FILED
Court of Appeals
Division II
State of Washington
8/24/2023 3:11 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
8/25/2023
BY ERIN L. LENNON
CLERK

No. 56202-2-II

I02307-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DAVID BOGDANOV, Petitioner

APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

THE HONORABLE JUDGE DAVID E. GREGERSON

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
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253-445-7920

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I. IDENTITY OF PETITIONER

Petitioner David Bogdanov, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

David Bogdanov seeks review of the Court of Appeals published opinion entered on July 25, 2023. A copy of the opinion is attached as an appendix.

III. ISSUES PRESENTED FOR REVIEW

A. The Court of Appeals determined it is enough for a trial court to provide a jury instruction on justifiable homicide which included only a part of RCW 9A.16.050(1) and held an instruction on RCW 9A.16.050(2) to be redundant. This Court should accept review because the precedent the Court relied on does not apply to the facts of this case and the change to the jury instruction which was given did not conform to the statute or WPIC recommendations. It relieved the State of the burden of

proving the force used was justifiable and denied Bogdanov of a right to present a complete defense.

B. A defendant has a compelling interest in having his guilt or innocence determined by a jury which is both impartial and free from coercion. Where the trial court is made aware that one juror is "refusing to deliberate" and other jurors wanted that juror replaced, is it an abuse of discretion because it is unduly coercive for the court to instruct the jury to continue its deliberations?

IV. STATEMENT OF THE CASE

On the evening of June 5, 2019, and into the following morning, David Bogdanov ("Bogdanov") and two of his brothers spent the evening drinking alcohol. Close to 3 a.m. they left to find a bar. Bogdanov and one brother went out to their van and waited for the third brother. As he sat in his brother's van, Bogdanov noticed a young woman walking across the street by herself. RP 1486-87. He approached her to see if she needed help. She

declined, but after chatting, accepted his jacket, a bottle of vodka, and Bogdanov's Snapchat information. RP 1488-89. Unbeknownst to Bogdanov, N.K. was a 17-year-old transgender transient. RP 670, 673.

After the social encounter, N.K. went to a friend's apartment and either smoked or injected herself with methamphetamines. RP 972, 976, 986-988. A few hours later, N.K. arranged to meet Bogdanov via Snapchat. RP 1490-91. She was under the influence of methamphetamines when she left the apartment. RP 972, 985.

Bogdanov picked her up in his brother's van and they returned to his apartment. They drank beer and talked for about 20 minutes. RP 1491-92. Bogdanov's brother then drove them to another family member's home, where Bogdanov had parked his own car, an Audi. RP 1494-95.

Bogdanov went into the house to use the bathroom. RP 1496. When he returned to the Audi, he found N.K. in the backseat, smoking meth. RP 1496. He did not complain about the drugs because he hoped they might have a sexual encounter. RP 1498.

Bogdanov regularly carried a permitted concealed gun. RP 1012,1500. He told N.K. he had a carry permit "so that she doesn't freak out or anything." RP 1500. He removed the gun, wedged it between the center console and the driver's seat. At N.K.'s invitation he got into the backseat with her. RP 1498-1500.

N.K. engaged in oral sex with Bogdanov. Bogdanov soon became aware N.K. was anatomically male. RP 1508-09. Stunned, he pushed her from him, yelled for her to get out of his car, and called her disgusting. RP 1510.

N.K. lunged at Bogdanov and slapped him in the face. RP 1510. He shoved her, and repeatedly told her to get out. She kicked at him and he pushed her feet down.

RP 1510-11. She jumped toward the center console, reaching for the loaded gun and got it onto the passenger seat. RP 1511,1521.

Bogdanov thought, “I just was deceived by this person into - - into oral sex and this person is high on meth. She’s jumping for my gun…And all I can think is ‘oh my God, I’m going to get shot right now. This person is crazy.” RP 1511.

Afraid of being shot, Bogdanov tried to restrain her. She elbowed him in the face, scratched at his eyes, hit him and kicked him. RP 1512-1515. He yelled for her stop. He intended to keep the gun away from her and to open the car door wide enough to push her out into the road. RP 1515. He grabbed her collar with one hand and yanked her back, while using his other hand to keep her away from the gun. RP 1512. As they struggled, his grip slipped from her windbreaker.

> I couldn't get a hold of her – couldn't stop her. And then in the passenger seat – the front passenger seat, in the rear pocket was hanging out my phone cord- my charging cable. And in that struggle I – I grabbed that cable and put it around her so I could hold onto it and pulled her back like that hold and hold her- hold her from going- keep going forward for the gun.

RP 1512-1513.

He kept the cord around her neck for 30-45 seconds. RP 1514. She stopped fighting and he thought she had passed out, "Like I've seen on TV in fighting sports- people get choked out and they just go to sleep for a little bit." RP 1515. He secured the gun in the trunk of the car, and when he returned, he saw she had not awakened. RP 1515, 1517. He panicked because she had stopped breathing. RP 1517-18. He drove to Larch Mountain, removed her body from the car, and pushed her down a hill. RP 1519.

Four days later, N.K.'s mother reported N.K. was missing. RP 676, 678. Six months later N.K.'s body was discovered. RP 1071.

Bogdanov flew to Ukraine on the night of June 6, 2019 and returned to the United States on July 15, 2019. RP 1439;1519-20,1551.

On December 17, 2019, police arrested Bogdanov. CP 1. Clark County prosecutors charged him by second amended information with murder in the second degree and malicious harassment. CP 183.

JURY INSTRUCTIONS

Over defense objection, the trial court refused to give the full Washington Pattern Jury Instructions 16.02 for justifiable homicide and WPIC 16.03 justifiable homicide- resistance to a felony. The court instructed the jury on the meaning of great personal injury but denied the defense instruction on assault first degree. CP 298;RP 1598.

The court instructed the jury:

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

CP 297.

JURY DELIBERATIONS

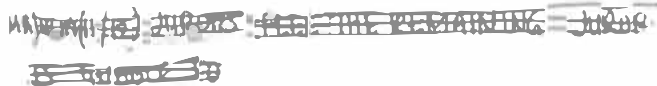
After excusing a juror who had taken ill, the jury began deliberating around 4:15pm on August 25th. *See State v. Bogdanov, Slip Op.* at *8. The following morning, deliberations continued, and within the first 90 minutes

the jury submitted two questions to the court: the first on the difference between premeditation and intent, and the second, about a concern over the jury's ability to reach a verdict. *Id.*

Shortly after 1:45 p.m., the jury provided another note to the court:

> We have a concern with a juror; we believe she is unable to make a decision based on the facts. While deliberating she is unable to express the reasoning for her position and refuses to.

On the upper left-hand side of the note was the following:



CP 280; RP 1838.

The court seemed to think the presiding juror said the jury had reached a verdict on one count, but not the other. There was no indication which count had been decided. RP 1830, 1832. The parties agreed to question

the presiding juror on the possibility of reaching a verdict. RP 1832.

The presiding juror told the court the jury did *not* believe they could reach a verdict on the other count "with the current jury we have." RP 1832. The court directed the presiding juror to fill out the form for one verdict on which they had agreed. RP 1833;1838.

Twelve minutes later, at 2:03 p.m., the presiding juror submitted another note:

> Can we replace a juror (1) and call in an alternate, if the current juror is unable to make decisions on the factual evidence and is unwilling to deliberate further? We feel it is a personal bias, with this (1) current juror. She is refusing to continue to discuss her views.

CP 281; RP 1838.

The court heard argument from the parties: the State advocated for instructing the jury on their duty to deliberate. RP 1839-1840. Bogdanov's counsel objected saying it was not juror misconduct simply because the

juror had already made up his or her mind. RP 1840. Defense counsel asked for a mistrial. RP 1843.

Over defense objection, the court denied the mistrial motion, recalled the jury, and re-read the instruction regarding the duty to discuss and deliberate. RP 1847-48.

The following morning the jury reached a verdict, finding Bogdanov guilty on both counts. RP 1855; CP 31-311. The court imposed the top of the standard range sentence of 234 months. CP 325. Bogdanov appealed. CP 336.

The Court of Appeals affirmed. Despite the omission of any reference to "felony" as part of the standard self-defense instruction, the Court relied on *Brightman* and *Brown,* to hold that under the facts of this case WPIC 16.03 was repetitious of WPIC 16.02 and therefore was unnecessary. Op. at *13.

The Court also held the trial court properly instructed the jury to return to deliberate after receiving

the second note the jury could not reach a verdict because of one juror, and asking to have that juror replaced. Op. at *22.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Incomplete WPIC 16.02 Jury Instruction Coupled With A Refusal To Provide a WPIC 16.03 Instruction Was Error Requiring Reversal.

