. (*Id.*). She came back around noon the next day and Mr. Bertram was to keep her company before going to detox the next day. (*Id.* at 734).

He left to take his youngest son home and she was gone when he came back around 8. (4/16/13 RP at 735). About 10 p.m., Mr. Bertram decided to try to find her. He

went first to a motor home, but nobody was there so he went home to go to Dryden. (*Id.* at 735-36). He had the Glock .40 on him because he did not know what to expect after Ms. Lee told him about Mr. Johnson. (*Id.* at 736). Mr. Bertram knew where he was going because he had been there before with Ms. Lee. (*Id.* at 740).

He arrived about 11 p.m., parked, and walked to the trailer. (4/16/13 RP 741-42). Mr. Bertram saw Ms. Lee puking at the back of the trailer. (*Id.* at 742). He talked to her in an effort to convince her to leave with him. But she had to go to the bathroom across the way. (*Id.*). Mr. Bertram told her he was going to get her stuff and she said good. (*Id.* at 743). He did not call the police as he figured it would be no problem getting her stuff and did not want to get Ms. Lee in trouble for being high. (*Id.*).

Mr. Bertram knocked on the trailer door and did not kick it in as it would be hard to do since the door opened out. (4/16/13 RP 743). When Mr. Johnson came to the door, Mr. Bertram said he was a friend of Ms. Lee's family and wanted to get her stuff and take her home. (*Id.* at 744). Mr. Johnson told him she was not there. (*Id.*). Having just seen her, Mr.

Bertram did not believe him and asked for her clothes as she did not need to be there. (*Id.*) Mr. Johnson told him to take the stuff and he did not need any trouble from the bitch. (*Id.*) He then stepped back from the door and went to the back of the trailer. (*Id.* at 745).

He stepped up when Mr. Johnson went a bit more to the left and could not be seen. Mr. Bertram wanted to keep an eye on him as he was unsure what Mr. Johnson was going to do. (4/16/13 RP 745). Mr. Bertram figured he could go into the trailer since Mr. Johnson told him to get the stuff and the door was open. (*Id.* at 746). When he walked in, Mr. Johnson charged and took a swing at Mr. Bertram, hitting him right behind the left ear. (*Id.*) Flashlight in hand, Mr. Bertram swung and hit Mr. Johnson as he turned to the left in the back of the head. (*Id.* at 747). He hit Mr. Johnson with the flashlight to fend him off. (*Id.*) Mr. Bertram told him this was not necessary and he would just get the stuff and go. (*Id.*) Mr. Johnson took two steps to the back of the trailer and Mr. Bertram stepped sideways through the door so his back would not be turned. (*Id.* at 747).

At that moment, Mr. Johnson immediately turned

around and Mr. Bertram saw something shiny in his hand. (4/16/13 RP 748). After hearing the description from Ms. Lee of Mr. Johnson's silver .45, Mr. Bertram was pretty sure it was the gun he was fond of. (*Id.*). In response, he "pulled the gun out of my pocket and I yell at him to put it down." (*Id.*). Mr. Bertram said he shot Mr. Johnson three times. (*Id.*). He was going down, crouching or squatting, before Mr. Bertram pulled the trigger. (*Id.* at 749). Mr. Johnson pointed his gun at him before he fired. (*Id.*). The .45 dropped out of his hand after he was shot. (*Id.* at 780). Mr. Bertram neither shot Mr. Johnson from the back nor hit him in the head from the back. (*Id.* at 783). He was not wearing a mask when he went inside. (*Id.*).

Mind racing, Mr. Bertram grabbed a bag and coat hanging next to the door and put them over Mr. Johnson. (*Id.*). He got some of Ms. Lee's stuff and put her clothes in a reusable canvas bag. (4/16/13 RP 7490-50). Mr. Bertram stepped out of the trailer and looked for Ms. Lee. (*Id.* at 750). He then knew he left his gun in the trailer. (*Id.*). It was not until later, however, that he realized he had taken Mr. Johnson's gun. (*Id.* at 750-51). Mr. Bertram walked out toward the road down the driveway, saw lights, and

jumped over a guardrail as he did not want to be seen. (*Id.* at 751-52). He went back to his truck, drove down to the park, and saw Ms. Lee running down the middle of the road. (*Id.* at 753). He told her to get in the truck. (*Id.*). At this time, Mr. Bertram did not have the gun and did not know what happened to it. (*Id.* at 754). She got in and they drove back to Wenatchee. (*Id.*). Ms. Lee said Mr. Johnson was dead; Mr. Bertram told her he got into a fight with Mr. Johnson, who pulled a gun, and he shot him. (*Id.*).

Jeffrey Casady's Glock .40 was stolen at the Gorge during an altercation. (4/15/13 RP 599). Mr. Bertram said he found the gun by a garbage can in summer 2010 at the Gorge and just picked it up and put it in his trunk. (*Id.* at 737-40). He did not know the pistol was stolen, but figured it was just lost. (*Id.* at 768).

Dr. Gina Fino, a forensic pathologist, performed the autopsy on Mr. Johnson. (4/11/13 RP 260). He suffered three gunshot wounds. (*Id.* at 268, 271). Dr. Fino opined Mr. Johnson was shot in the head from behind. (*Id.* at 282). He also had an abrasion on the left side of his head consistent with being hit with a heavy flashlight. (*Id.* at 283, 285). On the other hand, defense expert Dr. James Butt opined Mr.

Johnson was not shot from behind. (4/15/13 RP 628). Chelan County coroner Wayne Harris testified the cause of Mr. Johnson's death was multiple gunshots, two to the head and one to the chest. (4/12/13 RP 442).

