71912-2

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Court of Appeals
Division I
State of Washington

No. 71912-2-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

TRAVIS LEE LILE, Appellant.

BRIEF OF RESPONDENT

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2. Whether the trial court abused its discretion in denying the motion to sever two of the counts regarding the assault on the officer and resisting arrest where the arrest related to the two assaults that had occurred just minutes before.

3. Whether the trial court abused its discretion in denying defendant's request to impeach one assault victim with allegations of domestic harassment involving the victim's attempt to view his girl-friend's text messages where the victim was a complete stranger to the defendant.

4. Whether the trial court abused its discretion in permitting the state to cross examine the defendant as to whether he considered himself a warrior where he had testified to his military experience and had asserted that he punched one of the victims because he had been very frightened by the victim and the victim's friend's aggression towards him and where he had a tattoo on his back that said "eternal warrior" in Latin.

5. Whether the prosecutor's examination of the detective and cross examination of defendant's friend impugned defense counsel where the import of the questioning, and what was heard by the jury, was that the friend had gotten together with another defense witness and gone over what happened at the scene, when they were meeting with defense counsel, and that the friend put off meeting with the detective, despite initially being willing to meet, and even though he met with defense counsel.

6. Whether the defendant has adequately briefed an issue regarding the prosecutor's reference in closing to testimony that wasn't actually admitted to warrant review.

7. Whether the trial court abused its discretion in denying defendant's proposed general self-defense instructions where the victim of the assault was a police officer and where a defendant is not entitled to general self-defense in an arrest context, even though the defendant claimed he didn't know that the person was an officer.

8. Whether reversal is warranted under the cumulative error doctrine where defendant has failed to demonstrate how any errors affected the outcome of the trial.

C. FACTS

1. Procedural facts

Appellant, Travis Lile, was charged on Feb. 21, 2013 with Assault in the Second Degree, count I, in violation of RCW 9A.36.021; Assault in the Fourth Degree, counts II and III, in violation of RCW 9A.36.041; Third Degree, count IV, in violation of RCW 9A.36.031, and Resisting Arrest, in violation of RCW 9A.76.040 for his actions that occurred on February 16th, 2013. CP 6-8. The information was amended about a month before trial to eliminate count III that alleged Taylor Powell as a victim after Powell stated at an interview he did not think that Lile was the one who hit him. CP 66-68; 2RP 191-93 . Lile was tried by a jury and found guilty of all four counts of the amended information. CP 533-34. The court imposed a standard range sentence, which is not contested on appeal. CP 534-35.

2. Substantive Facts

While on patrol in downtown Bellingham around 11:30 p.m. on February 16, 2013, Officer Woodward heard yelling and saw a commotion on a sidewalk outside some bars near Railroad and Chestnut Avenues. 2RP 92-96. He was in his patrol car, was dressed in full uniform which had "Police" marked on it on the front and back, and had bright flashing lights on. 2RP 94-95, 125. While in the car, about 40 yards away, he saw a male in a blue plaid shirt, Lile, punch a guy, Rowles, in the face and then turn and punch another guy, Powell. 2RP 96-100. He didn't see either Rowles or Powell do anything aggressive towards Lile: it looked like Rowles was backing up when he got punched and Powell was just standing there. 2RP 101-02, 240. It was about five seconds from the time he saw them to the time Lile punched Rowles. 2RP 101-02. Woodward got out of the car and then saw Lile turn around and punch a female, Millman. 2RP 100. Millman, who initially had been about 10 feet away from Lile, had taken one or two steps towards Lile with her hands raised, but not in a threatening manner, had stopped, and was yelling, "stop, stop fighting!" when Lile took two to three steps towards her and punched her in the face. 2RP 101-04, 239-41. Millman went down. 2RP 104. No one had been actively engaged with Lile at the time Lile hit Millman, and Woodward had been able to observe them for about five seconds before

Lile hit Millman. 2RP 136. The punch knocked out one of Millman's teeth, left another dangling, which she ended up losing, and fractured her jaw. 2RP 133, 260-63. Lile did not dispute the injury element of the second degree assault. 2RP 1070.

Woodward ran towards Lile's location as Lile started to walk away fast, up the hill.2RP 105-06, 110. Another male was pulling Lile, either by arm or clothes away from the incident. 2RP 238. When he was about 20 feet away, Woodward said, "Stop, police. You're under arrest." 2RP 106, 110. Lile turned around, and started walking backwards with his hands up. 2RP 111. As he went to grab Lile, he made eye contact with Lile and said, "You're under arrest." 2RP 106-07. Woodward grabbed the front of his clothes, but Lile knocked his hand away and took off running. 2RP 111. Only a few feet behind, Woodward chased after Lile, continuing to yell, "stop, police." 2RP 114-15. Lile ran across the street, was almost hit by two passing cars, and then tripped and fell down near some parked cars. 2RP 116. It was less than a minute from the time Woodward saw Lile hit Millman to the time he caught up to Lile. 2RP 174-75.

While Lile was down, Woodward grabbed him and jumped on his back and tried to keep him on the ground while telling him, "Police, get on the ground" and that he was under arrest. 2RP 118-19. Lile got back up though while Woodward tried to hold on to him and struck Woodward on

the right side of his face, causing his glasses to fall off and land about 10 feet away. 2RP 119-20, 124. Woodward struck back at Lile, and was able to force him to the ground. 2RP 125. Woodward told Lile to put his hands behind his back in order to handcuff him, but Lile continued to resist and tried to get up. 2RP 126. After about two minutes of his resisting, Woodward tried to apply a lateral visceral neck restraint to get Lile to comply, but Lile tucked his chin. 2RP 127, 228, 1022-26.

Another officer arrived and observed Lile screaming and fighting violently. 2RP 354. The officer also told Lile they were police, that he needed to stop resisting. 2RP 353-54. Lile continued to resist, yelling "police brutality." 2RP 354, 514-15. Eventually the officer had to hit Lile a couple times to get him to put his hands behind his back to be handcuffed. 2RP 130, 358. At some point after that officer arrived and after Lile was under arrest, Lile said something about not knowing they were police and that he wasn't resisting. 2RP 129, 223. Lile smelled of alcohol. 2RP 138-40. Woodward acknowledged that Lile could have gotten the injuries to his face when he was trying to get Lile to comply by forcing his head into the ground, because he didn't see any injuries on Lile's face when he first encountered him. 2RP 231-34.

Earlier that night Taylor and Alyssa Powell met up with Rowles, a co-worker of Taylor's, and Rowles' girlfriend of a couple months,

Millman. 2RP 268, 4990-91. Millman, a supervisor at a local bank, had never met the Powells before. 2RP 267-69. The Powells and Millman and Rowles went to a bar and a nightclub in downtown Bellingham. The Powells, who had been drinking before meeting up with Rowles and Millman, had significantly more to drink than Rowles or Millman. Millman had about a beer and a half over the course of an hour and half, and then part of a mixed drink at the club. 2RP 270-75. Rowles had 2-3 beers total, but Alyssa was pretty intoxicated and stumbled so much as they left the club Millman had to help her walk. 2RP 275-76, 496-500.