A claim of instructional error is reviewed de novo. Where a claim of instructional error is based on a ruling of law, the error is reviewed de novo. *State v. Sublett,* 176 Wn.2d 58, 78, 292 P.3d 715 (2015).

RCW 9A.16.050(1) and (2) provide that homicide is justifiable when committed

> (1) in the lawful defense of the slayer…when there is reasonable ground to apprehend a design on the part of the person slain ***to commit a felony or to do some great personal injury*** to the slayer…and there is imminent danger of such design being accomplished; or
> (2) in ***the actual resistance of an attempt to commit a felony upon the slayer***, in his or her

presence, or upon or in a dwelling, or other place of abode, in which he or she is.

The Washington Criminal Pattern Jury Instructions

WPIC 16.02 and 16.03 follow the statutory elements[1],[2].

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[1] WPIC 16.02: It is a defense to a charge of [murder] [manslaughter] that the homicide was justifiable as defined in this instruction.
Homicide is justifiable when committed in the lawful defense of [the slayer] [the slayer's [husband] [wife] [registered domestic partner] [parent] [child] [brother] [sister]] [any person in the slayer's presence or company] when:
(1)the slayer reasonably believed that the person slain [or others whom the defendant reasonably believed were acting in concert with the person slain] ***intended [to commit a felony] [to inflict death or great personal injury];*** (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 facts and circumstances as they appeared to [him] [her], at the time of [and prior to] the incident.

[2] WPIC 16.03: It is a defense to a charge of [murder] [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] [in the presence of the slayer] [or] [upon or in a

Both instructions allow for an individual to resist another appearing to intend to commit a felony and the actual resistance of an attempt to commit a felony. The distinction by statute is the right to defend oneself from a felony as it occurs (RCW 9A.16.050(2)) independent from the anticipation of being a victim of a felony.

The notes for the WPIC 16.02 instruction specifically advise: If resistance to a felony is involved, see WPIC 16.03(Justifiable Homicide- Resistance to Felony.)

The notes for WPIC 16.03 provide:

> This instruction ***should be given*** in homicide cases in which there is evidence to support a claim that the defendant ***was acting in resistance to the***

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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] [her] at the time [and prior to] the incident. (Emphasis added).

> ***commission of a felony*** upon the defendant…If self-defense against a felony is involved see WPIC 16.02. (Emphasis added).

Here, the instruction given by the trial court and affirmed by the Court of Appeals included no mention of a felony being intended or attempted to be perpetrated by the slain individual. Contrary to the statute and the WPICs, the court found it was enough to tell the jury the person slain intended to inflict death or great personal injury. RP 1605.

Interpreting a jury instruction which ignores a part of the statute is error and deprives a defendant of a fair trial. Courts are admonished to give each word of a statute with meaning. *State v. Roggenkamp,* 153 Wn.2d 614, 624, 106 P.3d 196 (2005). Additionally, statutory interpretation instructs the court to construe a statute "to give effect to all the language used and avoid a construction that wound render a portion of a statute

meaningless or superfluous." *Ford Motor Co. v. City of Seattle,* 160 Wn.2d 32, 41, 156 P.3d 185 (2007).

The problem with affirming the omission of the justification of defense against a felony in the modified instruction, is that it ignores RCW 9A.16.050(1) and renders RCW 9A.16.050(2) meaningless.

In its opinion, the Court of Appeals relied on *State v. Brenner,* 53 Wn.App.367, 768 P.2d 509 (1989), *State v. Boisselle,* 3 Wn.App.2d 266, 415 P.3d 621(2018)(rev'd on other grounds, 194 Wn.2d 1, 448 P.3d 19 (2019); *State v. Brown,* 21 Wn.App.2d 541, 506 P.3d 1258(2022) and *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005).

In *Brightman* the Court recognized that an instruction on justifiable homicide to resist a felony in progress (RCW 9A.16.050(2)) was unwarranted where *the defendant was in fact not afraid of the victim* during a struggle over a small amount of money. *State v.*

Brightman, 105 Wn.2d at 518-19. The Court held that RCW 9A.16.050(1) concerns a reasonable fear that the person slain is about to commit a felony or inflict great bodily injury, and RCW 9A.16.050(2) "addresses situations in which a felony or attempted felony is already in progress. *Id.* at 521.

Here, there was no question the attempted felony was already in progress when Bogdanov fought back and that he was terrified N.K. was going to shoot him.

In *State v. Brown*, the court *provided both* WPIC 16.02 and 16.03 instructions to the jury. *State v. Brown,* 21 Wn.App.2d at 562. Brown told police she retrieved her gun from the car, removed it from the holster and shot her friend, *even though* she did not believe her friend was trying to hurt her. The issue was whether WPIC 16.03 required the slayer to be in fear of great personal injury before using deadly force. *State v. Brown,* 21 Wn.App. at 548.

Brown is inapplicable to Bogdanov because here not only was WPIC 16.03 not given, but WPIC 16.02 was modified to remove the word "felony". Additionally, there was no question Bogdanov was in fear of N.K.

In *Brenner,* the Court affirmed the denial of WPIC 16.03. *State v. Brenner,* 53 Wn.App. at 376. The Court conflated the justifiable homicide defense applying to resisting a felony as requiring fear of death or great personal injury. The statute (RCW 9A.16.050(2) does not specifically mention fear of great personal injury or death, but implies that self-defense requires this fear to take the life of another.

Again, here the question was not one of fear: the question was whether Bogdanov justifiably fought back in self defense as N.K. continually grabbed for his loaded gun, an attempted assault first degree.

Finally, the Court cited to *State v. Boiselle,* for the proposition that WPIC 16.03 was repetitious of WPIC

16.02. Op. at *12. The facts in that case differ markedly from Bogdanov. There, the defendant allowed an individual with serious addictions to move into his duplex. After several tense encounters, one night the individual pointed a gun at Boiselle. Boiselle left the room. Later, Boiselle saw the gun on the arm of the couch, so he walked over and took the gun. The individual stood up and walked toward Boiselle. Boiselle fired the weapon killing the man. *State v. Boiselle,* 3 Wn.App.2d at 271-272.

The court in Boiselle resisted defense attempts to add the WPIC 16.03 instruction because "there was no evidence presented by the defense that suggest the defendant's act of shooting the victim was, *at the time of the shooting,* done in resistance to the commission of a felony." *Boiselle,* 3 Wn.App.2d at 291. The court elaborated that the State "only had notice of the theory of self-defense, that is defense of the person, and the

evidence actually presented by the defense establish only that theory and no other." *Id.* at 290.

The *Boiselle* Court cited to *Brenner,* and stated "We have previously held that such a defense [justifiable homicide in the context of felonies] applies only if the felony which was sought to be prevented threatens life or great bodily harm." *Id.* at 291.

The facts in each of the cases relied on by the Court differ markedly from the facts in Bogdanov. The attempted felony, assault in the first degree, is a violent felony, threatening both his life and/or great personal injury. It was not a matter of believing N.K. intended to commit a felony (WPIC 16.02) it was defending himself against an actual attempted felony as it occurred. (WPIC 16.03). Yet even the modified self-defense jury instruction omitted any mention of defense from a felony and focused instead on whether Bogdanov "reasonably

believed that the person slain intended to inflict death or great personal injury."

On the facts here, the trial court erred in denying a complete jury instruction which conformed with the statute and the facts adduced at trial. Instructions must make manifestly apparent the law to the average juror. Where the instruction does not accurately state the law of self-defense, it misleads the jury. *State v. Irons,* 101 Wn.App.544, 559, 4P.3d 174 (2000).

An error affecting a defendant's self-defense claim is constitutional and requires reversal unless it is harmless beyond a reasonable doubt. *State v. Arth,* 121 Wn.App.205, 213, 87 P.3d 1206 (2004). This matter bears review as it impacts the constitutional right to a fair trial, in which a defendant may bring forth a full defense for the crime of which he has been accused. RAP 13.4(b)(3).

B. The Trial Court Violated Bogdanov's Right To A Fair Trial When It Instructed Jurors To Continue Deliberating After They Reported Being Deadlocked.

"The right of a jury to hang is an extremely important and useful one. '[A]s history reminds us, a succession of juries may legitimately fail to agree until, at long last, the prosecution gives up. But such juries, perhaps more courageous than any other, have performed their useful, vital functions in our system. This is the kind of independence which should be encouraged. It is in this independence that liberty is secured." *On Instructing Deadlocked Juries,*78 Yale L.J. 100, 142 (1968)(citing to the dissent *Huffman v. United States,* 297 F.2d 754, 759 (5th Cir. 1962).