WSP forensic scientist Kristine Hoffman testified DNA on the Glock .40 was from at least three contributors with Jasen Laine Bertram being the significant male contributor. (4/12/13 RP 415, 417). The camouflage mask had DNA from at least two contributors with Mr. Bertram being the significant male contributor. (*Id.* at 420). The flashlight had DNA from at least two contributors with Mr. Johnson being the major male contributor. (*Id.* at 421). The Springfield .45 handgun had DNA from at least three contributors with Mr. Johnson being the major male contributor. (*Id.* at 422). WSP forensic scientist Kathy Geil, a firearm and tool mark examiner, testified the shell casings recovered at the trailer were fired by the Glock .40. (*Id.* at 405, 409). WSP forensic scientist Brianne O'Reilly did a qualitative drug screen and Mr. Johnson tested positive for methamphetamine. (4/15/13 RP 536).

The State had no exceptions to the court's instructions. (4/16/13 RP 809). Among others, the defense took exception

to Instruction 21:

. . . I would call it the aggressor instruction, which the Court basically took the State's and left out the sentence that I added in under *State v. Riley* which says – which tells the jury that words alone are not sufficient provocation to cause another person to respond belligerently. So, in other words, my client talking with him does not give the deceased the provocation and I think that should be within the instruction. I understand it's not in the WPIC. It's a sentence that I added in accordance with *State v. Riley*, which I think is the law. (4/16/13 RP at 812-13).

The defense argued that Instruction 21, without the language “words alone are not sufficient provocation,” misstated the law because in this particular case, the only evidence of provocation was words and that was insufficient to make Mr. Bertram an aggressor. (4/16/13 RP at 816-18). The court disagreed. (*Id.* at 818).

The jury found Mr. Bertram guilty of (1) the lesser included offense of second degree murder with a firearm enhancement, (2) first degree robbery, and (3) possession of a stolen firearm. (CP 210-14). The court sentenced him to a standard range sentence, including consecutive enhancements, of 324 months total confinement. (CP 221).

Mr. Bertram's convictions were affirmed by the Court of Appeals. His motion for reconsideration was denied on December 15, 2015.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case should be accepted for review under RAP 13.4(b)(1) and (2) because the decision of the Court of Appeals conflicts with other appellate decisions.

Mr. Bertram contends instruction 21, the first aggressor instruction, was incorrect under the particular circumstances of this case. The court gave the standard pattern instruction:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense. (CP 186).

The defense had offered an instruction adding this sentence to Instruction 21:

However, words alone are not sufficient provocation to cause another person to respond belligerently. (CP 155).

The court determined this addition was an incorrect statement of the law and refused to include it. (4/16/13 RP 816,

818). The court explained:

If you make a threat to kill, that's just words alone, but if it reasonably appears from the circumstances that I'm going to carry through with my threat to kill, then potentially you could act upon my words alone and fall into justifiable homicide. (4/16/13 RP 816).

But "potentially" is not the inquiry and the court's ruling is contrary to *State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999), which held that words alone do not constitute sufficient provocation.

Thus, the giving of an aggressor instruction where words alone are the asserted provocation would be error. And words alone were the only possible provocation in light of the evidence presented at trial, even when viewed in a light most favorable to the State.

Mr. Bertram's proposed instruction properly stated the law under *Riley* and was supported by the evidence. The court therefore committed reversible error by refusing to give his instruction. *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253, review denied, 172 Wn.2d 1021 (2011); *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010). Without the requested language that was supported by the law and the facts, Mr. Bertram was unable to adequately argue his theory of defense.

The Court of Appeals misapprehended his argument by

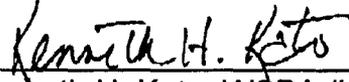
relying on statements by several witnesses supposedly belying what it called Mr. Bertram's own self-serving testimony and circumstantial evidence of vigilante justice rather than self-defense. (Op. at 14-15). Self-serving or not, the evidence is what it is. There can be no dispute the evidence, albeit from Mr. Bertram, showed that words alone were the sole provocation. The credibility determination was for the jury to make, not the trial court. But its ruling improperly did just that and deprived him of an instruction properly stating the law and clearly supported by the evidence. *Werner*, 170 Wn.2d at 337. The court therefore committed reversible error by refusing to give his instruction. *Hathaway*, 161 Wn. App. at 647.

The Court of Appeals opinion conflicts with decisions of the Supreme Court and Court of Appeals. Self defense was Mr. Bertram's only defense and the trial court's refusal to give the appropriate first aggressor instruction essentially took it away. Review is warranted under RAP 13.4(b)(1) and (2).

4. CONCLUSION

Based on the foregoing, Mr. Bertram respectfully asks this court to grant his petition for review.

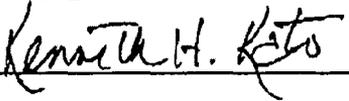
DATED this 11th day of January, 2016.



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CERTIFICATE OF SERVICE

I certify that on January 11, 2016, I served the petition for review by USPS on Jasen Bertram, # 365853, 191 Constantine Way, Aberdeen, WA 98520; and by email, as agreed by counsel, on Douglas J. Shae at prosecuting.attorney@co.chelan.wa.us.



APPENDIX

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

STATE OF WASHINGTON,)	
)	No. 31694-7-III
Respondent,)	
)	
v.)	
)	
JASEN L. BERTRAM,)	UNPUBLISHED OPINION
)	
Appellant.)	