As they walked down the hill on the sidewalk, Taylor and Rowles were about 10-15 feet behind Millman and Alyssa. 2RP 276, 500. Millman passed Lile and his friends, who all appeared to have been drinking and were swaying back and forth. 2RP 502. It appeared to Rowles that Millman bumped Lile with her purse or elbow accidentally as they passed. 2RP 502-04. Lile yelled some profanities at Millman and Alyssa, including calling one of them a cunt. 2RP 278-82. Alyssa said "fuck you," Millman turned around and saw Lile staggering backwards up the hill. 2RP 283-84, 502-05. Lile's friends were further up the hill. 2RP 502. Lile turned around and ran into Rowles, bumping shoulders, as Rowles walked down the hill. 2RP 284-85, 505-06. Lile said some more profanities, Rowles continued down the hill away from Lile when Lile

yelled, "Hey!" 2RP 506-07, 535, 563-64. When Rowles turned around, Lile punched Rowles in the jaw and then punched him a couple more times. 2RP 285-87, 507-08. Rowles shoved Lile and then got punched some more and shoved to the ground. Rowles got up and pushed Lile who fell down, but got back up. 2RP 286-88, 508-09. Rowles didn't throw any punches at Lile. 2RP 289. Taylor was scuffling with one of Lile's friends while this was going on. 2RP 288-89. Rowles went to assist Taylor and heard Millman yelling, "stop, stop!" 2RP 509.

Millman was about 20 feet away when she saw the altercation and started walking briskly back up the hill, yelling at them to stop fighting. 2RP 290. She slowed when she got closer, and stopped about five to seven feet away because she was scared she might get hit. 2RP 290-91, 510. At this point Rowles was off to the side and Taylor was scuffling with the other guy. 2RP 291. She continued to say stop, and while she was stationary and no one was doing anything aggressive towards Lile, Lile took the steps towards her and punched her. 2RP 292-93. Millman was on the ground when she came to. 2RP 294-95. Both Rowles and Millman heard someone say "Bellingham Police." around that time. 2RP 294, 513.

Due to her consumption of alcohol, the only thing Alyssa remembered about the incident was Millman asking her if she had any

teeth left. 2RP 347. Taylor admitted he'd had a bit to drink that evening and that he didn't remember much until the altercation because of it. 2RP 407-09, 414. All he remembered about the altercation was Rowles and Lile yelling and shoving, and his getting hit by someone other than Lile and his pushing the guy away. 2RP 410-12. He heard Rowles yell, "He hit Amanda!" 2RP 412-14. Taylor and Rowles followed the officer chasing Lile to make sure Lile was arrested. 2RP 513-14.

Lile testified that he and his friends had been drinking at a party earlier in the evening and then walked downtown to go to a bar. 2RP 864-88. He admitted he exchanged some words with Millman and Alyssa. 2RP 867. He testified he got struck in the shoulder and then one guy was in his face and another to his right. 2RP 867-68. One of the guys had his hands at his waist, Lile took a step back and then hit the guy because Lile was very frightened and the guys were approaching him aggressively, and then the fight broke out. 2RP 868-70. He didn't remember hitting anyone else or hitting Millman. 2RP 871. He testified he ran away because he wanted out of the situation and that he didn't know the police were there. 2RP 872. Lile admitted on cross that it was possible that he had gotten angry during the fight and possible that he had stepped forward before hitting Millman. 2RP 898-900. He also testified he didn't know why he

had lost his memory of the incident and agreed his judgment had been impaired a little bit. 2RP 912, 918.

Lile's friend Duff testified that Rowles "shoulder checked" Lile, that one of the guys was moving towards Lile and the other was behind Lile when Lile punched the guy, and then the fight broke out. 2RP 668-73. He testified that Lile's friend Owens pulled Lile away after about five to six seconds. 2RP 673. He admitted Lile's punch landed and that he didn't see any specific punches thrown at Lile. 2RP 674, 719-20. He also admitted telling the detective that no one threw punches at Lile even when Lile was throwing punches. 2RP 720.

Owens testified Rowles shoulder-checked Lile as Lile was walking backwards up the hill after having had words with Millman and Alyssa. Ex.34. He heard Lile say, "So, it's like that, is it?" 2RP 17. Owens testified he looked away to get Duff to help and when he turned back the fight had already started because he thought Lile had been shoved. 2RP 17-18. He testified that he didn't see who threw the first punch but was pretty sure it was Lile. Ex. 34. He testified he saw two guys surrounding Lile and that the three of them were all swinging, though he didn't see anyone get hit. Ex. 34. He admitted on cross that he didn't see anyone punch Lile and that he didn't actually see anyone shove Lile. 2RP 46. He admitted he told the detective that the guys got in Lile's face a little, not

that they attacked Lile, and that Lile was irritated by the shoulder check. 2RP 50-51.

D. ARGUMENT

1. The court did not abuse its discretion in denying the affidavit of prejudice as untimely because the court had previously made a discretionary decision regarding continuing the trial date.

Lile asserts that the Judge Uhrig erred in denying his motion to recognize filing of an affidavit of prejudice against him claiming that the granting of an uncontested continuance motion is not a discretionary ruling under the statute and under the local customs of the trial court. The granting of a continuance of a trial date is discretionary with the trial court even if the other party agrees to the continuance. Even if the local norms superseded the statutory provisions, the judge here noted that he had denied agreed motions to continue trial dates in the past, so his decision was still discretionary. The judge therefore did not abuse his discretion in denying the motion as untimely.

The statutory provision regarding affidavits of prejudice provides:

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge: PROVIDED, *That such motion and affidavit is filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the*

> *case*, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, *and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso*; …

RCW 4.12.050(1) (emphasis added). A party has a mandatory right to one affidavit of prejudice if the affidavit is timely filed. State v. Parra, 122 Wn.2d 590, 594, 859 P.2d 1231 (1993). In order to be entitled to a change of judge, the party must file a motion and affidavit of prejudice. In re Recall of Lindquist, 172 Wn.2d 120, 129, 258 P.3d 9 (2011). The party is to set forth in the affidavit that the judge is prejudiced against the party. Id. If a party fails to file the requisite motion and affidavit of prejudice, the affidavit of prejudice is subject to dismissal. Id.

A party is not entitled to a change of judge if the affidavit is untimely. An affidavit of prejudice is timely filed if it is filed before a discretionary decision is made by the judge. Parra, 122 Wn.2d at 594. A judge *may* continue a trial date to a specified date upon written agreement of the parties. CrR 3.3(f)(1) (emphasis added). "Grant or denial of a continuance is a discretionary ruling because the court must consider various factors, such as diligence, materiality, due process, a need for an orderly procedure, and the possible impact of the result on the trial." In re

Lindquist, 172 Wn.2d at 130 (quoting State v. Guajardo, 50 Wn. App. 16, 19, 746 P.2d 1231 (1987)); *see also*, State v. Dennison, 115 Wn.2d 609, 620, 801 P.2d 193 (1990) (grant or denial of continuance is an example of a ruling that involves the exercise of the trial court's discretion). Continuances are discretionary with the trial court and are reviewed only for manifest abuse of discretion. In re Lindquist, 172 Wn.2d at 130.

Lile asserts that his request for a continuance falls within the language of the statute that states that arranging the calendar or setting matters for hearing are not discretionary acts under the statute. A similar argument was made in In re Lindquist. In that case, the petitioners did not participate in a scheduled telephone conference during which the other party informed the judge of a conflict regarding a scheduled hearing date. In re Lindquist, 172 Wn.2d at 126. A continuance would have extended the hearing beyond a statutory deadline, and the judge denied the request. Id. at 126. After that decision the petitioner filed an affidavit of prejudice against the judge who denied the continuance request. Id. The judge dismissed the affidavit as untimely, as well as denying based on the requisite motion not having been filed. Id. at 127. On appeal, the petitioner argued that the judge's decision to deny the continuance request was not discretionary because the hearing date was dictated by statutory provisions. Id. at 130. The court affirmed the dismissal of the affidavit

despite the mandatory language of the statute, finding that continuances were discretionary. Here, the court rule language is discretionary, a judge *may* grant a continuance of the trial date upon written agreement of the parties. The judge's decision to grant the continuance request was discretionary.