Criminal defendants are guaranteed the right to a unanimous verdict. Art. I, §21, §22. Each juror must participate, but there are "no requirements as to how

much or how long a juror must speak, listen, or deliberate before forming an opinion." *State v. Morfin,* 171 Wn.App.1, 10, 287 P.3d 600 (2012). "After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." CrR 6.15(f)(2).

Where a jury has difficulty reaching a unanimous verdict because of a lone dissenter, it may be indicative that the case was not "open and shut" rather than that the dissenter is not inclined to deliberate. *See State v. Depaz,* 165 Wn.2d 842, 204 P.3d 217 (2009). The court walks a fine line in evaluating whether a juror is refusing to follow the law, or she has made a decision based on her perception of the facts. *State v. Elmore,* 155 Wn.2d 758, 770, 123 P.3d 72 (2005).

Elmore provides the framework for decision making where serial notes from the jury indicate that a particular individual juror is refusing to deliberate. *Id.* at 768-69.

The first step is to (1) reinstruct the jury on their duty to deliberate. If reinstruction is ineffective, the court should (2) further ask about the process of deliberations and the conduct of jurors. If there is failure to resolve the issue, (3) the court may engage in further inquiry of jurors, the accused, and some or all other jury members. *Elmore,* 155 Wn.2d at 774.

When and whether to declare a mistrial is within the trial court's broad discretion and reviewed under that standard. *State v. Barnes,* 85 Wn.App. 638, 656, 932 P.2d 669 (1997).

In this case, the jury sent three notes to the court about its inability to reach a verdict, each note becoming more descriptive of the problem. The first note "We have received a message from the presiding juror that they

were concerned about the ability to reach a verdict." RP 1815. Following Elmore, the court reinstructed the jury to deliberate.

The second note indicated "we" have a concern with "a" juror, who the other jurors believed was unable to make a decision on the facts. Following *Elmore,* the parties agreed to question the presiding juror on the possibility of reaching a verdict.

The presiding juror informed the court the jury did not believe it could reach a verdict on the other count with the current jury. The court directed the presiding juror to fill out the verdict for the single count which had been decided.

The jury submitted yet a third more troubling note, indicating they wanted to replace the juror because she was no longer deliberating.

Rather than make further inquiry to explore juror misconduct, per *Elmore*, the court again instructed the

jury to continue it deliberations. On the third day of deliberations, the lone juror changed her mind.

The Court of Appeals affirmed the trial court in not declaring a mistrial because the length and complexity of the matter, and the relatively short length of deliberations for a six-day murder trial. Op. at *21.

The problem is that "participants in a discussion are often influenced to change their opinion simply by the knowledge that an overwhelming majority disagrees with them. Consistent disapproval by a majority and shake a small minority's faith even in judgments it believes to be right...Such pressures are most effective against a single dissenter and fall off rapidly in efficacy as the size the dissenting coalition increases." *On Instructing Deadlocked Juries,* at 110.

The concern here is that a lone juror was subject to undue coercion, to change her mind because the court was simply going to continue sending the jury back with

instructions to deliberate. When a jury acknowledges through its presiding juror that it is hopelessly deadlocked, "there is a factual basis sufficient to constitute the 'extraordinary and striking' circumstance necessary to justify the discharge." *State v. Fish,* 99 Wn.App. 86, 90, 992 P.2d 505 (1999).

In *State v. Boogaard,* 90 Wn.2d 733, 585 P.2d 789*E* (1978), the trial court conducted an *Elmore* type inquiry although far beyond what *Elmore* recommends[3]. The reviewing Court later reasoned:

> We have heretofore recognized that the right of jury trial embodies the right to have each juror reach his verdict uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel; and that an instruction which suggests that a juror who

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[3] This was a pre-*Elmore* case: Jurors were brought into open court, the foreman was asked to disclose the history of the vote, and the court inquired of each jurors whether he believed a verdict could be reached in a particular length of time. The result was inevitable that the minority jurors would feel the pressure of judicial influence. *Id.* at 739.

> disagrees with the majority should abandon his conscientiously held opinion for the sake of reaching a verdict invades that right*, however subtly the suggestion may be expressed.*

State v. Boogaard, 90 Wn.2d at 736.(emphasis added).

Here, even if the court's direction was never intended to be coercive, withstanding the pressure of eleven other jurors and being reminded that everyone had to deliberate could only be perceived as a message to the dissenting juror to reconsider.

The trial court should grant a mistrial when the defendant has been so prejudiced that nothing short of a new trial can ensure that he will be treated fairly. *State v. Wade,* 186 Wn.App. 749, 346 P.3d 838 (2015). The trial court abused its discretion in denying the motion for a mistrial.

This matter must be reversed.

VI. CONCLUSION

Based on the foregoing facts and authorities, Mr. Bogdanov respectfully asks this Court to accept review of his petition.

This document has 4439 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 24th day of August 2023.

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

July 25, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID Y. BOGDANOV, Appellant.	No. 56202-2-II PUBLISHED OPINION

CHE, J. — David Bogdanov killed NK by strangling her when they fought in Bogdanov's car after a sexual encounter. Bogdanov appeals his convictions for second degree murder and malicious harassment. At trial, Bogdanov did not deny that he killed NK. He argued that the homicide of NK was justifiable because he was acting in self-defense and excusable because NK's death was an accident. To that end, Bogdanov requested justifiable homicide jury instructions based on criminal Washington pattern jury instructions (WPIC) 16.02 and 16.03, which are patterned after RCW 9A.16.050(1) and (2), respectively.[1] The trial court issued an instruction based on WPIC 16.02 but declined to issue an instruction on WPIC 16.03.

We hold that the trial court's justifiable homicide instruction was adequate. We remand for the trial court to strike the community custody provision imposing supervision fees. We reject each of Bogdanov's remaining arguments. And we otherwise affirm.

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[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (5th ed. 2021).

FACTS

I. Background

On June 5, 2019, Bogdanov was out drinking with his brother, Artur. And in the early hours of June 6, Bogdanov was waiting to pick up his brother, Stanislav, when he saw NK walking alone. Bogdanov approached her, inquired about her well-being, and gave her his coat. Bogdanov also gave her his contact information. Later that night, NK asked Bogdanov to pick her up. Bogdanov picked up NK and drove her to his sister's apartment in Vancouver, Washington, where he drank with NK. Subsequently, Artur drove Bogdanov and NK to a house in Brush Prairie.

Once there, Bogdanov and NK got into Bogdanov's Audi. After driving around, the two ended up back at the Brush Prairie house. Bogdanov testified that NK was in the back of the Audi smoking meth. Bogdanov was hoping to have sex with NK. He placed his gun between the driver's seat and the center console before entering the back of the Audi.

The two began having a sexual encounter. During the sexual encounter, Bogdanov learned that NK was transgender. Bogdanov shoved NK and said something to the effect of, "[W]hat the f[*]ck; what is this; you didn't tell me you were a dude. And started---started yelling at her to---said she's a disgusting—disgusting piece of crap." Rep. of Proc. (RP) at 1510.

Bogdanov testified that NK lunged at him, striking him in the face. Bogdanov shoved her, and she attempted to kick him. NK lunged for Bogdanov's gun between the driver seat and the center console. Bogdanov attempted to restrain her by pulling her jacket. But he was unable to restrain her as she continually elbowed him while reaching toward the gun.

To stop her, Bogdanov wrapped a nearby phone charging cable around her chest and pulled. The cable slipped around her neck. NK attempted to gouge out his eyes. Bogdanov continued pulling until NK stopped struggling. Shortly thereafter, Bogdanov realized she was dead.[2] Bogdanov took NK's body to Large Mountain and pushed it down a steep incline. After disposing of N.K's body, Bogdanov fled to Ukraine.

Bogdanov returned to Washington more than two months later, and law enforcement eventually arrested him. Bogdanov was driving a Ford Econoline van that belonged to Artur when he was arrested. The State charged Bogdanov with second degree murder and malicious harassment.

II. Trial

A. *Judge's Characterization of the Case*

During a midtrial hardship voir dire of juror 1—without the other jurors present, the judge said,

> [Y]ou've been selected on this jury. It's a *major homicide case* in this county and can—do we have your assurance then—we're going to do everything we can to accommodate you, but you understand that we're at the mercy of all the other moving pieces in this. And can you assure us that you'll be able to pay attention and give your best effort, consistent with your juror oath?