SIDDOWAY, C.J. — Jasen Bertram shot and killed Cody Johnson in Mr. Johnson’s travel trailer late one night in June 2012. The principal disputed issue when Mr. Bertram was tried for the first degree murder of Mr. Johnson, first degree robbery, and possession of a stolen firearm, was whether Mr. Bertram had acted in self-defense. The jury concluded that he did not. It found him guilty of the lesser degree charge of second degree murder and the other two counts.

Mr. Bertram contends on appeal that the trial court erred when it refused to modify the Washington pattern “first aggressor” jury instruction by adding his proposed language that “words alone are not sufficient provocation to cause another person to respond belligerently.” Clerk’s Papers (CP) at 155. He also contends that insufficient evidence supports each of his three convictions. In a statement of additional grounds (SAG), Mr. Bertram contends he received ineffective assistance of counsel, the trial court erred in denying his motion for a mistrial, and cumulative error deprived him of a fair trial.

Finding sufficient evidence and no error or abuse of discretion, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Bridgette Jack-Lee is the daughter of Bill Jack, a good friend of Jasen Bertram since 2003, when Ms. Jack-Lee would have been about 12 years old. Mr. Bertram knew Ms. Jack-Lee through outings with her father and family; Ms. Jack-Lee was a tomboy when young and participated in snowmobiling and motocross with her father. As she reached her late teens, however, Ms. Jack-Lee struggled with drug addiction, as Mr. Bertram learned from Mr. Jack.

A couple of weeks before Cody Johnson was killed, Mr. Bertram and his own daughter, Caitlin, who was a couple of years older than Ms. Jack-Lee, visited with Mr. Jack. Mr. Bertram asked how Ms. Jack-Lee was doing. Mr. Jack answered that he didn't know where she was but "knew that whatever was happening probably wasn't good." Report of Proceedings (RP) at 542. Knowing that Ms. Jack-Lee did not get along with her stepmother (Mr. Bertram described them as "clash[ing] heads") Mr. Bertram offered to contact Ms. Jack-Lee and obtained her telephone number from her father. RP at 708. Mr. Bertram thereafter sent her a text message asking how she was doing and saying that he would be there for her if she needed him.

On the Thursday or Friday before Mr. Johnson was killed, Ms. Jack-Lee contacted Mr. Bertram to say she was having a rough time and needed help. The two met at a park, where Ms. Jack-Lee told Mr. Bertram that she had been involved in a relationship for

several months with Mr. Johnson, who was a drug dealer. She left him and contacted Mr. Bertram after overhearing a discussion between Mr. Johnson and his “partner in crime,” Jason Hansch, in which Mr. Hansch encouraged Mr. Johnson to use a pipe bomb to kill her. RP at 671, 693, 695. When Ms. Jack-Lee heard Mr. Johnson respond, loudly, that “she’s a smart girl If I tell her to leave, she’ll leave,” she took it as her cue “to basically get out of there.” *Id.* at 693. Her description of Mr. Johnson was that he could be threatening; he had guns and was constantly armed with a .45 Springfield handgun that was his favorite.

Mr. Bertram encouraged Ms. Jack-Lee to get away from Mr. Johnson and outlined some options; Ms. Jack-Lee said she would like to stay with Mr. Bertram at his house in Wenatchee for a few days while she went through withdrawals and then try to get into rehab the following week. Mr. Bertram agreed, and over the next few days, he and Caitlin, who was living with him, fed and encouraged Ms. Jack-Lee as she struggled through withdrawals. They also helped her collect clothing she had left at various places. One of the places that Mr. Bertram drove to with Ms. Jack-Lee was the small travel trailer in Dryden where Mr. Johnson lived. Mr. Johnson’s was the last of several trailers parked in an area surrounded by an orchard and located near a river. Across the street from the trailer were several small cabins, rented to river raft instructors, and a community shower and toilets. There was no response when Mr. Bertram and Ms. Jack-Lee stopped at Mr. Johnson’s trailer, so they left without going inside.

On Sunday evening, June 3, Mr. Bertram left to run a quick errand and told Ms. Jack-Lee he would be right back. Caitlin was out with friends. Unbeknownst to Mr. Bertram, Ms. Jack-Lee had been speaking with Mr. Johnson by phone while staying at the Bertram home, and had received a text from Mr. Johnson earlier that day asking her to come back to his place in Dryden. Mr. Johnson had arranged with an acquaintance to pick her up and drive her. She used Mr. Bertram's errand and Caitlin's absence as her opportunity to escape.

Upon arriving in Dryden, Ms. Jack-Lee spent the evening getting high with Mr. Johnson and his friends. According to her, she got "extremely high" on heroin and methamphetamine. RP at 580.

When Mr. Bertram returned from his errand and found Ms. Jack-Lee gone, he sent her a text message asking where she was and received a response that she was hanging out with friends down the street. When she stopped responding to his text messages around 9:30 or 10:00 p.m., Mr. Bertram "decided to take a shot at it and go see if I could find her." RP at 735. He got in his truck and drove to a few places he thought she might be, but to no avail. He then decided to drive to Mr. Johnson's trailer in Dryden.

Mr. Bertram usually kept a Glock .40 handgun in his truck and he armed himself with it before approaching Mr. Johnson's trailer; according to him, this was based on Ms. Jack-Lee's statement that Mr. Johnson ordinarily had a gun close at hand. Mr. Bertram claims to have acquired the Glock .40 several years earlier by finding it abandoned next

to a garbage can at a concert venue at the Columbia River Gorge, where he was then working as a bartender. He claimed that under the circumstances, he believed he owned it. For a reason he would later prove unable to explain, Mr. Bertram also took with him a balaclava: a mask that would cover his head and neck, with only a hole for his eyes.