Lile was arraigned on March 1, 2013 and a trial date of May 20, 2013 was set. Supp CP __, Sub Nom 12, 13. Lile had requested a trial date in October, but the prosecutor objected. Supp CP__, Sub Nom. 12, 13. Defense filed another couple of motions for continuances of varying lengths, despite the prosecutor's objections to some of them, and ultimately obtained a trial date of October 21, 2013. Supp CP __, Sub Nom. 16, 19, 20, 21, 24, 31, 33, 34.[1] On Oct. 9, 2013, Judge Garrett again continued the trial date to January 13, 2014 despite the prosecutor's concerns regarding the continuances. Supp CP __, Sub Nom. 36, 37. On January 13, 2014 at the status hearing Judge Uhrig granted a one week continuance of that hearing. Supp CP __, Sub Nom. 47. On January 15, a trial setting order was entered setting the matter on for February 3rd for trial and January 22nd for status. Supp CP ___, Sub Nom. 48.

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[1] In a memorandum in support of one of the continuance requests, defense acknowledged that the "matter of a request for a continuance is discretionary with the court." Supp CP__, Sub Nom. 20 at 2.

On January 22, 2014, about 8 months after the original trial date, defense counsel informed Judge Uhrig that the prosecutor had agreed to set the case over one week, with a new trial date of February 10th, informing the court that it was what was known as a "Super Bowl continuance." 1RP 3. At the next status conference, before Judge Uhrig again, defense counsel indicated that the order setting dates previously agreed upon would be filed. Supp CP __, Sub Nom. 51. On February 3rd, the order setting the trial date for February 10th was signed by Judge Uhrig and filed. Supp CP __, Sub Nom 53, 53A; 1RP 5.

A couple days later at defense motion to sever counts for trial, defense counsel informed Judge Uhrig that his client had filed an affidavit of prejudice against Judge Uhrig that morning. 1RP 6. No affidavit of prejudice signed by Lile appears in the court docket, however. Defense counsel did file a motion to recognize filing of an affidavit of prejudice, and his declaration in support thereof indicates that he had been instructed to file an affidavit of prejudice by his client and referenced a declaration of prejudice filed by his client. Counsel's affidavit, however, did not specifically allege that Judge Uhrig was prejudiced against his client and therefore could not obtain a fair trial. CP 46-47.

The prosecutor objected to the filing of an affidavit of prejudice as untimely on the basis that the judge had made a discretionary decision in

granting the continuance on January 22nd, even though the continuance had been agreed. 1RP 7. Defense counsel reminded the court it had been a Super Bowl continuance, that it had been an agreed continuance. 1RP 9-11. The prosecutor noted that even when a continuance is agreed, the judge still has the discretion to deny it. 1RP 11-13. Judge Uhrig denied the affidavit, finding that his granting of the continuance was discretionary, noting that he had denied agreed continuances in the past, although infrequently. 1RP 13-14.

Judge Uhrig then proceeded to address a defense motion to continue the trial date and the defense motion to sever counts. The judge deferred the continuance until a firm date could be worked out and denied the motion to sever. 1RP 15-34. Judge Uhrig did not preside over the trial, Judge Garrett did. CP 204.

Lile contends that because the prosecutor agreed to the one week continuance and the request was made a status hearing, that the judge's decision was not discretionary. However, in Dennison, the parties had stipulated to a continuance, and the reviewing court still concluded that the judge's decision regarding the continuance was discretionary, and therefore the affidavit of prejudice untimely. Dennison, 115 Wn.2d at 620, n10; *see also*, Parra, 122 Wn.2d at 603 ("… matters relating merely to the conduct of a pending proceeding, or to the designation of the issues

involved, *affecting only the rights or convenience of the parties, not involving any interference with the duties and functions of the court*, may be the subject of a stipulation.") (emphasis added).

Moreover, Judge Uhrig indicated that he did not always grant continuances that were agreed. The fact that the prosecutor agreed to the continuance does not render the judge's decision non-discretionary. The case had been continued eight months beyond the original trial date, and the prosecutor had objected to some of the previous continuances. The reason given for the continuance request was that it was the Super Bowl. Given these circumstances, this was a case in which the judge might have decided not to grant the continuance even though it was agreed.

Lile relies upon State v. Dixon, 74 Wn.2d 700, 446 P.2d 329 (1968), in asserting that the continuance here was not discretionary. Dixon did not involve the continuance of a trial date, but the resetting of a date for a motion to suppress to an earlier date than that originally set by the defendant. In having its motion to renote the hearing date for an earlier date granted, the State essentially chose a different judge to hear the motion given the way the judicial rotation calendar worked in King County at the time of the case. Ultimately the court issued the writ of prohibition regarding the judge's denial of the affidavit of prejudice because the court believed it would be "manifestly unfair to compel

petitioner to expend, mayhaps uselessly, his motion and affidavit of prejudice prior to the conclusion of the hearing" regarding the state's motion to renote because the state's motion to renote created the uncertainty regarding which judge would preside over the hearing on the merits. Id. at 703. The court also commented that it believed the resetting of the petitioner's motion pursuant to the state's motion fell within the language of RCW 4.12.050 regarding the arrangement of the calendar or the setting of an action or motion for hearing. Id.

The hearing at issue in Dixon was not the *continuance* of a trial date, and therefore the provision in CrR 3.3(f)(1) did not apply. The continuance granted here fell within that discretionary rule and did not involve just the setting of a matter on the calendar, but impacted the duties and administration of the court. If the statute meant to have included continuances of trial dates, it could have said so, and subsequent caselaw makes clear that the continuance of a trial date is a discretionary decision.

In addition, it is unclear that the motion and affidavit filed by defense counsel satisfied the requirement of filing an affidavit stating that the defendant or counsel believed that the judge was prejudiced. Defense counsel referenced a declaration of his client, Lile, however none appears in the record.

While the statute provides for a mandatory right assuming compliance with its other provisions, the trial here was not presided over by Judge Uhrig, the judge that Lile sought to remove. While Judge Uhrig did decide Lile's motion to sever the counts for trial, such decision was clearly within the court's discretion, as argued herein subsequently, and any judge likely would have made the same decision given the facts of this case. Reversal of the trial would not be warranted where the judge sought to be removed did not preside over the trial.

2. The trial court did not abuse its discretion in denying the motion for severance of counts where some of the evidence of regarding the counts would have been admitted as to the other counts.

Lile next asserts that the trial court erred in denying his motion to sever counts I and II regarding the assaults on Rowles and Millman from counts III and IV regarding the assault on the officer and resisting arrest. The trial court did not abuse its discretion in denying the severance motion because Officer Woodward was a witness to the assault on Millman, and the reason for the officer's pursuit and subsequent arrest of Lile, which occurred within minutes of the assaults, would have been at issue regarding counts III and IV. In addition, the assaults in Counts I and II were the basis for the lawful arrest of Lile. Moreover, Lile waived the

issue regarding severance when he failed to reassert his motion at the close of evidence.