RP at 858-59 (emphasis added). Bogdanov moved for a mistrial, arguing that the characterization of the case as a "major homicide case" constituted an improper comment on evidence. RP at 859.

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[2] Dr. Martha Burt, a state forensic anthropologist, explained that with use of a ligature the interruption of blood flow to death is incredibly variable and could take anywhere from one to seven minutes. Loss of consciousness could be within seconds or a few minutes, depending on the pressure used. Dr. Burt further testified that loss of consciousness and death could occur in less than a minute.

The trial court stated that such a comment is "baked into the cake when you're here on a Murder 2nd Degree trial. It's a major—It is a homicide. It's a most severe version of the homi—well, murder." RP at 860. The trial court chose to not bring the juror back in because "it's sort of something that's just so patently obvious that I think it would be an ineffective remedy under the circumstances." RP at 860-61.

B. *Van Evidence*

Bogdanov's brothers provided inconsistent testimony about which vans were involved during the night of the murder. Stanislav testified that Artur and Bogdanov were not driving around in Stanislav's Nissan van, but one of their vans. Artur testified that Bogdanov did not own any vehicles at the time of the murder, but Bogdanov was using Artur's Ford Econoline van.

Bogdanov had one van registered to him during the time of the murder, a GMC Savana van. Bogdanov testified that he was in Stanislav's Nissan van when he drove to Brush Prairie with NK, but the pair got into Bogdanov's Audi before he killed NK. More generally, it is not contested that Bogdanov was in the Audi when he killed NK.

The State introduced evidence regarding the search of two different vans. On December 17, 2019, the State searched the van that Bogdanov was in when he was arrested—Artur's Ford Econoline Van. The State sought to admit photographs taken during the search of the Ford van, including pictures of a fixed blade knife, a gun holster, a pocketknife, and an empty gun magazine. Bogdanov objected to the admission of that evidence based on a lack of foundation, relevance, and materiality. The trial court overruled that objection.

On January 2, 2020, the State searched the GMC Savana van registered to Bogdanov at the time of the murder. The State presented testimony regarding the contents of the GMC van,

including a pocketknife, handcuffs, a bloodstained t-shirt, and a roll of duct tape. The State elicited testimony about the various forms of testing it conducted upon select items in the van.

Bogdanov objected on multiple grounds and broadly argued that the evidence was irrelevant because "there's nothing in the police reports to suggest that these are, you know, implements of criminal activity in this case." RP at 1170. The State argued that it was "just trying to show that there was a thorough and complete investigation." RP at 1169-70. The State also argued that the knife would also be relevant for the self-defense claim. The trial court admitted the evidence. The trial court cautioned the State to be careful what it used the challenged evidence for because "there's no direct evidence of use of these things and it would be improper to suggest or imply those in any testimony or arguments." RP at 1172-73.

Later, the State elicited testimony that a string of beads was in the GMC van. Bogdanov objected, arguing that there was a lack foundation, and the beads were not relevant. The State argues that the beads could have belonged to the victim. The trial court overruled the objection and admitted the evidence.

Bogdanov moved for a mistrial, arguing that the State engaged in prosecutorial misconduct by seeking to admit the irrelevant contents of the GMC van under the completeness of the investigation grounds. The trial court denied the motion.

The State's argument as it pertains to the vans in closing was as follows:

> Ladies and gentlemen, you've heard a lot about these searches of these vans that end up with not a lot of evidence. First of all, that is consistent with the testimony that you heard. What happened to [NK] didn't happen in those vans. [NK] might have been a passenger in one of those vans for a brief period of time that morning, but that was six months before those searches.
>
> So not finding her DNA in those vans is consistent with the evidence.

RP at 1678. Bogdanov emphasized the weakness of the van evidence in closing by arguing that the vans were not where the self-defense took place, and evidence from the vans was not tied to the incident by DNA analysis or testimony.

C. *Issues Regarding Bogdanov's Case-in-Chief*

Before Bogdanov's case-in-chief, he made an offer of proof to admit evidence that NK had been shot in a previous incident. Bogdanov's counsel explained that the testimony would be that NK saw Bogdanov place his gun in the front. Then, NK disclosed to Bogdanov "that she did not like guns necessar[il]y, but she was okay with it because she had been shot." RP at 1443. The trial court ruled that the defense could not elicit information about NK being a gunshot victim.

During the cross-examination of Bogdanov, the State elicited that he was about 6'2 and 200 pounds. The State further elicited that NK was about 5'8 and 130 pounds. The State asked, "At least by appearances, you could tell that you were significantly stronger than her[?]" RP at 1538. Bogdanov responded, "Yeah." RP at 1538. Later, the State asked, "You could have bear hugged her at any point in time, right?" RP at 1545. Bogdanov responded, "It was—that's kind of what I was trying to do. It wasn't working out. Nothing was working." RP at 1545.

D. *Jury Instructions*

The trial court gave the following excusable homicide instruction based on WPIC 15.01,

> It is a defense to a charge of murder that the homicide was excusable as defined in this instruction.
>
> Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

> The State has the burden of proving the absence of excuse beyond a reasonable doubt. 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 295.

Regarding the justifiable homicide defense, Bogdanov proposed jury instructions based on WPIC 16.02 and WPIC 16.03, which outline self-defense in relation to a reasonable apprehension of great personal injury and self-defense in the actual resistance to an attempt to commit a felony upon the slayer, respectively. Under the proposed WPIC 16.03 instruction, Bogdanov planned to argue that he committed justifiable homicide in actual resistance to NK's attempt to commit the felony of first degree assault.

The trial court gave the following justifiable homicide instruction based on WPIC 16.02,

> Homicide is justifiable when committed in the lawful defense of the slayer when:
>
> (1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury;
>
> (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.

CP at 297.

The trial court declined to give an instruction based on WPIC 16.03 because it reasoned that the instruction would be subsumed by the instruction being given based on WPIC 16.02. In pertinent part, WPIC 16.03 states,

> Homicide is justifiable when committed in the actual resistance of an attempt to commit a felony [upon the slayer] [in the presence of 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] [her] at the time [and prior to] the incident.

The jury began deliberations in the afternoon on August 25.[3] At 5:03 p.m., the trial court released the jury. The next day, deliberations began at 8:30 a.m., and before 10 a.m., it appears the jury submitted two separate questions to the trial court—one about the difference between premeditation and intent, and the other about a concern over the jury's ability to reach a verdict.[4]

The State asked the trial court to instruct the jury that "without premeditation" is not an essential element of second degree murder and, in response to the hung jury issue, to continue deliberating. RP at 1816. Bogdanov objected to the State's proposal. After the trial court decided that it would read the State's supplemental premeditation instruction, Bogdanov moved for a mistrial, but the court denied his request. The trial court issued a supplementary instruction that stated,

> "Without premeditation" is not an essential element of the crime of Murder in the Second Degree that the State must prove beyond a reasonable doubt. The elements of the crime of Murder in the Second Degree are listed in Instruction No. 10.
>
> You are not to give this instruction special importance just because it was read separately. Consider it along with all of the instructions you have received.

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[3] Later that afternoon, the trial court excused an ill juror and seated an alternate juror. The court reconstituted the jury around 4:15 p.m.

[4] The jury's written questions do not appear in the record.

CP at 309.[5] The jury returned to deliberations.

At 1:47 p.m., the jury submitted another note that stated, "We have a concern with a juror; we believe she is unable to make a decision based on the facts. While deliberating, she is unable to express the reasoning for her position. And refuses to." CP at 280 (most capitalization omitted). In response, the trial court asked the presiding juror if the jury had a reached a verdict for one count and "if there [was] a reasonable probability of the jury reaching a verdict on the other Count?" RP at 1832.

The presiding juror said that the jury had reached a verdict on one count. But as to whether there was a reasonable probability of being able to reach a verdict on the other count, the presiding juror responded, "I don't believe so with the—the current jury we have." RP at 1832. The trial court asked the jury to hand the verdicts to the bailiff, but the presiding juror informed the court that they had not filled out the verdict forms yet. In response, the trial court asked the jury to return to deliberation. Additionally, the trial court said, "Follow your Instructions—I won't say anymore. And if you do, in fact, have a verdict as to that one Count and not [] the other, whatever your decision is—once you are satisfied and have agreed on the decision, then we'll bring you back into court, okay?" RP at 1833.

At 2:03 p.m., the jury submitted a note that stated,

> Can we replace a juror (1) and call in an alternate, if the current juror is unable to make decisions on factual evidence and is unwilling to deliberate further. We feel it is a personal bias, with this (1) current juror. She is refusing to continue to discuss her views.

