Supreme Court No. 94285-4

(Court of Appeals No. 74015-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN ALEXANDER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Brian Alexander, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. Alexander*, No. 74015-6-I (Slip Op. filed February 27, 2017). A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. A defendant is entitled to have the court instruct the jury on his theory of the case if any evidence supporting it is presented. In this assault case, the alleged victim testified that as Mr. Alexander was driving she opened the passenger door and grabbed the steering wheel, that Mr. Alexander pulled her back and they wrestled, and that her actions otherwise could have caused the car to crash. Did the trial court abuse its discretion in denying Mr. Alexander's request to instruct the jury on lawful use of force in defense of property?

2. Did the Court of Appeals err in holding that a defendant must prove the complaining witness acted with malice in order for the jury to be instructed on the lawful use of force in defense of property?

3. The rule against hearsay prohibits admission of out-of-court statements offered for their truth, unless an exception applies. Did the trial court abuse its discretion in admitting a recording of a 911 call from witness Annette Weis under the "present sense impression" and "excited

utterance" exceptions, where Ms. Weis placed the call 10-15 minutes after the incident in question and calmly answered the operator's questions?

4. Did the trial court abuse its discretion in relying on these exceptions for the portions of witness Rebecca Kent's 911 call that dealt with alleged prior incidents, and the portions of the call in which calm dispatchers and first responders were speaking?

5. Under ER 403, evidence may be excluded if its probative value is substantially outweighed by considerations of needless presentation of cumulative evidence. Did the trial court abuse its discretion in admitting the 911 calls, where the callers testified at trial to the same alleged facts?

6. Did the trial court err in ruling that there was no hearsay concern simply because there was no Confrontation Clause violation?

7. Did the Court of Appeals err in concluding the above evidentiary errors were not preserved and were harmless?

8. Because defendants have a constitutional right to have the jury decide factual questions, witnesses may not express opinions as to the guilt of the defendant in criminal trials, either directly or by inference. Did the trial court abuse its discretion in overruling Mr. Alexander's objections to testimony by Officer Jennings and Detective Gill stating their opinions that the alleged victim's injuries were consistent with assault rather than a car accident?

C. STATEMENT OF THE CASE

Brian Alexander and Kelly Colangelo dated on and off for several years. RP (5/26/15) 136-37. In August of 2014, the two were driving home from a party when Ms. Colangelo became upset because she was still grieving for her son who died two years earlier. RP (5/26/15) 140; RP (5/28/15) 22. Ms. Colangelo was highly intoxicated, with a blood alcohol level later determined to be .328. RP (5/27/15) 13.

Mr. Alexander was unsympathetic, and the two argued. RP (5/26/15) 138. According to Ms. Colangelo's testimony at trial, she was upset that Mr. Alexander was not being supportive, and she wanted to get out of the car notwithstanding the fact that it was moving. RP (5/26/15) 140-41. She had attempted suicide on multiple occasions, including jumping out of another moving car two weeks prior to this incident. RP (5/26/15) 180; RP (5/28/15) 21-23. This time, she unbuckled her belt, opened the passenger door, and grabbed the steering wheel. RP (5/26/15) 142. Mr. Alexander pulled her back and they wrestled. RP (5/26/15) 142-43. During the tussle, they hit a curb and Mr. Alexander applied the brakes. Ms. Colangelo's head hit the windshield. RP (5/26/15) 142-44. Ms. Colangelo got out of the car a block from her apartment complex. RP (5/26/15) 144.

Annette Weis was walking in the area and saw Ms. Colangelo. RP (5/26/15) 121-22. Ms. Colangelo was stumbling and falling, and blood was coming out of her head. RP (5/26/15) 122. She told Ms. Weis that a man had beaten her and dropped her off, but that she did not want Ms. Weis to call for aid. *Id.* Ms. Weis walked Ms. Colangelo to her apartment complex, then walked back to her office and called 911. RP (5/26/15) 126-28.

Ms. Colangelo eventually went to the apartment of her friend and neighbor, Rebecca Kent. RP (5/27/15) 94. According to Ms. Kent, Ms. Colangelo "was clearly inebriated and she was bleeding." RP (5/27/15) 94. Ms. Colangelo told Ms. Kent that she and Mr. Alexander had gotten into a fight and that he "had slammed her face into the car panel, instrument panel, and thrown her out of the moving vehicle." RP (5/27/15) 96. Ms. Kent called 911, and police officers and firefighters responded. RP (5/27/15) 24-34, 97. Ms. Colangelo told them that she "was accidentally punched in the face by her boyfriend." RP (5/26/15) 12. Ms. Colangelo was taken to the hospital, where she was given 2-3 sutures for a cut above her left eye. RP (5/27/15) 55-56. She also had bruising around her right eye and on her neck. *Id.* A CT scan ruled out cranial injuries. RP (5/27/15) 55, 66.