Mr. Bertram arrived at the trailer and cabin area where Mr. Johnson lived around 11:00 p.m. The cabin dwellers across the street were having a party and loud music was playing but Mr. Johnson's guests had left. Mr. Bertram parked a few hundred feet from the trailer and walked the rest of the way.

According to Mr. Bertram, he encountered Ms. Jack-Lee outside of the trailer "puking her guts up," and tried talking her into leaving with him. RP at 741. When she said she needed to go to the bathroom across the street, he said he would get her belongings from Mr. Johnson.

Mr. Bertrand claims that after Ms. Jack-Lee left for the bathroom, he knocked on the trailer door. When Mr. Johnson came to the door, Mr. Bertram said he was a family friend of Ms. Jack-Lee's and wanted to get her stuff and take her home. After some initial disagreement over whether Ms. Jack-Lee was there, Mr. Bertram claims that Mr. Johnson said, something like, "fine. . . . Take the stuff. I don't need this trouble from the bitch." RP at 744. Mr. Johnson then stepped back into the trailer, leaving the door open.

Mr. Bertram followed him in but claims that as he stepped into the trailer, Mr. Johnson suddenly charged at him and hit him behind the left ear, yelling, "[G]et the fuck

out.” RP at 746. In response, Mr. Bertram swung at Mr. Johnson with a Maglite flashlight he was carrying, hitting him in the back of the head. According to Mr. Bertram, he told Mr. Johnson, “We don’t need to be doing this. I’ll just get her stuff and go,” but Mr. Johnson turned away and told him, again, to “get out.” RP at 747.

Mr. Bertram claims that he complied and stepped toward the door, but he side-stepped to keep an eye on Mr. Johnson. As he did, he claims Mr. Johnson turned to face him, with something shiny in his hand. Mr. Bertram was “pretty sure” it was the .45 he had heard about from Ms. Jack-Lee. RP at 748. He responded by pulling the Glock .40 out of his pocket, yelled at Mr. Johnson to put his gun down, and then pulled the trigger on the Glock three times. According to Mr. Bertram, Mr. Johnson was crouching when he pulled the trigger and he fell to the floor.

Mr. Bertram had never pulled a gun on anyone or shot at anyone before and describes his mind as “racing.” RP at 749. He grabbed a coat hanging next to the door, put it over Mr. Johnson, and began grabbing some of Ms. Jack-Lee’s belongings. Although he claims not to have realized it at the time, he left his Glock .40 in the trailer and took Mr. Johnson’s Springfield .45 with him instead. Police officers would later find the Glock on the bed in Mr. Johnson’s trailer, covered by Mr. Bertram’s balaclava.

Ms. Jack-Lee had a different version of events on the night of the shooting. According to her, when Mr. Bertram arrived at the trailer, she must have been in the community bath facility, taking a shower, and did not see him arrive. She finished her

shower and was returning to the trailer when she saw that it was shaking, “like there was [sic] people wrestling around in there,” and heard someone inside yell, “Get the fuck on the ground.” RP at 571, 662. Fearing that the intruder or intruders might be dangerous drug dealers, she ran back to the bath facility.

She didn’t hear shots while there, perhaps due to the loud music playing next door. After a short time, she decided to return to the trailer and found its door ajar. When she looked in, she saw Mr. Johnson on the floor, covered with his jacket, and saw blood splatter on the wall. She “immediately took off running again,” this time toward Wenatchee. RP at 574.

Mr. Bertram encountered Ms. Jack-Lee as she was running down the road and told her to get into his truck. As they drove away, she claims that he threw something—she didn’t know what—out of the truck. According to her, Mr. Bertram told her that evening or the next morning that he had gone into the trailer, hit Mr. Johnson in the back of the head with a flashlight, and when that did not faze him, pulled out the gun, told Mr. Johnson to get on the ground, and then shot him. According to Ms. Jack-Lee, Mr. Bertram said Mr. Johnson “was begging or asking him, what did he do, what did he do, and then he shot him.” RP at 574. She also said Mr. Bertram said that he felt good about what he had done. Ms. Jack-Lee claims that the morning after he killed Mr. Johnson, Mr. Bertram showed her a bag of heroin that he had taken from Mr. Johnson’s trailer. Mr.

Bertram denies telling Ms. Jack-Lee that he stole heroin from Mr. Johnson's trailer, or that Mr. Johnson ever begged for his life.

That same morning, Mr. Bertram learned from Ms. Jack-Lee's parents that the police were looking for her. Mr. Bertram told her that he intended to report to police what had happened, but he needed to retain a lawyer first. He dropped her off at the home of her friend, telling her that she, too, should speak to a lawyer before going to the police. Ms. Jack-Lee's friend took her to a motel to hide out, but Wenatchee police tracked her down the next day and she agreed to speak with them. Although she was not initially forthcoming about all that she knew, she provided enough information that officers contacted Mr. Bertram, interviewed him, and then obtained a search warrant for Mr. Bertram's home.

At trial, the State presented evidence that the bullets that killed Mr. Johnson were fired from the Glock. They presented evidence that Mr. Johnson's gun and Mr. Bertram's Maglite flashlight, with Mr. Johnson's blood on it, had been found on the side of the road about a quarter mile from Mr. Johnson's trailer, consistent with Ms. Jack-Lee's testimony that Mr. Bertram had thrown something out of the truck. It presented expert testimony that all of Mr. Johnson's injuries—the blow to his head and all three shots—had come from behind and had been fired while Mr. Johnson was kneeling or otherwise close to the ground. It presented DNA evidence tying Mr. Bertram to the Glock and to the balaclava found in the trailer.