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[5] As part of its initial instructions to the jury, the trial court issued the following instruction: "A person commits the crime of Murder in the Second Degree when with intent to cause the death of another person but *without premeditation*, he or she causes the death of such person or of a third person unless the killing is excusable or justifiable." CP at 291 (emphasis added).

CP at 281 (most capitalization omitted). The trial court indicated it was planning on rereading its initial instruction regarding the duty to deliberate. Bogdanov moved for a mistrial on several grounds. The trial court denied Bogdanov's motion for a mistrial and reinstructed the jury about its duty to deliberate.

The next morning, the jury appears to have deliberated from around 8:30 a.m. to 9:35 a.m. The jury convicted Bogdanov on both counts. At sentencing, the trial court found that Bogdanov was indigent under RCW 10.101.010(3). But the trial court ordered Bogdanov to "pay supervision fees as determined by [the Department of Corrections]." CP at 326.

Bogdanov appeals.

ANALYSIS

I. JUSTIFIABLE HOMICIDE JURY INSTRUCTION

Bogdanov argues that the trial court erred by declining to issue a justifiable homicide instruction based on WPIC 16.03. We disagree.

We review the trial court's refusal to issue a justifiable homicide instruction for an abuse of discretion if the decision was based on a factual dispute or de novo if the decision was based on a ruling of law. *State v. Brightman*, 155 Wn.2d 506, 519, 122 P.3d 150 (2005). "'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'" *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012) (quoting *State v. Knutz*, 161 Wn. App. 395, 403, 253 P.3d 437 (2011)). The sufficiency of jury instructions is evaluated on a case by case basis.

Error occurs when the jury instructions, read as a whole, fail to "'make the relevant legal standard manifestly apparent to the average juror.'" *State v. Ackerman*, 11 Wn. App. 2d 304, 312, 453 P.3d 749 (2019) (quoting *State v. Corn*, 95 Wn. App. 41, 53, 975 P.2d 520 (1999)). The relevant legal standard is codified in RCW 9A.16.050, which provides,

> Homicide is also justifiable when committed either:
>
> (1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
>
> (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

Where the defendant raises some credible evidence that the homicide occurred in circumstances that met the requirements of RCW 9A.16.050, the defendant is entitled to an instruction on justifiable homicide. *Brightman*, 155 Wn.2d at 520.

The requirements of RCW 9A.16.050(1) are met "where the defendant reasonably fears the person slain is *about to* commit a felony upon the slayer or inflict death or great personal injury, and there is *imminent* danger that the felony or injury will be accomplished." *Id.* at 520-21. WPIC 16.02 is patterned after RCW 9A.16.050(1). To meet the requirements of RCW 9A.16.050(2), "the defendant [must] act[] in *actual resistance* against an attempt to commit a felony on the slayer." *Brightman*, 155 Wn.2d at 521. WPIC 16.03 is patterned after RCW 9A.16.050(2). Under RCW 9A.16.050(1) and (2), the slayer's use of deadly force must be reasonably necessary under the circumstances. *Brightman*, 155 Wn.2d at 523.

A defendant is not entitled to repetitious instructions. *State v. Brenner*, 53 Wn. App. 367, 377, 768 P.2d 509 (1989), *overruled on other grounds by State v. Wentz*, 149 Wn.2d 342, 68 P.3d 282 (2003). In *Brenner*, the trial court instructed the jury that homicide is justifiable "when the defendant reasonably believes that the person slain intends to inflict death or great personal injury and there is imminent danger of such harm being accomplished." 53 Wn. App. at 375. But the trial court declined to instruct the jury regarding justifiable homicide in actual resistance of an attempt to commit a felony. *Id.* at 375.

Division One held that the given instruction correctly stated the law of self-defense and allowed the defendant to argue his theory of the case as he "could argue the more narrow actual resistance of a felony within the broader language of reasonable belief of intent." *Id.* at 376-77. Division One further noted that the proposed actual resistance instruction would have been repetitious with the instruction given "[b]ecause justifiable homicide is limited to felonies where the attack on the defendant's person threatens life or great bodily harm." *Id.* at 377. And in *State v. Boisselle*, Division One noted that the proposed WPIC 16.03 instruction was repetitious with the given WPIC 16.02 instruction because the defendant was already arguing that he was resisting death or great bodily harm under WPIC 16.02. 3 Wn. App. 2d 266, 291, 415 P.3d 621 (2018), *rev'd on other grounds*, 194 Wn.2d 1, 448 P.3d 19 (2019).

Here, the trial court found credible evidence to give both an excusable and justifiable homicide instruction. But the trial court declined to issue a justifiable homicide instruction based on WPIC 16.03 because that instruction would have been duplicative with the court's other justifiable homicide instruction based on WPIC 16.02. Accordingly, the trial court's decision was based on a ruling of law. As such, we review the trial court's decision de novo.

We hold the instruction the trial court gave under WPIC 16.02 was a correct statement of law that was not misleading. Given Bogdanov's defense theories, his proposed WPIC 16.03 instruction was repetitious with the given WPIC 16.02 instruction.

In closing, Bogdanov primarily argued that his homicide of NK was justifiable under RCW 9A.16.050(1) because NK was reaching for the gun to shoot him, which created a reasonable belief that NK intended to inflict death or great personal injury upon him. Bogdanov emphasized that he did not have time to reflect on his ability to restrain NK due to NK's combative conduct—striking him in the face, attempting to kick him, and not leaving the vehicle.

Based on the denied instruction, Bogdanov planned to argue that he committed justifiable homicide in actual resistance to NK's attempt to commit the felony of first degree assault.[6] To show first degree assault, Bogdanov thus pointed only to an argument that NK, with the intent to inflict great bodily harm, put Bogdanov in apprehension of harm by reaching for the gun to shoot him or attempted with unlawful force to inflict bodily injury upon him with the gun.

That line of argument would have focused on NK's attempt to grab the gun and shoot Bogdanov. It would likely have focused on whether Bogdanov's killing was reasonably necessary under the circumstances, which would involve discussing how combative NK was. Lastly, such argument would likely have focused on Bogdanov's apprehension of harm stemming from the aforementioned circumstances. All of these arguments could be made under

[6] First degree assault occurs in four situations, but relevant here, it occurs where an individual "with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). "Three definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

WPIC 16.02. And Bogdanov actually made these arguments to the jury in closing. None of these arguments were precluded by the decision not to give WPIC 16.03. Under these circumstances, we hold that the instruction given allowed Bogdanov to argue he actually resisted an attempt to commit first degree assault within the broader language of reasonable belief that NK intended to inflict death or great personal injury.

Citing *Ackerman*, Bogdanov argues the instructions are not repetitious because the use of deadly force may be reasonable under RCW 9A.16.050(2) even if there was no reasonable belief of imminent danger of death or great personal injury. In *Ackerman*, the trial court issued a verbatim WPIC 16.02 instruction and a modified WPIC 16.03 instruction. 11 Wn. App. 2d at 311. The modified instruction provided, "(1) The homicide is committed in the actual resistance of an attempt to commit a *violent* felony upon the slayer; (2) *The slayer reasonably believed that the violent felony threatens imminent danger of death or great personal injury; and* . . . ." *Id.* at 312. The trial court also issued an instruction that robbery is a felony, but did not specify whether it was a violent felony. *Id.*

Division One held that the justifiable homicide instructions failed to make the self-defense standard manifestly apparent because (1) the instructions diluted the State's burden by suggesting that robbery may not satisfy the requirements of justifiable homicide because it does not qualify as a violent felony, and (2) the instruction based on RCW 9A.16.050(2) added the requirement for the slayer to have a reasonable belief of "imminent danger of death or great personal injury." *Id.* at 313-14. As to the second ground, the *Ackerman* court implied that the use of deadly force to resist a robbery may be reasonable under RCW 9A.16.050(2), even if there is no reasonable belief of imminent danger of death or great personal injury. *Id.* at 314-15

(explaining the instruction "misstated the requirements" of the statute "[b]y requiring the jury to also consider, in an instruction based on only subsection (2), whether there was a reasonable belief of imminent danger of death or great personal injury."). But "*Brightman* held that lethal force must be reasonably necessary, and 'necessary' means in response to a perceived threat to life or great personal injury." *State v. Brown*, 21 Wn. App. 2d 541, 564, 506 P.3d 1258, *review denied*, 199 Wn.2d 1029 (2022).