Trial courts may properly join multiple offenses for trial pursuant to RCW 10.37.060 and CrR 4.3. The joinder rule under CrR 4.3 is construed broadly to promote conservation of judicial and prosecution resources. State v. Bryant, 89 Wn. App. 857, 864, 950 P.2d 1004 (1998), *rev. den.*, 137 Wn.2d 1017 (1999). Offenses properly joined under CrR 4.3(a) shall be consolidated for trial unless the court determines that severance will promote a fair determination of the defendant's guilt or innocence for each offense. CrR 4.3.1; CrR 4.4(b); Bryant, 89 Wn. App. at 864.

a. waiver

Lile failed to preserve the denial of his severance motion for appellate review by failing to renew his motion at the close of evidence. If a defendant moves for severance pretrial but fails to renew the motion before or at the close of all evidence, the defendant waives the issue of severance and may not raise it on appeal. CrR 4.4(a)(2); State v. McDaniel, 155 Wn. App. 829, 859, 230 P.3d 245, *rev. den.*, 169 Wn.2d 1027 (2010); Bryant, 89 Wn. App. at 864-65. Lile did not renew his

motion for severance before or at the close of all evidence, therefore he is precluded from raising it on appeal.

b. trial court did not abuse its discretion in denying the severance motion

Even if this Court were to address the merits of this issue, Lile has failed to meet his burden to show that joinder in this case was so manifestly prejudicial as to outweigh the need for judicial economy. The defendant seeking severance has the burden of demonstrating that joinder is so manifestly prejudicial as to outweigh concerns for judicial economy. State v. Russell, 125 Wn.2d 24, 135, 882 P.2d 747 (1994); State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). The failure of the trial court to sever counts is reversible only upon a showing that the court's decision was a manifest abuse of discretion. Bythrow, 114 Wn.2d at 717-18. "In order to support a finding that the trial court abused its discretion in denying severance, the defendant must be able to point to specific prejudice." Id. at 720.

In determining whether the denial of a motion to sever amounts to manifest abuse of discretion, the reviewing court must balance the potential prejudice against the following prejudice-mitigating factors: (1) the jury's ability to compartmentalize the evidence, (2) the strength of the State's evidence on each count; (3) the clarity of defenses as to each

count; (4) the court's instruction to the jury to consider each count separately; and (5) the cross-admissibility of the evidence of the offenses charged even if not joined for trial. State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993).

Evidence of other misconduct is admissible under ER 404(b) if it is res gestae of the crime. Under this permissible purpose, evidence of other bad acts is admissible in order to complete the story or "to provide the immediate context for events close in time and place to the charged crime." State v. Warren, 134 Wn. App. 44, 62, 138 P.3d 1081 (2006), *aff'd on other grounds*, 165 Wn.2d 17 (2008), *cert. den.*, 129 S.Ct. 2007 (2009). "A defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows the defendant's bad character, thus forcing the State to present a fragmented version of the events." State v. Lillard, 122 Wn. App. 422, 431, 93 P.3d 969 (2004), *rev. den.*, 154 Wn.2d 1002 (2005).

Here, much of the evidence was cross-admissible between the two sets of counts. Officer Woodward would have had to testify in both trials regarding the events of that night if counts I and II had been severed from counts III and IV for trial. Officer Woodward was a witness to and would have had to testify regarding the assault of Millman in count I. He also

would have testified regarding his attempt to stop Lile, and Lile's subsequent flight from the scene, all res gestae of the prior assaults, and for purposes of identifying Lile as the person who assaulted Millman. He would have also testified to the reason for the arrest, the prior assaults, in order for the state to show that his attempt to and subsequent arrest of Lile was lawful regarding counts III and IV. The jury was instructed to decide each count separately. CP 466 (Inst. 7). The defenses as to each count were distinct: Lile asserted self-defense against the assault charges involving Millman and Rowles and was not permitted to argue self-defense per se regarding the assault on the officer. Even assuming the strength of the State's cases differed between the two sets of counts, Lile failed to demonstrate that joinder was so manifestly prejudicial as to outweigh concerns for judicial economy because the other mitigating factors significantly reduced the prejudicial nature of having the counts all tried together. Judge Uhrig did not abuse his discretion in denying the motion to sever the counts.

3. The trial court did not abuse its discretion in ruling the prior allegations of domestic harassment inadmissible as impeachment evidence.

Lile originally moved to have evidence regarding domestic harassment and disputes admitted under ER404(b). The trial court ruled

them inadmissible under ER404(b). Lile does not appear to challenge that ruling[2], but instead asserts that the prosecutor opened the door to such evidence when Rowles testified that he hadn't been in too many fights. The trial court did not abuse its discretion in finding the proffered evidence that Rowles had grabbed his girlfriend's phone and wrist and thrown her down on the bed as minimally relevant to impeaching Rowles' testimony that he didn't get into too many fights where the incident herein involved total strangers.

a. impeachment

The right to cross-examine and to impeach the credibility of a complaining witness against a criminal defendant is a fundamental constitutional right. Wash. Const. Art 1, §22 (amend 10), State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The right to present evidence on one's behalf is not absolute however, and does not guarantee the right to present irrelevant or inadmissible evidence. State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996); *accord*, State v. O'Connor, 155 Wn.2d 335, 348-49, 119 P.3d 806 (2005). It is within a trial court's discretion to refuse to allow cross-examination that will only remotely tend to show bias or prejudice of the witness, or where the evidence is

[2] Thus, the State has not including briefing regarding admissibility of prior bad acts under ER 404(b).

merely argumentative. State v. Roberts, 25 Wn. App 830, 834, 611 P.2d 1297 (1980). A court's decision to limit cross-examination is reviewed for manifest abuse of discretion and should only be reversed "if no reasonable person would have decided the matter as the trial court did." Connor, 155 Wn.2d at 351.

The proponent of impeachment evidence must show that the evidence is relevant to the witness's veracity and to the facts at issue at trial. O'Connor, 155 Wn.2d at 350-52. Relevant evidence is evidence that tends 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. If relevant, the court must then balance the defendant's right to introduce the evidence "against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process." State v. McDaniel, 83 W*rev. den.,* 131 Wn.2d 1011 (1997)n" \s "WSFTA_48431efac3bf4e1f82d4fb2ecd468f6f" \c 2 State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). *rev. den.*, 131 Wn.2d 1011 (1997).

Under general rules of evidence, specific instances of conduct of a witness cannot be proved through extrinsic evidence in order to attack the witness's credibility. ER 608(b). ER 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule ER 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

ER 608. A witness cannot be impeached on matters that are collateral to the issues at trial. State v. Oswalt, 62 Wn.2d 118, 120-21, 381 P. 2d 617 (1963); State v. Alexander, 52 Wn. App. 897, 901, 765 P.2d 321 (1988). Not every instance of misconduct is probative of a witness's truthfulness or untruthfulness. O'Connor, 155 Wn.2d at 350.

Lile attempted to have these incidents admitted under ER 404 (b), however, at trial when the court inquired as to what evidence he wanted to ask about, counsel stated: "Isn't it true you have a harassment order for pushing somebody down on the bed, getting control over them, wouldn't you call this a fight?" 2RP 545. Ex. 21, which was the evidence defense counsel proffered, relates solely to Whatcom County Superior Court Cause no. 12-2-02787-7, a petition for an order of protection. Judge Garrett reviewed the documents pertaining to that incident, which in part alleged that Rowles grabbed for his girlfriend's phone, grabbed her wrists and kept her on the bed. Ex. 21. The judge determined that the accusation

pertained mainly to Rowles' interfering with his girlfriend's text messages and email account, and therefore wasn't similar enough to impeach Rowles with it. 2RP 548-49, Ex. 21. She specifically noted that she did not interpret the protection order allegations as accusing him of fighting. 2RP 549. Rowles' prior harassment of his ex-girlfriend, one related mainly to his trying to view her texts and emails, does not make it more or less likely that he started a fight with a person that he had never met before. The trial court did not abuse its discretion in declining to admit this evidence because it was collateral and not relevant to the issues at trial.