The State also called as a witness Dana Dilts, a friend of Mr. Bertram's, who testified that Mr. Bertram told her he entered Mr. Johnson's trailer by kicking the door in, hit Mr. Johnson in the head with a flashlight, shot him three times in the chest, and then covered his body with a coat. She testified that Mr. Bertram told her he used a gun that he had stolen from the Gorge concert venue, thereby providing support for the State's charge of possession of a stolen weapon. She testified that he told her he had taken a gun and heroin from Mr. Johnson's trailer, thereby providing support for the charge of first degree robbery. She testified that he told her he had later thrown Mr. Johnson's gun into an orchard. Mr. Bertram admitted that he had spoken with Ms. Dilts about events on the night of the shooting but denied making most of the incriminating statements she attributed to him.

The jury found Mr. Bertram guilty of the lesser degree offense of second degree murder and guilty as charged with first degree robbery and possession of a stolen weapon. Mr. Bertram appeals.

ANALYSIS

Mr. Bertram makes four assignments of error: two arising out of the court's giving the Washington pattern "first aggressor" instruction to the jury, and two challenges to the sufficiency of the evidence to support the jury's findings of guilt. We first address the alleged instructional errors and then turn to the sufficiency of the evidence.

I. Alleged instructional error

Because Mr. Bertram presented sufficient evidence of self-defense, the trial court instructed the jury on that defense and on the State's burden of proving beyond a reasonable doubt that it did not apply. It also gave the Washington pattern "first aggressor" jury instruction explaining how someone who provokes aggression may lose the right to assert self-defense.

Although self-defense is available in response to the unlawful use of force, one who provokes another to lawfully act in self-defense is not responding to unlawful force and therefore has no right of self-defense. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). In other words, "one who provokes an affray cannot invoke the right of self-defense." *State v. Bea*, 162 Wn. App. 570, 575, 254 P.3d 948 (2011). A Washington pattern instruction "properly directs the jury to determine whether the defendant's acts precipitated a confrontation with the victim." *State v. Wingate*, 155 Wn.2d 817, 821, 122 P.3d 908 (2005), *aff'd*, 174 Wn. App. 1050, 2013 WL 4018008. It states:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense [sic] and thereupon kill another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

CP at 186 (Instruction 21); *see* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 16.04, at 241 (3d ed. 2008) (WPIC) (“Aggressor—Defense of Self”).

A first aggressor instruction is appropriate where “(1) the jury can reasonably determine from the evidence that the defendant provoked the fight; (2) the evidence conflicts as to whether the defendant’s conduct provoked the fight; or (3) the evidence shows that the defendant made the first move by drawing a weapon.” *State v. Anderson*, 144 Wn. App. 85, 89, 180 P.3d 885 (2008) (citing *Riley*, 137 Wn.2d at 909-10)).

“A first aggressor instruction potentially removes self-defense from the jury’s consideration, relieving the State of its burden of proving that a defendant did not act in self-defense.” *Bea*, 162 Wn. App. at 575-76. Accordingly, it should only be given “in cases where the theories of the case cannot be sufficiently argued and understood by the jury without such an instruction.” *Id.* at 576. To justify a first aggressor instruction, the State need only produce “some evidence” that the defendant was the first aggressor. *Anderson*, 144 Wn. App. at 89.

Mr. Bertram did not object to the court giving a first aggressor instruction; in fact, he proposed his own.¹ But his proposed instruction modified the pattern instruction by

¹ Mr. Bertram’s first assignment of error is to the trial court giving the pattern instruction and his second is to the court refusing to give his proposed instruction. But his single argument is that the court gave the instruction without including what he contends was his necessary modification.

inserting the sentence, “However, words alone are not sufficient provocation to cause another person to respond belligerently,” CP at 155, relying on *Riley*, 137 Wn.2d at 911, as support.

When the court did not accept the modified instruction and an opportunity was provided for the lawyers to state any objections to the court’s instructions, Mr. Bertram’s only objection was that the court was not giving the instruction in the form he had proposed. Responding to Mr. Bertram’s objection, the court explained that it believed Mr. Bertram’s proposed instruction was potentially an inaccurate statement of the law because

if you make a threat to kill, that’s just words alone, but if it reasonably appears from the circumstances that I’m going to carry through with my threat to kill, then potentially you could act upon my words alone and fall into justifiable homicide.

RP at 816.

Jury instructions are proper if “substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform the jury of the applicable law.” *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253 (2011). If a party proposes an instruction that properly states the law and is supported by the evidence, it is reversible error to refuse to give the proposed instruction. *Id.* A trial court does not err, however, by “refus[ing] a specific instruction when a more

general instruction adequately explains the law and allows each party to argue its case theory.” *Id.*

The proposition Mr. Bertram sought to add to the pattern first aggressor instruction is supported by *Riley*, as he contends. The defendant in *Riley* was convicted of first degree assault while armed with a deadly weapon after he shot Gustavo Jaramillo. *Riley*, 137 Wn.2d at 906-07. At trial, Mr. Riley claimed he shot Mr. Jaramillo in self-defense. *Id.* at 907. He claimed that he teased Mr. Jaramillo about being a street gang “wanna-be,” Mr. Jaramillo was offended and said he was going to shoot Mr. Riley, Mr. Riley then pulled out his own gun and demanded that Mr. Jaramillo turn over his weapon, and Mr. Riley shot Mr. Jaramillo only when Mr. Jaramillo was reaching for his gun with aggression rather than to relinquish it to Mr. Riley. *Id.* at 906-07.