A few days after the incident, Ms. Colangelo told Detective Daljit Gill that she "got punched in the face" that night in the car. RP (5/26/15) 162. The State charged Brian Alexander with second-degree assault. CP 1-2, 64-65.

The next month, Ms. Colangelo wrote a letter retracting her allegations and stating that Detective Gill manipulated her into making the accusation. RP (5/26/15) 167-68. She said the same thing in a later interview with defense counsel, and again at trial. RP (5/26/15) 160-61, 169-70. In the letter, interview, and testimony, Ms. Colangelo said she unbuckled her seat belt, grabbed the wheel, and tried to open the door, and that Mr. Alexander pulled her back to prevent her from harming herself or causing an accident. RP (5/26/15) 188-91, 195-98. She said she was injured when her face hit the windshield. RP (5/26/15) 142.

At trial, the State played the recordings of Ms. Weis's and Ms. Kent's 911 calls, over Mr. Alexander's objections that they contained hearsay and were cumulative of live testimony. CP 13, 20-23; RP (5/27/15) 4-5, 97. Also over Mr. Alexander's objections, a police officer and the detective were permitted to testify about their opinions regarding the cause of injury. RP (5/26/15) 16-17, 82.

The court granted Mr. Alexander's motion to instruct the jury on the lawful use of force in defense of self and others, but denied his motion to instruct the jury on the lawful use of force in defense of property. CP 15-17, 55; RP (5/26/15) 206-07; RP (5/27/15) 121-23; RP (5/28/15) 56. The jury found Mr. Alexander guilty of second-degree assault, and he was sentenced to 74 months in prison. CP 400-03.

The Court of Appeals affirmed. It ruled the trial court properly denied a jury instruction on defense of property because there was no evidence that Ms. Colangelo acted with malice. Slip Op. at 7. The court ruled that Mr. Alexander did not preserve hearsay and ER 403 objections to the 911 calls, and that their admission was harmless even if erroneous. Slip Op. at 8. The court endorsed the trial court's ruling admitting the officers' testimony regarding cause of injury, and held that in any event the outcome would have been the same in the absence of the testimony. Slip Op. at 8-9. Mr. Alexander seeks review in this Court. RAP 13.4.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The trial court abused its discretion in denying Mr. Alexander's motion to instruct the jury on the lawful use of force in defense of property, and the Court of Appeals erred in requiring proof of malice.

a. A defendant is entitled to have the jury instructed on his theory of the case if any evidence supports the theory.

"A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction." *State v. Werner,* 170 Wn.2d 333, 336, 241 P.3d 410 (2010). The quantum of evidence necessary is simply *any* evidence. *State v. Hendrickson*, 81 Wn. App. 397, 401, 914 P.2d 1194 (1996). The defendant need not show sufficient evidence was presented to create a reasonable doubt regarding the defense. *State v. Adams*, 31 Wn. App. 393, 395, 641 P.2d 1207 (1982). Once any evidence supporting the defense is produced, "the defendant has a due process right to have his theory of the case presented under proper instructions even if the judge might deem the evidence inadequate to support such a view of the case were he [or she] the trier of fact ...." *Id.* (internal quotation omitted).

b. Mr. Alexander was entitled to have the jury instructed on the lawful use of force in defense of property because Ms. Colangelo testified that she opened the passenger door and grabbed Mr. Alexander's steering wheel and that harm could have come to his vehicle had he not pulled her back.

Mr. Alexander requested jury instructions on self-defense, defense of others, and defense of property. CP 15-17, 55; RP (5/26/15) 206-07; RP (5/27/15) 121-23. The trial court granted the request as to self-defense and defense of others, but denied the request to instruct the jury on defense of property. (5/27/15) 121-23; RP (5/28/15) 56. This was error.

The use of force toward another person is not unlawful when used by a party "in preventing or attempting to prevent ... a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary[.]" RCW 9A.16.020. Evidence was presented to support this theory. Kelly Colangelo testified that she was depressed and wanted to die, so while Mr. Alexander was driving the car, she opened the passenger door and grabbed the steering wheel. RP (5/26/15) 142-43. In response, Mr. Alexander tried to pull her back. RP (5/26/15) 142-43. Ms. Colangelo recognized that if Mr. Alexander had not stopped her, her behavior could have harmed not only Mr. Alexander and other people on the road, but also Mr. Alexander's car. RP (5/26/15) 195.