Lile asserts the harassment evidence was admissible under State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980). That case, however is distinguishable. York was a case in which the state presented testimony from the sole witness to the delivery of drugs, an undercover investigator for the sheriff's office. The prosecutor presented testimony regarding the investigator's work in the military and his undercover work for other entities. Defense sought to cross-examine the investigator with evidence that he had been fired from a position with another law enforcement agency because of irregularities in his paperwork procedures and unsuitability for the job. Id. at 34. The defense had sought to show through some other witnesses that the investigator had never been present

at the location where the drug buy was alleged to have occurred, and that he had fabricated the incident because the investigator had been penniless and unemployed when he arrived in the county and had been paid $20 per undercover drug buy. Id at 35. Defense argued that the evidence of the investigator's firing supported this defense theory. The court found the trial court had abused its discretion in precluding the evidence because the investigator was the only witness to the buy, and his credibility, which the State had argued had not been impeached, was crucial to the defense case. Id. The court concluded:

> … as a matter of fundamental fairness, the defense should have been allowed to bring out the only negative characteristics of the one most important witness against York. If the elicited testimony had no substantial bearing upon the witness's credibility, we would not be offended by the trial court's action.

Id. at 37.

Here, there was more than one witness to the fight. In addition to the officer, which Lile discounts because he didn't see the start of the fight, there was also Millman[3]. There was also other impeachment evidence. Defense counsel impeached Rowles regarding the amount of drinking the group had engaged in prior to the incident, the different statements he had made regarding the incident, including stating that Lile

[3] The Powells were also present, but given their lack of memory at trial and level of intoxication at the time, the State is not relying upon their testimony regarding the start of the incident.

had punched Taylor Powell although he never saw that, and about what he had testified to that was not in his earlier statement. 2RP 521-24, 554-61. In this regard, the circumstances more closely resemble those in State v. Martinez, 38 Wn. App. 421, 424-25, 685 P.2d 650, *rev. den.*, 102 Wn.2d 1020 (1984), in which the appellate court upheld the denial of a request to cross examine the victim with an 18 year old felony conviction because an abundant amount of other impeachment evidence had been presented and there was another witness to the incident. Moreover, here the prosecutor did not argue that Rowles had not been impeached and was a stellar witness as the State did in York.

Lile also asserts that the judge should have permitted him to cross examine Rowles with this evidence because she permitted the prosecutor to cross examine him regarding the "warrior" tattoo evidence. However, she made her ruling regarding the cross examination of Rowles prior to Lile testifying and prior to any issue regarding the defendant's being a "warrior" having arisen.

b. opening the door

Lile asserts that the door was opened to this otherwise inadmissible evidence.

Inadmissible evidence may be admitted if a party "opens the door":

> A party may introduce inadmissible evidence if the opposing party has no objection, or may choose to introduce evidence that would be inadmissible if offered by the opposing party… The introduction of inadmissible evidence is often said to "open the door" both to cross-examination and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence.

State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995), *rev. den*., 129 Wn.2d 1007 (1996). "Fairness dictates that the rules of evidence will allow the *opponent* to question a witness about a subject matter that the proponent first introduced through the witness." State v. Gallagher, 112 Wn. App. 601, 610, 51 P.3d 100 (2002), *rev. den*., 148 Wn.2d 1023 (2003) (emphasis added).

Lile asserts on appeal that the door was opened when Rowles testified that he was not a fighting guy and that he wasn't a fighter. 2RP 528, 538. However, as noted by the prosecutor at trial, that specific testimony came out during cross-examination of Rowles, not during the state's direct examination. 2RP 550-51. The court, however, indicated it had already ruled and precluded questioning about the domestic allegations, and did not premise its ruling on that basis. 2RP 551. The state, however, did not open the door to any testimony regarding Rowles' domestic misconduct by Rowles' testimony on cross examination that he wasn't a fighter.

4. The trial court did not abuse its discretion in admitting evidence of whether Lile considered himself to be a "warrior" to rebut his claim that he was very fearful when involved in a confrontation.

Lile next asserts the trial court erred in admitting evidence related to whether he considered himself a "warrior." The State incorporates by reference the law set forth in the preceding argument regarding impeachment evidence. The question about whether Lile identified himself as a warrior was relevant to his testimony that he was very afraid when he was confronted by Rowles and that group. When Lile answered no, the evidence that Lile had a tattoo on his back that included the Latin term for warrior rebutted Lile's statement that he did not identify himself as a "warrior." The trial court did not abuse its discretion in admitting this impeachment evidence. Even if admission of the evidence was error, it was harmless because Lile explained that he had the tattoo for religious reasons and the term "warrior" in and of itself is not a negative one.

Lile asserts the trial court erred in permitting the prosecutor to attempt to impeach him with evidence of his warrior tattoo, but provides no legal authority or analysis to support his factual argument. He asserts that tattoos have a negative connotation per se, but while that may have been the case a number of years ago, tattoos are fairly prevalent these

days, and people obtain them for any number of reasons, just as Lile himself claimed that he got the tattoo for religious reasons.

During direct examination, Lile testified that after he got struck in the shoulder/back area, there was a guy in his face and another one to the side of him. 2RP 868. He testified that he hit the guy because he was "very frightened" and that he felt "very threatened as well as scared for [his] life" and that he thought they would hurt him. 2RP 268-69. He also testified that when the officer was trying to put him in a choke hold, that "it was very scary" and that he had been "pretty distraught from the events before." 2RP 876.

On cross examination, the prosecutor asked Lile if he was proud of his ability to function in the military, to which Lile answered yes. The prosecutor then attempted to ask whether he was proud of the fact that he was a warrior, but the judge sustained defense counsel's objection. 2RP 910. The prosecutor then inquired, "you're not someone who gets afraid easily in a fight?" to which Lile responded that he hadn't been in a lot of fights and that he had been scared in this one. 2RP 911. When the prosecutor asked whether one of the words on his back was a term for warrior, the judge again sustained the objection. 2RP 911.

At a break, the prosecutor requested to be allowed to ask two questions of Lile: 1) whether Lile self-identified as a warrior, and if the

answer was no, 2) to ask about the tattoo on his back meaning "eternal warrior." 2RP 919-921. He explained that he wanted to inquire about that because of Lile's testimony that he was afraid, and argued that if someone identifies themselves as a warrior, they are less likely to be afraid than someone else. 2RP 919-20. In response to the judge's concern that the prosecutor would be arguing that a person in the armed forces, a warrior, is an assaulter, the prosecutor further explained that he wasn't saying Lile was an assaulter, he wanted to show that Lile knew how to handle himself in a fight in order to rebut Lile's claim that he was overcome with fear. 2RP 920-21. In responding to defense counsel's objection to the term "warrior," the judge explained she didn't consider the term itself to be a prejudicial term, particularly regarding members of the armed services. 2RP 924. The judge then permitted the prosecutor to ask just those two questions. 2RP 922. After Lile answered no, he wasn't a warrior, he explained that the phrase tattooed across his back means "eternal warrior for God," that he had gotten the tattoo because of his religious beliefs and that it meant he was to carry out God's work whether he fell short or not. 2RP 925-26.

As the prosecutor argued, whether Lile considered himself to be a "warrior" was relevant to rebut his claim of absolute fear when confronted by Rowles. When Lile testified that he didn't consider himself a warrior,

the words on his back became relevant because they tended to show that he did, discounting his claim of fear.