The trial court instructed the jury on self-defense, and also gave a first aggressor instruction. *Id.* at 907. Mr. Riley objected that his only act provoking Mr. Jaramillo’s belligerent response was that he called Mr. Jaramillo a “wanna-be.” He contended that giving the instruction violated his right of free speech and prevented him from arguing his theory of self-defense. *Id.* at 908-09.

The court held that the instruction was properly given because there was evidence of aggressive non-speech conduct on Mr. Riley’s part—namely, that Mr. Riley drew his gun first and aimed it at Mr. Jaramillo. *Id.* at 909, 913. But it agreed with the defense that “words alone do not constitute sufficient provocation” and “the giving of an

aggressor instruction where words alone are the asserted provocation would be error completely aside from any First Amendment issue.” *Id.* at 911. It also observed that the pattern instruction given did not wrongly suggest to the jury that words alone would be enough provocation to foreclose a claim of self-defense. The instruction spoke instead of “any intentional *act* reasonably likely to provoke” *Id.* at 913 (internal quotation marks omitted) (quoting WPIC 16.04, at 241 (3d ed. 2008)).

As Mr. Bertram’s appellate lawyer recognizes, if the State’s evidence of Mr. Bertram’s provocation was words alone, then under *Riley* the first aggressor instruction should not have been given at all. Nonetheless, he argues that Mr. Bertram should at least have gotten the modified instruction he requested. Relying on the fact that Mr. Bertram is the only living witness to his shooting of Mr. Johnson, he argues that

[W]ords alone were the only provocation that could possibly have been asserted as there was no evidence of any other provoking act or conduct Other than his words, the State produced no evidence showing Mr. Bertram was the aggressor. He did not provoke the fight; there is no conflicting evidence; and he did not make the first move by drawing his weapon.

Br. of Appellant at 18.

Mr. Bertram’s argument fails to consider the testimony of Ms. Jack-Lee and Ms. Dilts. Mr. Bertram’s statements to the two women, being admissions of a party-opponent, are not hearsay. ER 801(d)(2). Where their reports conflicted with Mr. Bertram’s own testimony as to events, the jury was free to believe what the women

claimed they were told by Mr. Bertram and to reject his self-serving trial testimony. Mr. Bertram also fails to consider circumstantial evidence suggesting that he was meting out vigilante justice rather than acting in self-defense. “The elements of a crime can be established by both direct and circumstantial evidence,” *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977), *abrogated on other grounds by In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), and circumstantial evidence is considered just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Whether the State produced sufficient evidence to justify an initial aggressor instruction is a question of law that we review de novo. *Anderson*, 144 Wn. App. at 89. In determining if the evidence at trial was sufficient to support the giving of an instruction, we view the supporting evidence in the light most favorable to the party requesting the instruction. *Bea*, 162 Wn. App. at 577.

The State presented evidence that Mr. Bertram entered Mr. Johnson’s trailer, unwelcomed, likely wearing a mask and armed with the Glock. Dana Dilts testified that Mr. Bertram told her he entered Mr. Johnson’s trailer by kicking the door in. Ms. Jack-Lee testified that when returning to the trailer from her shower, the trailer was shaking and she heard someone, evidently Mr. Bertram, yelling, “Get the fuck on the ground.” RP at 571. According to Ms. Jack-Lee, Mr. Bertram told her that he went into the trailer, hit Mr. Johnson in the back of the head with a flashlight, and when that did not faze him, pulled out the gun, told Mr. Johnson to get on the ground, and then shot him. Ms. Jack-

Lee testified that Mr. Bertram admitted that Mr. Johnson was on the ground, begging, when Mr. Bertram shot him from above.

The first aggressor instruction was properly given without the modification proposed by Mr. Bertram.

II. Sufficiency of the evidence

Mr. Bertram's third and fourth assignments of error are to the sufficiency of the evidence to support his convictions of second degree murder, first degree robbery, and possession of a stolen firearm.

In reviewing a defendant's challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine "whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt." *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case." *State v. Boyle*, 183 Wn. App. 1, 7, 335 P.3d 954 (2014), *review denied*, 357 P.3d 666 (2015). Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We defer to the fact finder "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d

970 (2004), *abrogated in part on other grounds by Crawford v. Wash.*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Second degree murder. Mr. Bertram's first sufficiency challenge is to his conviction for second degree murder. To find Mr. Bertram guilty of second degree murder, the jury was required to find that he (1) intended to cause the death of Mr. Johnson but did not act with premeditation, (2) caused the death of Mr. Johnson, and (3) that the killing was not justified on the basis of self-defense. RCW 9A.32.050(1)(a); RCW 9A.32.050.² Mr. Bertram contends the State failed to disprove self-defense beyond a reasonable doubt.

"In Washington, self-defense is defined by statute." *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Under RCW 9A.16.050, homicide is justifiable when committed

[i]n the lawful defense of the slayer . . . when there is reasonable ground to apprehend a design on the part of the person slain . . . to do some great personal injury to the slayer . . . and there is imminent danger of such design being accomplished.

² A person is guilty of murder in the second degree if, "[w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person . . ." RCW 9A.32.050(1)(a). A person acts intentionally "when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a).

RCW 9A.16.050(1). As previously discussed, however, if the jury found that Mr. Bertram provoked aggression on Mr. Johnson's part, then self-defense was not an available defense.

For reasons already discussed, the State presented enough evidence of aggressive action on Mr. Bertram's part to support giving the unmodified pattern first aggressor instruction. The same evidence that supports giving that instruction would support a finding by the jury that Mr. Bertram was the first aggressor and not entitled to assert self-defense. No further analysis is needed.