We conclude that *Brightman* is controlling, and we join *Brown* in declining to follow *Ackerman* on this issue. And more generally, we are not persuaded that *Ackerman* entitles Bogdanov to a WPIC 16.03 instruction under these facts. Consequently, we hold that there was no instructional error here.

II. Ineffective Assistance of Counsel

Bogdanov argues that he received ineffective assistance of counsel because his counsel failed to request a lesser-included offense instruction of manslaughter regarding his second degree murder charge. We disagree.

When the defendant claims ineffective assistance of counsel, he "bears the burden of establishing both 'that counsel's performance was deficient' and that 'the deficient performance prejudiced the defense.'" *State v. Carson*, 184 Wn.2d 207, 216, 357 P.3d 1064 (2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Where a jury found the defendant guilty of second degree murder, the Supreme Court held there was no prejudice for failure to request a lesser-included offense instruction because "assuming, as this court must, that the jury would not have convicted [the defendant] of second degree murder unless the State had met its burden of proof, the availability of a compromise

verdict would not have changed the outcome of [the] trial." *State v. Grier*, 171 Wn.2d 17, 43-44, 246 P.3d 1260 (2011).

Here, even assuming Bogdanov could show that his counsel's failure to request a lesser included instruction was deficient, he cannot show that counsel's failure to do so was prejudicial. The jury found Bogdanov guilty beyond a reasonable doubt of second degree murder. We infer, as we must, that the jury convicted Bogdanov because the evidence showed he was guilty beyond a reasonable doubt. And so, the availability of a compromise verdict would not have changed the outcome of Bogdanov's trial. Accordingly, we hold that Bogdanov did not receive ineffective assistance of counsel.

III. Supplemental Jury Instruction Regarding the Essential Elements of Second Degree Murder

A. *Abuse of Discretion*

Bogdanov appears to argue that the trial court abused its discretion by issuing the supplemental jury instruction regarding the elements of second degree murder. We disagree.

Trial courts have discretion to issue supplemental jury instructions after deliberation has begun. *State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990). Trial courts may abuse that discretion when their supplemental instructions "go beyond matters that either had been, or could have been, argued to the jury." *Id.*

Here, the trial court issued Instruction No. 7, which stated, "A person commits the crime of Murder in the Second Degree when with intent to cause the death of another person *but without premeditation*, he or she causes the death of such person or of a third person unless the

killing is excusable or justifiable." CP at 291 (emphasis added). The "without premeditation" language was not defined elsewhere in the original jury instructions.

After deliberations began, the jury appears to have submitted a question regarding the difference between premeditation and intent. In response, the trial court clarified the essential elements of second degree murder, by stating that "without premeditation" is not an essential element of second degree murder. CP at 309. Bogdanov does not argue that the trial court's supplemental instruction was an incorrect statement of law.

That instruction did not exceed matters that were argued or could have been argued to the jury, as the substance of the instruction was included in Instruction No. 7, which was issued before deliberation began. Instruction No. 7 defined the elements of second degree murder.

Accordingly, we hold that the trial court did not abuse its discretion by issuing the challenged supplemental instruction.

B. *Judicial Comment*

Bogdanov also argues that the trial court's supplemental instruction was an improper judicial comment because it "was inartfully worded because it altered the perception of the burden of the State," and the trial court did not answer the jurors' question. Br. of Appellant at 35. We disagree.

We review the trial court's choice of jury instructions for an abuse of discretion, but we review whether the instruction constitutes a comment on the evidence de novo. *State v. Butler*, 165 Wn. App. 820, 835, 269 P.3d 315 (2012). "A judge is prohibited from expressing to the jury his or her personal attitudes regarding the merits of the case or instructing the jury that issues of fact have been established as a matter of law under article IV, section 16 of the Washington

Constitution." *State v. Gouley*, 19 Wn. App. 2d 185, 197, 494 P.3d 458 (2021), *review denied*, 198 Wn.2d 1041 (2022). Judicial comments on evidence are presumptively prejudicial. *Id.* The State has the burden to show that such comments did not prejudice the defendant unless the record affirmatively shows that no prejudice could have occurred. *Id.*

A jury instruction that merely states the law pertaining to an issue is not an impermissible comment on evidence. *Id.* For example, where a trial court issued an instruction that an alleged rape victim's testimony did not need to be corroborated to find the defendant guilty of rape, Division One held the instruction was not a comment on evidence because its phrasing did not reveal the trial court's opinion on witness credibility, it was a correct statement of the law, and it was relevant to the issues at trial. *State v. Malone*, 20 Wn. App. 712, 714-15, 582 P.2d 883 (1978).

Similarly, here the supplemental instruction merely stated the law pertaining to second degree murder. Bogdanov concedes that the instruction correctly stated the law. Bogdanov argues that the instruction could suggest that the State did not need to prove the intent element of second degree murder beyond a reasonable doubt. But the supplemental instruction does not even mention intent. Consequently, the instruction does not suggest that the State does not need to prove the intent element of second degree murder.

Additionally, Bogdanov relies upon *State v. Levy*[7] to argue that the court's instruction constituted an improper judicial comment. There, the Supreme Court held that the trial court's reference to a crowbar as a deadly weapon was an improper judicial comment because it suggested to the jury that the crowbar was a deadly weapon as a matter of law. *Levy*, 156 Wn.2d

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[7] 156 Wn.2d 709, 132 P.3d 1076 (2006).

at 722. Similarly, the court held that the trial court's reference to "the building of Kenya White" was an improper judicial comment because "the use of the word 'building' in the instruction improperly suggested to the jury that the apartment was a building as a matter of law." *Id.* at 721.

Bogdanov's reliance on *Levy* is inapposite. The supplemental instruction here does not suggest to the jury that it need not consider an element of second degree murder. Nor does the instruction reference any piece of evidence. Nor does the instruction's phrasing reveal the trial court's opinion of a witness's credibility. Rather, the instruction does no more than accurately state the law. Consequently, we hold that the supplemental instruction was not an improper judicial comment.

IV. JURY INSTRUCTION TO CONTINUE DELIBERATING

Bogdanov argues that the trial court erred by instructing the jury to continue deliberating after the jury reported that one juror was refusing to deliberate. We disagree.

A trial judge has broad discretion in determining whether to declare a mistrial. *State v. Barnes*, 85 Wn. App. 638, 656, 932 P.2d 669 (1997). As such, we review the trial court's denial of a mistrial for an abuse of discretion. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). Where no reasonable judge would have reached the same conclusion, the trial court abuses its discretion. *Id.*

A mistrial is warranted only where "the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be fairly tried." *Id.* When determining whether a jury is deadlocked, the trial court "may consider the length of jury deliberations relative to the length of the trial and the complexity of issues and evidence." *Barnes*, 85 Wn.

App. at 656. The trial court may also rely on the representations of the presiding juror. *Id.* at 657. But more generally, "[t]here are no particular procedures that the court must follow in determining the probability of the jury reaching an agreement." *Id.*

Additionally, even where the jury is already deliberating, trial courts have a duty to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit. *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). To that end, "[a] juror is unfit if he or she exhibits prejudice by refusing to follow the law or participate in deliberations." *Id.* When investigating jury problems, courts have broad discretion but must take care to not taint the jury nor disturb the contents of deliberation. *Id.* at 773-74.

When a juror accuses another juror of refusing to deliberate, the trial court should first reinstruct the jury. *Id.* at 774. If the problem persists, the court should engage in as limited inquiry as possible, prioritizing the secrecy of the jury deliberations. *Id.* Importantly, "prejudice occurs only where a court dismisses a juror without applying the appropriate evidentiary standard." *State v. Morfin*, 171 Wn. App. 1, 11, 287 P.3d 600 (2012).

Here, the trial lasted from August 17th until the 25th. The case involved more than 30 witnesses and more than 200 exhibits. Most of the evidence was indirect. There were two charges in this case, second degree murder and malicious harassment. Bogdanov argued that the homicide was both excusable and justifiable.

Jury deliberations began around 2:39 p.m. and the jury was reconstituted around 4:15 p.m. on August 25th. At 5:03 p.m., the trial court released the jury. The jury deliberated from around 8:30 a.m. to 4:57 p.m. the following day. The next day, the jury appears to have deliberated from 8:30 a.m. to 9:35 a.m., and then, the jury issued its verdict. In total, the jury

deliberated less than a day and a half for a six day murder trial. As such, the relative length of the deliberation compared against the length and complexity of the issues and evidence weighs against granting a mistrial.

The claimed error occurred on the second day of jury deliberations. That day, it appears the jury submitted three notes that indicated its inability to continue deliberations. In the morning, the jury appears to have submitted a question about the difference between premeditation and intent, and a note indicating the jury was concerned about its ability to reach a verdict.[8] After receiving those notes, the trial court issued the instruction clarifying the elements of second degree murder and sent the jury back to deliberate.