Even if the court erroneously admitted the evidence of Lile's tattoo with the Latin words for "eternal warrior for God," any such admission was harmless. *See*, State v. Jones, 33 Wn. App. 372, 377, 656 P.2d 510, 513 (1982) *aff'd*, 101 Wn. 2d 113, 677 P.2d 131 (1984) (violations of ER 609 are judged under nonconstitutional harmless error standard where error is not prejudicial unless within reasonable probabilities had the error not occurred, the outcome of the trial would have been materially affected). First, as noted by the judge, the word "warrior" itself is not pejorative, and in fact can have a positive connotation, and does not necessarily equate with someone who assaults people. Defense counsel elicited, on direct, testimony regarding the defendant being in the military, his training in the military and his deployments overseas. 2RP 862-63. Given Lile's testimony regarding his military experience, and the fact that the term warrior is not prejudicial per se and Lile's explanation that it was for religious reasons, the outcome of the trial was not materially affected by this limited cross examination.

5. In the context of the entire record, the prosecutor's permitted cross examination did not impugn defense counsel, but permissibly elicited testimony that defense witnesses got together after the incident and discussed what happened, which discussion occurred when they met together with defense counsel.

Lile next asserts that the prosecutor impugned defense counsel by trying to present defense counsel as someone who was trying to thwart the police investigation. The prosecutor, however, was attempting to elicit information that defense witnesses met to discuss the case and did discuss the case, relevant cross examination regarding their credibility and bias, was responding to the defense attack on the thoroughness of the investigation. The court limited the questions the prosecutor could ask regarding involvement of defense counsel and cautioned the jury twice that the purpose of the testimony regarding the witnesses' meeting with defense counsel was merely to establish a chronology, and should not be interpreted in any other manner. The actual testimony heard by the jury did not impugn defense counsel. Whatever prejudice regarding disparagement defense counsel perceived was cured by the judge's instructions to the jury.

"A prosecutor must not impugn the role or integrity of defense counsel." State v. Lindsay, 180 Wn.2d 423, 432, 326 P.3d 125 (2014). Statements that impugn defense counsel are impermissible because they

can negatively impact a defendant's ability to present his/her case. Id. In order to establish "prosecutorial misconduct,[4]" a defendant must establish both that the prosecutor's conduct was improper and that there is a substantial likelihood that it affected the jury's verdict. State v. Thorgerson, 172 Wn.2d 438, 442-43, 258 P.3d 43 (2011). In reviewing such a claim, the court determines whether the conduct was improper and prejudicial in the context of "the entire record and circumstances at trial." Id. at 442. Reversal of the trial is not warranted if the improper remarks or conduct were invited or provoked by defense counsel. Russell, 125 Wn.2d at 86. Reversal is also not warranted if the improper argument could have been obviated by a curative instruction. Id. at 85.

The issue of the adequacy of the investigation initially came up during direct examination of the state's first witness, Officer Woodward. In addressing whether the jury should be informed of the change in charges i.e., the dismissal of the assault charge regarding Taylor Powell, defense counsel informed the judge that he wanted to cross examine the officer regarding his recommendation of charges, specifically that he wanted to challenge his proficiency as an investigator and thereby challenge his credibility. 2RP 153-59. During cross examination of the

[4] While the appellate courts continue to use the term "prosecutorial misconduct," the State believes the more appropriate term of prosecutorial error applies to most claims of prosecutorial "misconduct."

officer, defense counsel questioned the officer about having concluded that Lile had hit Rowles without justification, though he never read the interview of Rowles, about mistakes in his reports and about details that weren't in his report. 2RP 201-03, 212-15, 220, 242-45.

Then, the prosecutor elicited testimony from the detective who conducted the follow-up investigation that it was important to separate witnesses when interviewing them. He also testified he had received a phone message from Duff, that he called Duff back on the 21st and Duff agreed to meet with the detective that day to talk about what happened, but Duff did not show up. 2RP 578-81. When the prosecutor inquired as to whether he spoke with Duff about why he didn't show up, defense counsel objected, and the judge sustained the objection on hearsay grounds. Upon inquiry, without objection, the detective testified that he told Duff that he wanted to meet with Duff, "even if Mr. Lile's attorney told him not to speak with [the detective].[5]" 2RP 582. When the prosecutor began to inquire about a phone call the detective received later that day from defense counsel, defense counsel objected. *Outside the presence of the jury*, the prosecutor informed the court that he wanted testimony in that

[5] In the detective's report it stated that Duff had told the detective on the phone that the defense attorney had told him that the defense attorney would provide the necessary information to the police. About an hour later, defense counsel called the detective and told the detective that he was going to recommend to Duff that Duff not meet with the detective until he had obtained a copy of the statement Duff gave to the Navy. CP 520.

defense counsel told Duff not to speak with the detective in order to respond to defense counsel's allegations of an incompetent investigation. 2RP 582-85. The judge indicated that the evidence was more properly presented on rebuttal, rather than the state's case in chief to which the prosecutor responded that defense didn't have to present a case and that it was important to establish the integrity of the investigation. 2RP 585.

In order to counter the defense theme of an incompetent investigation, when the jury was back, the prosecutor asked the detective whether he told defense counsel that he wanted to meet with Duff while he was in town, regardless of defense counsel's feelings on the topic, to which the detective was permitted to answer yes over defense objection. 2RP 587. The prosecutor then inquired whether he met with Duff that day, to which the detective responded no. 2RP 587. The prosecutor then inquired about the detective's attempts to obtain access to the Navy's interviews, why he had been so insistent upon getting interviews that day, the 21st, and other follow-up he conducted. 2RP 587-88, 590-93. The detective testified he wasn't able to speak with Duff and Owens until the 26th of February. 2RP 589.

On cross, defense counsel questioned the detective about when and why he checked for video footage of the incident, attempting to get the

detective to admit that he only checked for one video[6] because defense counsel asked him to. 2RP 618-622. Defense counsel continued with this line of questioning, ultimately obtaining a concession from the detective that defense counsel had been pressuring him to get the video. 2RP 629-31. Defense counsel then inquired about the detective's failure to interview Rowles and Powell and some inconsistencies in the reports and statements. 2RP 639-47.

Later, Duff admitted on cross examination he wasn't sure about what he saw versus what he had been told happened, that he had spoken with defense counsel about what happened, but denied speaking with Lile about it. 2RP 722-23. When Duff testified about his conversation with the detective and that he told the detective he was on his way to see defense counsel, the judge cautioned the prosecutor there would be no further questions along those lines after defense counsel objected. 2RP 743. *Outside the presence of the jury*, the prosecutor explained that he expected the testimony to be that defense counsel had told Duff not to talk to police, that Duff had originally told the detective that it was his chain of command at the Navy who told him not to talk to police, but after further questioning told the detective it was actually defense counsel who told

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[6] No recording of the incident had been made despite the location of the video camera. 2RP 652.

him not to. 2RP 745. The prosecutor stated he didn't want to disparage defense counsel, but explained the detective's investigation had been attacked and this went to Duff's credibility. 2RP 744-45. The judge ruled it was relevant, but hearsay and too prejudicial to get into what defense counsel might have said. 2RP 745-48. The judge ruled that the prosecutor could ask Duff whether he gave two different reasons for not meeting with the detective, but instructed him not to ask what the reasons were. 2RP 748-49. When the prosecutor inquired as to whether he could ask about the witnesses discussing this, the judge ruled that the prosecutor could ask if the witnesses discussed the incident together at defense counsel's, but couldn't get into the substance of what was discussed. 2RP 750. When asked, defense counsel indicated that he agreed with the judge that if the state started to get into that area, it was tangential. 2RP 751.