First Degree Robbery. Mr. Bertram next argues that the evidence was insufficient to prove that he committed first degree robbery. Although he admitted at trial that he picked up and left the trailer with Mr. Johnson's .45, he argues "the defense showed Mr. Bertram did not even know he had Mr. Johnson's .45 until later and had no intent to commit a theft as required . . . for first degree robbery." Br. of Appellant at 22.

To prove that Mr. Bertram was guilty of first degree robbery, the State was required to prove

- (1) That on or about the 4th day of June, 2012, the defendant unlawfully took personal property from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's use of immediate force, violence, or fear of injury to that person;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;

- (5) That in the commission of these acts the defendant inflicted bodily injury; and
- (6) That any of these acts occurred in the State of Washington.

CP at 189. “The intent required to prove first degree robbery is the intent to deprive the victim of property.” *State v. Webb*, 162 Wn. App. 195, 209, 252 P.3d 424 (2011).

While Mr. Bertram attributed his departure from the trailer with Mr. Johnson’s .45 to confusion, the State presented evidence that the two guns look nothing alike in terms of size or color; Mr. Bertram admitted as much in cross-examination. The prosecutor also elicited testimony from Mr. Bertram that he didn’t take the .45 out of Mr. Johnson’s hand; instead, “It dropped out of his hand when I shot him.” RP at 778. The prosecutor then asked:

Q. So instead, you put your gun down on the bed, as the picture shows, because the gun is right underneath the mask, and then you have to reach down and pick up that gun in order to put that gun in your pocket, and you didn’t see that it’s the silver gun, you just picked up the gun and put it in your pocket. Is that what you’re saying?

Id. To which Mr. Bertram answered, “Yeah.” *Id.*

Presented with undisputed evidence that the two guns look nothing alike and that Mr. Bertram picked up the .45 from the floor, where it had fallen from Mr. Johnson’s hand, the jury was not required to accept Mr. Bertram’s self-serving testimony that he inadvertently took the wrong handgun out of shock and confusion. It had also been presented with the testimony of Ms. Dilts and Ms. Jack-Lee that Mr. Bertram had taken a

bag of heroin. Viewed in the light most favorable to the State, a rational trier of fact could find the requisite intent to commit theft of property.

Possession of Stolen Firearm. Mr. Bertram finally contends that insufficient evidence supports his conviction of possession of a stolen firearm. The State was not required to prove that Mr. Bertram had “actual and positive knowledge” that the Glock .40 was stolen. *State v. Rye*, 2 Wn. App. 920, 927, 471 P.2d 96 (1970). Rather, “[i]t is sufficient if [the defendant] had knowledge of facts sufficient to put him on notice that [it] w[as] stolen.” *State v. Rockett*, 6 Wn. App. 399, 402, 493 P.2d 321 (1972).

Here again, Mr. Bertram focuses solely on his own evidence. According to Mr. Bertram, “the defense established Mr. Bertram did not know the Glock was stolen and figured it was just lost when he picked it up by the garbage can at the Gorge,” and therefore the State could not show that he had the requisite knowledge that the gun had been stolen. Br. of Appellant at 22.

The jury heard testimony from Jeffrey Casady, from whom the Glock was stolen two years earlier during a concert at the Gorge, that the gun was in his backpack that he set down during the concert for “[n]o more than five minutes.” RP at 599. And the State presented testimony from Mr. Bertram’s friend, Ms. Dilts, that Mr. Bertram told her the Glock was a stolen weapon:

Q. Did he tell you about that gun, where he got the gun?

A. Yes, he got it at the Gorge where he used to work.

Q. Did he tell you if it was his or—

A. It was a stolen weapon.

Q. He told you he knew that?

A. Yes.

RP at 551. Ms. Dilt's testimony alone is sufficient evidence to support the element of knowledge that the Glock was stolen.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds, Mr. Bertram raises three. The first is that he received ineffective assistance of counsel. The second is that the trial court erred in refusing to grant a mistrial. The third is that cumulative error deprived him of a fair trial. We address his contentions in turn.

Ineffective Assistance of Counsel. Mr. Bertram claims he received ineffective assistance of counsel because his trial attorney failed to investigate known witnesses or call witnesses to support his self-defense claim. In particular, Mr. Bertram claims his lawyer failed to interview the State's primary medical expert, Dr. Gail Fino, before trial; that his lawyer should have called an expert of his own to rebut Dr. Fino's testimony; and that his lawyer failed to interview Mr. Hansch, Ms. Jack-Lee, and others who "knew Mr. Johnson's propensity for dealing drugs and using extreme violence." SAG at 4.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove (1) defense counsel's representation fell below an objective standard of reasonableness and (2) the deficient representation prejudiced the defendant. *Strickland v. Washington*,

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466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

There is nothing in the record on appeal that establishes who Mr. Bertram's trial lawyer did or did not interview, or whether some expert other than the expert who was called by the defense was available to better rebut Dr. Fino's testimony. Insofar as Mr. Bertram's arguments depend on information outside the record on appeal, his remedy is to pursue a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

Denial of Motion for Mistrial. Mr. Bertram next contends the trial court erred in denying his motions for a mistrial because jurors improperly communicated with the bailiff.