At 1:47 p.m., the jury informed the court that it believed one juror was unable to decide and would not deliberate. In response, the trial court asked the presiding juror if the jury had reached a verdict for one count and if there was "a reasonable probability of being able to reach a verdict on the other Count." RP at 1832. The presiding juror said that the jury had reached a verdict on one count. But as to whether there was a reasonable probability of being able to reach a verdict on the other count, the presiding juror responded, "I don't believe so with the—the current jury we have." RP at 1832.

The trial court asked the jury to hand the verdicts to the bailiff, but the presiding juror informed the court that they had not filled out the verdict forms yet. In response, the trial court asked the jury to return to deliberation. Additionally, the court said, "Follow your Instructions—I won't say anymore. And if you do, in fact, have a verdict as to that one Count

[8] These jury notes do not appear in the record, but the parties do not dispute their contents.

and not [] the other, whatever your decision is---once you are satisfied and have agreed on the decision, then we'll bring you back into court, okay?" RP at 1833.

The trial court's actions after the second note complied with *Elmore* because after receiving an allegation that a juror was refusing to deliberate, the court ordered the jury to continue deliberating. Just minutes later, the jury submitted a third note, asking if the trial court could replace the juror who was refusing to deliberate. The trial court chose to reinstruct the jury about its duty to deliberate.

As the jury submitted its third note minutes after the court's previous instruction, indicating they were having the same problem, the trial court could have engaged in an inquiry to explore juror misconduct. But the trial court does not abuse its discretion by not immediately engaging in this inquiry under *Elmore*. And in any case, the trial court took the more cautious route of reinstructing the jury, instead of engaging in questioning to ultimately dismiss a juror, which arguably would have been more likely to prejudice the jury or invade their secrecy.

Bogdanov relies on *State v. Fish*, 99 Wn. App. 86, 90, 992 P.2d 505 (1999) to argue that a mistrial was warranted. In *Fish*, Division One analyzed whether a mistrial based on deadlock was proper, not whether the trial court abuses its discretion by instructing the jury to continue deliberating instead of granting a mistrial. 99 Wn. App. at 90. As such, the case is not persuasive. Bogdanov also cites *State v. Dykstra*, 33 Wn. App. 648, 651, 656 P.2d 1137 (1983), which also analyzed whether a mistrial based on deadlock was proper. These cases are inapposite.

Given the length and complexity of this matter, and that the trial court took a cautious course of action in response to an allegation of juror misconduct, we hold that the trial court did

not abuse its discretion by reinstructing the jury on its duty to deliberate, instead of granting a mistrial.

V. Community Custody Supervision Fees

In Bogdanov's supplemental brief, he argues that the trial court erred when it imposed community custody supervision fees because he is indigent. The State concedes that the supervision fee should be stricken because the trial court found Bogdanov indigent. We accept the State's concession.

The trial court imposed "supervision fees as determined by [the Department of Corrections]." CP at 326. The imposition of community custody supervision fees used to be governed by former RCW 9.94A.703(2)(d) (2021). Effective July 1, 2022, the legislature amended RCW 9.94A.703 by removing the waivable condition to impose community custody supervision fees on defendants. *State v. Wemhoff*, 24 Wn. App. 2d 198, 199, 519 P.3d 297 (2022).

The amendment applies prospectively to cases on direct appeal. *Id.* at 202. Consequently, the amendment applies to Bogdanov's case. Thus, we remand for the trial court to strike the community custody provision imposing supervision fees.

VI. Statement of Additional Grounds

In Bogdanov's statement of additional grounds (SAG), he raises a myriad of issues. We reject each of his arguments.

A. *Judicial Comment*

Bogdanov argues that the trial court prejudiced him when the judge characterized his case as a "major homicidal case" in front of a juror. SAG at 1. We disagree.

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH. CONST. art. 4, § 16. To that end, a judge may not "'[convey] to the jury his or her personal attitudes toward the merits of the case' or instruct[] a jury that 'matters of fact have been established as a matter of law.'" *Levy*, 156 Wn.2d at 721 (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)).

To determine if reversal is warranted, we engage in a two-step inquiry. *State v. Bass*, 18 Wn. App. 2d 760, 802, 491 P.3d 988 (2021), *review denied*, 198 Wn.2d 1034 (2022). First, we "examine the facts and circumstances of the case to determine whether a court's conduct or remark rises to a comment on the evidence." *Id.* at 802-03. A remark may constitute a comment on evidence if the judge's personal feelings are implied. *Id.* at 803. Second, if we determine the trial court made an improper comment, we presume the comment is prejudicial, and the State must "'show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.'" *Id.* (quoting *Levy*, 156 Wn.2d at 723).

Here, during a midtrial hardship voir dire of juror 1 outside of the presence of other jurors, the judge characterized the case as "a major homicide case in this county." RP at 858. This comment is not a remark on the evidence. The comment does not instruct the jury that matters of fact have been established as a matter of law. The question is then whether characterizing a second degree murder trial as a "major homicide case in this county" conveys the judge's personal attitude toward the merits of the case.

Although the trial court's comment may have conveyed the judge's personal attitude about the seriousness of the case, it did not convey the judge's personal attitude about the merits of the case. The comment does not suggest something about the veracity of any witness, the importance

of any piece of evidence, or, more broadly, the strength of any party's case. As such, we hold that the comment did not constitute an improper judicial comment on evidence.

B. *Prosecutorial Misconduct*

Bogdanov argues that the State engaged in prosecutorial misconduct (1) by asking if he was significantly stronger than NK and if he could have bear hugged her at any point in time, and (2) by eliciting irrelevant testimony regarding the contents of two vans. We disagree.

Where the defendant timely objects to prosecutorial misconduct, the defendant must prove that the challenged conduct was improper and prejudicial in the context of the entire trial. *State v. Zamora*, 199 Wn.2d 698, 708-09, 512 P.3d 512 (2022). However, when the defendant fails to object, the defendant must make a heightened showing of prejudice—that the prosecutor's conduct was so flagrant and ill-intentioned as to result in incurable prejudice. *Id.*

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. But relevant "evidence may be excluded if its probative value is substantially outweighed by the danger . . . misleading the jury." ER 403. "'Evidence is relevant if a logical nexus exists between the evidence and the fact to be established.'" *State v. Pratt*, 11 Wn. App. 2d 450, 462, 454 P.3d 875 (2019), *aff'd*, 196 Wn.2d 849 (2021) (quoting *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15 (1999)).

1. *Challenged Questions*

Bogdanov argues that the State engaged in prosecutorial misconduct by asking if he was significantly stronger than NK and if he could have bear hugged her at any point in time. To that

end, Bogdanov argues that this line of questioning misguided the jurors into believing that he "was in a present, rational state of mind," not a state of fight or flight. SAG at 3. We disagree.

The State has the burden to prove the absence of self-defense beyond a reasonable doubt if the defendant produces some evidence of self-defense. *State v. Woods*, 138 Wn. App. 191, 199, 156 P.3d 309 (2007).

Here, Bogdanov argued that his killing of NK was excusable and justifiable. During the cross-examination of Bogdanov, the State elicited that he was 6'2 and about 200 pounds. The State further elicited that NK was about 5'8 and 130 pounds. The State asked, "At least by appearances, you could tell that you were significantly stronger than her[?]" RP at 1538. Bogdanov said, "Yeah." RP at 1538.

Bogdanov did not object to the question. Later, the State asked, "You could have bear hugged her at any point in time, right?" RP at 1545. Bogdanov responded, "It was—that's kind of what I was trying to do. It wasn't working out. Nothing was working." RP at 1545. Bogdanov did not object. Because Bogdanov did not object, he must show that the State's conduct in posing the aforementioned questions was improper, and so flagrant and ill-intentioned as to result in incurable prejudice.

The challenged questions sought to produce highly relevant evidence, that Bogdanov had the strength and capability of restraining NK without killing her. Such evidence is highly relevant because it goes directly to meeting the State's burden of showing that the killing was not justified. Whatever likelihood such questions had of misleading the jury does not outweigh the substantial probative value of those questions. Consequently, we hold that the State's conduct in

posing the aforementioned questions was not improper. Thus, the State did commit prosecutorial misconduct in this regard.

2. *Evidence from the Vans*

Bogdanov argues that the State committed prosecutorial misconduct by introducing irrelevant evidence from the Ford Econoline and the GMC Savana vans, including a knife, a pair of handcuffs, a bloodstained shirt, and a beaded bracelet. We disagree.