With the jury back, the judge cautioned them not to read anything into objections made by counsel. 2RP 751. The prosecutor then elicited testimony that Duff told the detective he wanted to meet with the detective, that he was on his way to see defense counsel and that Owens was at defense counsel's as well. 2RP 752. When the prosecutor asked whether it was after meeting with defense counsel that Duff changed his mind about meeting with the detective, defense counsel objected and the prosecutor revised his question to state "After the visit, after that time

interval that elapsed when you were talking with" defense counsel, he changed his mind. 2RP 752. Upon objection, the judge ruled:

> I am going to permit the question because as I understand it this is the chronology in time in which the events occurred, but I'm also going to instruct the jury that's simply what this is, a discussion of the chronology in time when the events occurred and you're not to infer anything beyond the testimony, you're not to infer any causal connection that you don't hear testimony or other evidence about.

2RP 753. When asked the question again, Duff answered that it wasn't that he had changed his mind, but that the meeting was to occur at a particular time and then he had to get back to work. 2RP 753. The prosecutor then elicited testimony that Duff gave two different reasons as to why Duff didn't want to speak with the detective, the first being that he had been told by his command to make a report to the Navy first. 2RP 754. Later, upon redirect, defense counsel asked Duff if when he and Owens met with him, whether they went to the scene of the incident. 2RP 760. The prosecutor objected, and noted he thought that question would open the door to what the court had concerns about. 2RP 760.

In the video of Owens on direct defense counsel prefaced a question with the fact that Owens and he had gone back to see the scene. Owens then testified on cross examination, without objection, that he, Duff and defense counsel went back to look at the scene and were trying

to figure out what happened, and that he and Duff had gone over what happened before they spoke with the Navy investigators. Ex. 34.

In his closing, defense counsel attacked the investigation as inadequate and argued that the police had pre-judged the case. 2RP 1064, 1073-75, 1089. Defense counsel raised the issue of Duff and what he didn't do, and that the important thing was that he gave a statement to the Navy. 2RP 1082. He continued:

> Okay, how about myself going to the scene of the crime with the two witnesses to the crime. Somehow that's wrong. That's what gave me notice of the video camera and that's why I had to get on him. Somehow I did something wrong, you're not supposed to go out with witnesses to the scene of the crime. From the Defense' perspective that's a groundless objection because the major criticism that's the Defense is we don't work hard enough, we don't get out there, we have some kind of a detective do it. So that's a red herring.
> What isn't a red herring is that they didn't interview Christopher Rowles and Taylor Powell, now that's a biggie as far as getting the correct decision made, you know. …

2RP 1082-83. In rebuttal the prosecutor argued that defense witnesses started using the same term "shoulder check" to refer to the contact between Rowles and Lile, after they had gone together to see defense counsel. When defense counsel objected, the prosecutor revised his argument to state "after the interview" and the judge instructed the jury

> … witnesses and parties meet with lawyers frequently in the development of a case so the fact that a witness or lawyer met with another lawyer is not to be taken by you to make an adverse inference against anybody.

2RP 1095-97.

Here, the import of the prosecutor's questioning, given defense's attack on the adequacy of the police investigation, focused on the fact that two of the defense witnesses got together days after the incident and went over the evidence together. This happened when they met with defense counsel and went to the scene of the incident. One of them also put off meeting with the detective. That was what the jury heard. The import was not that the defense witnesses lacked credibility because they met with defense counsel, but because they had discussed the incident and had gone over *together* what happened at the scene. The court's rulings and verbal instructions to the jury ensured that the impact of the fact that it occurred when Owens and Duff met with defense counsel was to be considered by the jury for chronological purposes, and for no other purpose.

The prosecutor was also responding to defense counsel's attack on the police investigation's failure to interview witnesses, by eliciting testimony about Duff's unwillingness to meet with the detective. Duff's bias was implicated by his willingness to meet with defense counsel, but not with the police. The judge sustained defense objections to questions that strayed into defense counsel's representation of Lile.

The import of the testimony the jury heard was that two of the defense witnesses used the same term, and their versions of the events differed, after they met *together* with defense counsel. Any suggestion of disparagement of defense counsel from this testimony was alleviated by the judge's instructions to the jury to not infer anything negative from meeting with defense counsel. *See*, Thorgerson, 172 Wn.2d at 451-52 (although prosecutor's remarks in closing that defense counsel had engaged in "sleight of hand" tactics and that the defense case was "bogus" impugned defense counsel, there wasn't a substantial likelihood they altered the verdict and a curative instruction would have alleviated any prejudicial effect); *see also*, Russell, 125 Wn.2d at 87-88(prosecutor's statements regarding additional incriminating evidence, while improper, were in response to defense counsel's argument that the police investigation was inadequate, and were not reversible error particularly where judge gave curative instruction).

U.S. v. McDonald, 620 F.2d 559 (5th Cir. 1980), cited by Lile, is distinguishable. In that case, the prosecutor attempted to establish that the defendant had destroyed evidence of a counterfeiting operation while agents waited for a search warrant for the defendant's house. In doing so, the prosecutor purposefully elicited testimony that defendant's attorney was present at the time the warrant was executed. McDonald, 620 F.2d at

561. In rebuttal the prosecutor also pointed out that the attorney had been present and suggested to the jury that if the defendant had known what was going on and had his attorney at the house three hours later, that would be sufficient time to dispose of any evidence. Id. at 562. Defendant claimed on appeal that the prosecutor used the defense attorney's presence at the house as a basis to infer that he was guilty. Id. The court found that the argument "struck at the jugular" of the defense theory and that the facts that the government wanted to elicit had already been established before the testimony about the presence of defense attorney and could have been established without reference to the attorney. Id. at 563-64. The court found that the reference to the presence of his attorney at the scene permitted the jury to infer that the defendant wouldn't have obtained an attorney unless he was guilty, in addition to permitting a possible inference that defense counsel individually or by profession had acted unethically. Id. at 564. Here, the questioning did not imply that Lile was guilty because he hired an attorney, and the judge's instructions ensured that the jury only considered the evidence for permissible purposes and not for any negative implication about defense counsel.

6. Lile has failed to provide authority upon which this Court can decide his claimed error of improper questioning of a defense witness.

In his opening brief, Lile asserted that the prosecutor improperly asked Owens whether he would have punched Rowles in a similar situation. He was unclear whether the question and answer were actually heard by the jury. He has since clarified, via letter to this Court, that the exchange in fact was not heard by the jury. See also Ex. 34. The State therefore will not address his argument about the admissibility of such evidence.

Lile maintains however that it was error for the prosecutor to reference in closing Owens' testimony that he wouldn't have thrown the punch if he'd been in Lile's shoes. Lile is correct that the prosecutor's reference to that testimony was error since it wasn't actually heard by the jury, but he fails to cite to any authority or to brief the standard for such error. "In the absence of argument and citation to authority, an issue raised on appeal will not be considered." American Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

If Lile is asserting that it was prosecutorial error, he has the burden of proving prejudice in addition to the error, i.e., that there is a substantial likelihood that the error affected the verdict. Thorgerson, 172 Wn.2d at 442-43. Lile has failed to show this. As Lile himself indicated, it was not

exactly clear as to whether Owens testimony in response to that question had come in given the various rulings about the videotape. In addition other testimony came in that Owens testified that Lile was irritated at the time and had "his own tolerance," that all the other guys did was get in Lile's face a bit, and that he didn't know "how close people can be [to Lile] before it becomes way too much." Ex. 34. The jury was also instructed that the comments of the attorneys were not evidence and that the evidence was testimony and exhibits. CP 459 (inst. 1). The reference to Owens' testimony that was not admitted did not affect the jury's verdict.

7. The trial court did not abuse its discretion in denying defense's proposed self-defense instruction regarding the third degree assault charge.