Mr. Bertram first moved for a mistrial after the parties were informed by the court that a juror approached the bailiff following the testimony of Dr. Fino and expressed frustration with the fact that she referred to a deposition or a book of some other sort during her testimony, with no indication to the jury as to what the book was. Outside the presence of the jury, the bailiff testified to what the juror had said and the fact that her comments were made in the presence of other jurors. The bailiff testified that she told the juror she would "speak to the judge about her concerns." RP at 388. Defense counsel argued that, by stating that she would take the issue to the judge, the bailiff "actually suggested a solution to the juror's problem that we now know about." RP at 390. Because the exchange took place in the presence of other jurors, the defense argued that

excusing the tainted juror would not remedy the error, and therefore a mistrial was necessary.

The court denied the motion for a mistrial, explaining that while the juror had violated the Court's instructions by discussing the case before the conclusion of the evidence, it was a "one-sided discussion," with no response from the bailiff, and the juror's expression of frustration "[did] not appear to be particularly favorable to either side in that it is a somewhat neutral criticism as to both." RP at 395. It also gave the following curative instruction to the jury:

At the beginning of the morning recess, a discussion with [the bailiff] occurred at the threshold of the courtroom door. If any of you overheard this conversation, you are to disregard such conversation and comment in its entirety.

RP at 400. The court then told the jury not to ask the bailiff anything about the case and repeated its general instructions regarding outside influences.

Later in the trial, the bailiff reported that a second juror had approached her and asked her about the profession of one of the witnesses. The bailiff responded, "I can't answer that and you're not supposed to discuss it," which ended the conversation. RP at 432. Defense counsel again moved for a mistrial, without articulating any prejudice from the juror's comment. The court broadened the instruction regarding the role of the bailiff, reminding the jury not to ask the bailiff "anything about the facts, testimony, the law or any other evidence in this case," nor to repeat testimony. RP at 434-35.

The decision to grant or deny a motion for a mistrial is addressed “to the sound discretion of the trial court,” *State v. Tigano*, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991), and will be disturbed on appeal “only where the trial court abused its discretion or erroneously interpreted the law.” *State v. Boyle*, 183 Wn. App. at 12. “An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion.” *State v. Johnson*, 125 Wn. App. 443, 460, 105 P.3d 85 (2005).

“In a criminal proceeding, a new trial is necessitated only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be treated fairly.” *Id.* at 460; CrR 7.5(a) (court will grant a new trial only “when it affirmatively appears that a substantial right of the defendant was materially affected”). “Something more than a possibility of prejudice must be shown to warrant a new trial.” *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968).

It is well settled that there should be no communication between the court and the jury in the defendant’s absence. *State v. Caliguri*, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). Because a bailiff is the spokesman for the court, and in a sense the “alter-ego” of the judge, bailiffs are subject to the same constraints as the trial judge. *State v. Bourgeois*, 133 Wn.2d 389, 407, 945 P.2d 1120 (1997) (quoting *O’Brien v. City of Seattle*, 52 Wn.2d 543, 548, 327 P.2d 433 (1958)). Thus, “an improper communication between the bailiff and the jury is a constitutional error.” *Johnson*, 125 Wn. App. at 460.

Even when such an error occurs, however, “the communication may be so inconsequential as to constitute harmless error.” *Id.*; *Caliguri*, 99 Wn.2d at 509 (refusing to apply a conclusive presumption of prejudice arising from improper communications between the court and jury). While the State bears the burden of showing that the error was harmless beyond a reasonable doubt, the defendant must first raise the possibility that he was prejudiced by the improper communication between the court and the jury. *Johnson*, 125 at 460; *State v. Jasper*, 158 Wn. App. 518, 541, 245 P.3d 228 (2010), *aff’d*, 174 Wn.2d 96, 271 P.3d 876 (2012).

Mr. Bertram has not shown a possibility that he was prejudiced. The bailiff did not comment on the case in response to the second juror’s question and her only response to the first juror’s statements was that she would bring the juror’s concern to the attention of the judge; she “communicated no information to the jury that was in any manner harmful to the [defendant].” *State v. Johnson*, 56 Wn.2d 700, 709, 355 P.2d 13 (1960). “Generally, where the trial court’s response to a jury inquiry is ‘negative in nature and conveys no affirmative information,’ no prejudice results and the error is harmless.” *Jasper*, 158 Wn. App. at 541 (quoting *State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980)).

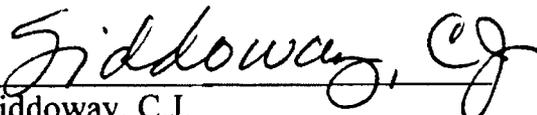
Because any error was harmless, the trial court properly denied Mr. Bertram’s motion for a mistrial.

Cumulative Error. Mr. Bertram finally voices a number of complaints about his trial that he claims amount to cumulative error requiring reversal. “The cumulative error doctrine applies when several trial errors occurred and none alone warrants reversal but the combined errors effectively denied the defendant a fair trial.” *State v. Jackson*, 150 Wn. App. 877, 889, 209 P.3d 553 (2009).

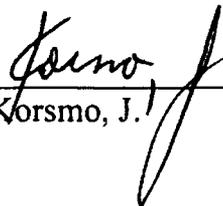
We have identified only one harmless error in reviewing the contentions set forth above: the juror misconduct in speaking with the bailiff. Mr. Bertram’s SAG fails to sufficiently identify any other asserted error for review. RAP 10.10(c) (although a defendant is not required to cite to the record in a SAG, he must inform the court of the “nature and occurrence of the alleged errors”). Mr. Bertram received a fair trial.

Affirmed.

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.


Siddoway, C.J.

WE CONCUR:


Korsmo, J.


Fearing, J.

• **OFFICE RECEPTIONIST, CLERK**

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Thank you. Kenneth H.
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