There is evidence to suggest that Bogdanov could have been in a Nissan van, his own GMC van, or the Ford van during the night that he killed NK. But it is uncontested that Bogdanov was in the Audi when he killed NK.

There was no testimony that the contents of the Ford or the GMC van were transferred into the Audi before or after the incident. Nor is there evidence that any of the contents of either van were instruments in the crime or in Bogdanov's self-defense. Both of the vans were searched several months after the murder. In closing, the State argued that NK "might have been" in one of the vans for a brief period of time that morning. RP at 1678.

Because the nexus between the contents of the vans and Bogdanov's self-defense claim is purely conjectural, the contents of the vans were irrelevant. But the trial court admitted the aforementioned evidence over Bogdanov's objections. Bogdanov did not appeal this ruling. The State followed the trial court's ruling, and that ruling has not been challenged on appeal. Thus, the State's introduction of the challenged evidence was not improper.

Moreover, Bogdanov has not met his burden of showing that such conduct was prejudicial in the context of the entire trial. To meet his burden, Bogdanov argues that the knife, the pair of handcuffs, and the shirt with a spot of blood on it was used to make him look bad.

Bogdanov also claimed he was prejudiced when the State argued he could have used the pocketknives or other things instead of taking NK's life.

The State argued, outside the presence of the jury, that the handcuffs, pocketknife, or other things around could have been used as an alternative to deadly force. The jury was not exposed to that argument so it is not considered when determining whether any misconduct affected the jury's verdict.

The State did not suggest to the jury that the evidence was used in the crimes. The State's argument in closing was merely,

> Ladies and gentlemen, you've heard a lot about these searches of these vans that end up with not a lot of evidence. First of all, that is consistent with the testimony that you heard. What happened to [NK] didn't happen in those vans. [NK] might have been a passenger in one of those vans for a brief period of time that morning, but that was six months before those searches.
>
> So not finding her DNA in those vans is consistent with the evidence.

RP at 1678.

Any suggestion that Bogdanov could have used the pocketknives or handcuffs instead of the phone charging cable to restrain NK was at most, implicit, not explicit. And Bogdanov underscored the weakness of that testimony in closing by emphasizing the vans were not where the self-defense took place, and that evidence from the vans was not tied to the incident by DNA analysis or testimony. Under these circumstances, we hold that Bogdanov did not meet his burden of showing that the State committed misconduct or that the State's presentation of evidence from the van sufficiently prejudiced Bogdanov to warrant reversal.

C. *Ineffective Assistance of Counsel*

Bogdanov argues that he received ineffective assistance of counsel because his counsel failed to acquire an expert witness "to testify about the [m]ale-female tran[s]fer characteristics." SAG at 3. We disagree.

"'[G]enerally the decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics.'" *Matter of Lui*, 188 Wn.2d 525, 545, 397 P.3d 90 (2017) (internal quotation marks omitted) (quoting *In re Morris*, 176 Wn.2d 157, 171, 288 P.3d 1140 (2012)). But "depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant." *State v. A.N.J.*, 168 Wn.2d 91, 112, 225 P.3d 956 (2010).

To establish that counsel was deficient for failing to call an expert witness, the defendant must present supporting declarations from relevant expert witnesses to show what such experts would have testified to. *See Matter of Davis*, 188 Wn.2d 356, 376, 395 P.3d 998 (2017). Without such evidence, evaluating prejudice resulting from the failure to retain such experts is highly speculative. *Id.* When the claim is based on matters outside the trial record, we decline to consider such claims. *State v. Linville*, 191 Wn.2d 513, 525, 423 P.3d 842 (2018).

Even assuming that Bogdanov could show that the failure to call an expert to testify about the consequences of gender transitioning was deficient, he cannot show prejudice. Bogdanov does not present any evidence of what an expert witness would have said that could have changed the outcome of his trial. Consequently, any evaluation of prejudice would be

highly speculative. As such, we decline to consider this argument as it involves matters outside the trial record.[9]

D. *Right to Present a Defense*

Bogdanov argues that the trial court erred by ruling that he could not admit evidence that NK had previously been shot. We disagree.

Defendants have a federal and state constitutional right to present a defense. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. We engage in a two-step review of evidentiary rulings that implicate the defendant's constitutional right to present a defense. *State v. Arndt*, 194 Wn.2d 784, 797, 453 P.3d 696 (2019). We first review whether the trial court abused its discretion regarding the evidentiary ruling. *Id.* Then, we review de novo whether that ruling violated the defendant's right to present a defense. *Id.* Where the trial court's ruling is manifestly unreasonable or based on untenable grounds, it abuses its discretion. *Id.* at 799.

"[W]hen assessing a self-defense claim, the trial court applies both a subjective and objective test." *State v. Read*, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002). Evidence that shows facts and circumstances known to the defendant that go to the reasonableness of the defendant's apprehension of danger is admissible. *State v. Burnam*, 4 Wn. App. 2d 368, 376, 421 P.3d 977 (2018). "It is well established that a victim's specific acts of violence, *if known by the defendant*, are admissible when the defendant asserts self-defense." *State v. Duarte Vela*, 200 Wn. App. 306, 326, 402 P.3d 281 (2017).

[9] We note that the appropriate way to raise an issue on appeal that requires additional evidence or facts not in the existing trial record is through a personal restraint petition. *Linville*, 191 Wn.2d at 525.

Where a trial court excluded evidence that the victim was associated with a homicide, Division Three held that it did not violate the defendant's right to present a defense because "[t]he mere fact that Ms. Sweet dated a man accused of murder and hid the murder weapon does not strongly imply that Ms. Sweet was violent. The prejudicial effect of excluding this questionable evidence is minimal." *Burnam*, 4 Wn. App. 2d at 378.

Here, Bogdanov attempted to introduce the evidence that NK had previously been a gunshot victim. Bogdanov's counsel explained that the testimony would have been that NK saw Bogdanov place his gun in the front. Then, NK disclosed to Bogdanov that "she did not like guns necessar[il]y, but she was okay with it because she had been shot." The trial court ruled that the evidence was not admissible because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

In Bogdanov's SAG, he alleges additional facts that were not presented to the trial court about NK being a gunshot victim, including that NK was previously shot because she tricked someone about her gender identity. Apparently, Bogdanov claims to have learned the aforementioned fact and much more about NK during his time in jail. But because the additional factual allegations mentioned in his SAG were not before the trial court, we will not consider them in determining whether the trial court abused its discretion.[10]

We hold that the trial court did not abuse its discretion in excluding evidence that NK had previously been shot. The fact that NK had been shot does not suggest that she had the propensity for violence. As such, that fact is irrelevant. Even assuming that such evidence is

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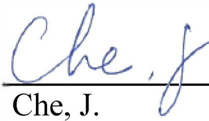
[10] We cannot consider matters outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

marginally relevant, its probative value is substantially outweighed by the danger of unfair prejudice as it tends to create the illogical inference that victims of crime have a propensity for violence. Here, Bogdanov was able to advance his defense theories. We hold the exclusion of irrelevant evidence did not violate Bogdanov's right to present his defense.

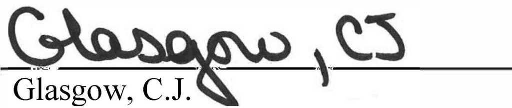
CONCLUSION

We hold that the trial court's self-defense instruction was adequate. We remand for the trial court to strike the community custody provision imposing supervision fees. We reject each of Bogdanov's remaining arguments. And we otherwise affirm.

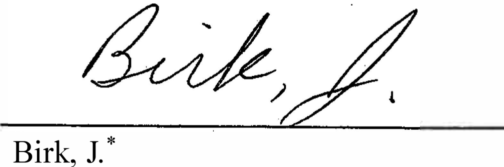


Che, J.

We concur:



Glasgow, C.J.



Birk, J.[*]

[*] Sitting in Division II pursuant to RCW 2.06.040 by order of the Associate Chief Justice.

CERTIFICATE OF SERVICE

I, Marie Trombley, hereby certify under penalty of perjury under the laws of the State of Washington, that August 24, 2023, I electronically served, a true and correct copy of the Petition for Review to: Clark County Prosecuting Attorney at cntypa.generaldelivery@clark.wa.gov and to David Bogdanov c/o Marie Trombley.

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August 24, 2023 - 3:11 PM

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Appellate Court Case Title:	State of Washington, Respondent v David Y. Bogdanov, Appellant
Superior Court Case Number:	19-1-03403-3

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