Lile next asserts that he was entitled to a self-defense instruction on the assault in the third degree charge involving Office Woodward. He asserts that Washington law on self-defense regarding assaults on officers is predicated on the defendant knowing that the person he is assaulting is a police officer. While he acknowledges that caselaw, State v. Brown, 140 Wn.2d 456, 998 P.2d 321 (2000), doesn't require the State to prove that the defendant knew he was assaulting a police officer, he still maintains that he was entitled to the customary self-defense instruction because he

testified that he was acting in self-defense and was not aware that the person he was defending against was a police officer. Appellant's Brief at 37. He, however, has no specific caselaw to support this proposition and State v. Belleman holds otherwise.[7]

Trial courts have considerable discretion in wording jury instructions. State v. Brown, 132 W*cert. denied*, 523 U.S. 1007, 140 L.Ed.2d 322, 118 S.Ct. 1192 (1998)n" \s "WSFTA_42a9d3aa35ea49128639ada5a4b6d968" \c 2 State v. Brown, 132 Wn.2d 529, 618, 940 P.2d 546 (1997) *cert. denied*, 523 U.S. 1007, 140 L.Ed.2d 322, 118 S.Ct. 1192 (1998). A defendant is not entitled to an instruction that is not a correct statement of the law or for which there is insufficient evidentiary support. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Instructions are sufficient if they properly inform the jury of the applicable law without misleading the jury and permit each party to argue its theory of the case. State v. Castle, 86 Wn.App. 48, 62, 935 P.2d 656, *rev. den.*, 133 Wn.2d 1014 (1997).

Courts have consistently held that "[t]he use of force to prevent even an unlawful arrest which threatens only a loss of freedom is not reasonable." Seattle v. Cadigan, 55 Wn. App. 30, 37, 776 P.2d 727, *rev.*

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[7] State v. Belleman, 70 Wn.App. 778, 856 P.2d 403 (1993).

den., 113 Wn.2d 1025 (1989) (quoting State v. Goree, 36 Wn. App. 205, 209, 673 P.2d 194 (1983); *accord*, State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995) (citing number of cases for same proposition). In fact, no distinction is made as to whether the arrest was lawful or unlawful in determining whether a defendant is entitled to assert self-defense in the context of an arrest. State v. Valentine, 132 Wn.2d 1, 20, 935 P.2d 1294 (1997); *see also*, State v. Holeman, 103 Wn.2d 426, 431, 693 P.2d 89 (1985) (no right to assert defense of another to unlawful arrest, law makes no distinction between lawful and unlawful arrests in this context). In upholding this premise, the court in Valentine noted, "To endorse resistance by persons who are being arrested by an officer of the law, based simply on the arrested person's belief that the arrest is unlawful, is to encourage violence that could, and most likely would, result in harm to the arresting officer, the defendant, or both." Valentine, 132 Wn.2d at 20. That rationale applies equally to situations where the defendant or arrestee simply asserts that they didn't know the person they were assaulting was a police officer.

The court in State v. Belleman, 70 Wn. App. 778, 856 P.2d 403 (1993), addressed the very argument Lile makes here. In that case the defendant asserted he was entitled to a self-defense instruction on third degree assault because he was defending himself from an attack by

someone he did not know was a police officer. Id. at 780. In denying that defendant should be entitled to a self-defense instruction when he claims he did not know the person he assaulted was a police officer, the court reasoned:

> Because police officers are not the only ones who can effect a "lawful apprehension or detention", Belleman's argument reduces itself to what the *Goree* court already resolved: whether the defendant's knowledge of the lawfulness of his arrest is relevant. The *Goree* court held that it was not. Similarly, in the present case it makes no difference that Belleman did not know Kasprzyk was a police officer, because a defendant can be charged with third degree assault against *non*-police officers whose apprehension of the defendant is "lawful." The essential issue thus remains whether the arrest was lawful, not whether Belleman knew Kasprzyk happened to be a police officer. The defendant's subjective assessment is irrelevant, even as to a claim of self-defense.

Belleman, 70 Wn. App. at 782-83.

Under Belleman Lile was not entitled to a self-defense instruction. Moreover, the officer and others testified he identified himself a number of times, that he approached Lile in full uniform, made eye contact with him, said "you're under arrest" when he grabbed the front of Lile's shirt, and that he continued to say "stop, police" as he chased after Lile. 2RP 94, 106-07, 110-11.

Lile alternatively suggests that even if he hadn't been entitled to a normal self-defense instruction he would have been entitled to one in the context of an arrest because the officer put him in a chokehold. He,

however, did not propose such an instruction. CP 224-31, 247-55. He failed to preserve this issue for appeal. Furthermore, he would not have been entitled to such an instruction under the facts of the case because the alleged "choke hold" occurred after Lile struck the officer.

The self-defense rule that applies in the context of an arrest situation is distinct and more limited than the general self-defense rule (hereinafter referred to as "arrest self-defense"). State v. Garcia, 107 Wn. App. 545, 549, 27 P.3d 1225 (2001). If a defendant alleges self-defense in connection with an arrest situation, he must produce some evidence that he was in actual, as opposed to apparent, imminent danger of serious injury or death in order to assert self-defense. State v. Bradley, 141 Wn.2d 731, 737-38, 10 P.3d 358 (2000); Garcia, 107 Wn. App. at 549. The defendant must produce evidence of actual serious injury because an arrest that "falls short of causing serious injury or death can be protected and vindicated through legal processes whereas loss of life or serious physical injury cannot be repaired in the courtroom." Holeman, 103 Wn.2d at 430; *accord*, Bradley, 141 Wn.2d at 737-38; *see also*, WPIC 17.02.01 (a person may use force in resisting arrest "only if the person being arrested is in actual and imminent danger of serious injury."). Even if the defendant can show that he was actually in imminent danger of serious injury, the

defendant must also show that the force used by the police was excessive and not in response to his own actions. Mierz, 127 Wn.2d at 476.

Lile proposed the self-defense instruction under WPIC 17.02 for the assault in third degree count. CP 226, 249. This is not the correct WPIC instruction for arrest self-defense, which is WPIC 17.02.01. In addition, the officer testified that he was hit while trying to bring Lile to the ground the second time, that Lile hit him on the right side of his face, knocking him off balance and causing his glasses to fly off and land about 10 feet away, and that he didn't apply a lateral visceral neck restraint (the "choke hold") until after he had Lile on the ground the second time. 2RP 118-27. Lile testified he didn't remember hitting the officer and agreed that the "choke hold" happened while he was on the ground and someone was on top of him. 2RP 875. The trial court did not abuse its discretion in denying Lile's request for a self-defense instruction because he didn't propose one with the correct legal standard and because the facts did not establish that he was entitled to one.

8. Lile has failed to establish that the cumulative error doctrine warrants reversing this case.

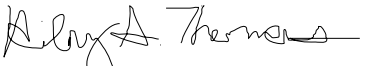
Finally, Lile asserts that the case should be reversed because of all the erroneous rulings combined. The cumulative error doctrine applies only where have been "several trial errors that standing alone may not be

sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). In order to prevail under the doctrine, however, the defendant must demonstrate how claimed errors affected the outcome of the trial. Thorgerson, 172 Wn. 2d at 454. The State has argued that the trial court did not err in its evidentiary rulings and/or that any error was harmless. Lile has failed to show how any such errors, when combined, actually affected the outcome of the trial. The cumulative error doctrine does not warrant reversal in this case.

E. CONCLUSION

The State respectfully requests this Court to deny Appellant's appeal and affirm his convictions for second, third and fourth degree assault and resisting arrest.

Respectfully submitted this 27th day of August, 2015.



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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Bill Johnston
PO Box 953
Bellingham, WA 98227
Wjtj47@gmail.com

TDAStavik _____ 8/27/15

Legal Assistant Date