Evidence was presented that Ms. Colangelo's blood alcohol level was .328, supporting the proposition that she may have been disposed to behave recklessly. RP (5/27/15) 13. Evidence was also presented that Ms. Colangelo had previously attempted suicide, again supporting the theory that she initiated the altercation by opening the door and grabbing the wheel, and that Mr. Alexander had to pull her back to protect both people and property. *See* RP (5/28/15) 21-23 (Rebecca Kent testifies about Ms. Colangelo's other recent suicide attempts).

Ms. Colangelo acknowledged that she had told Detective Gill that Mr. Alexander punched her, but she insisted this was a story she gave in response to the detective's manipulative interrogation tactics. RP (5/26/15) 160-62, 195-98. On the stand, Ms. Colangelo said she and Mr. Alexander were merely "wrestling" and that Mr. Alexander tried to "pull" her back to prevent her from opening the door or grabbing the wheel. RP (5/26/15) 142-43. Thus, the trial court erred in denying the request for the instruction on the basis that "I do not believe that somebody has the right to beat somebody else to prevent them from grabbing the steering wheel." RP (5/27/15) 122. While the jury was entitled to credit the portion of the evidence the judge credited, it was manifestly for the jury to make that choice. *See Adams,* 31 Wn. App. at 396-97. *See also State v. Bland*, 128 Wn. App. 511, 516, 116 P.3d 428 (2005) ("Whether the use of force used

in defense of property is greater than is justified by the existing circumstances is a question of fact for the jury to determine under proper instructions.").

c. The Court of Appeals erred in holding a defendant must prove a complaining witness had a mental state of malice in order to receive an instruction on the lawful use of force in defense of property.

The Court of Appeals rejected the above argument on the basis that there was no evidence that Ms. Colangelo "acted with malicious intent to harm the car." Slip Op. at 7. But while the statute refers to lawful acts preventing "malicious interference with real or personal property," the meaning of the word "malicious" in this context cannot possibly be limited to "evil intent." *See* RCW 9A.16.020(3); RCW 9A.04.110(12); Slip Op. at 6.

Contrary to the Court of Appeals' claim, the complaining witness's mental state is not the issue; the issue is whether *Mr. Alexander* reasonably believed he had to use force to protect his property from malicious interference. *See Bland*, 128 Wn. App. at 513. The Court of Appeals' rule, which turns on the mental state of the complainant rather than the defendant, would lead to absurd results. For example, if a mentally ill person started bashing a parked car with a hammer – not with evil intent but because he thought the car was a monster – the car's owner

could lawfully grab the person's arm and pull him away from the car. Similarly, if a highly intoxicated passenger grabbed the steering wheel of a moving car – not with evil intent but because she was drunk – the car's driver could lawfully grab the passenger's arm and pull it off of the wheel. In either instance, if the person who grabbed another's arm were charged with assault, the Court of Appeals' rule would preclude him from asserting lawful use of force in defense of property. That is not the law. *See Bland*, 128 Wn. App. at 513-17; *cf. State v. Janes*, 121 Wn. 2d 220, 238-39, 850 P.2d 495 (1993) (explaining reasonably prudent defendant standard in self-defense context).

This Court should grant review in order to clarify the standard a defendant must meet in order to have the jury instructed on the lawful use of force in defense of property. This is a due process issue applicable to many defendants, not just Mr. Alexander. RAP 13.4(b)(3), (4).[1]

[1] Even if a defendant does have to prove the complaining witness acted with malice, Mr. Alexander met his minimal burden to show *some* evidence of malice here. In evaluating the question, the evidence must be viewed in the light most favorable to Mr. Alexander. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). If a person grabs the steering wheel of a car moving at 45 miles per hour, malice can be inferred. RCW 9A.04.110(12).

2. The trial court abused its discretion in admitting cumulative hearsay statements and improper opinion testimony.

a. The 911 calls contained inadmissible hearsay statements and cumulative evidence.

i. *Mr. Alexander objected to the admission of the 911 calls on the basis that they contained statements that were hearsay and were cumulative of live testimony.*

The Court of Appeals wrongly ruled that Mr. Alexander failed to preserve adequately his objections to the admission of 911 calls. Slip Op. at 8. In Mr. Alexander's trial brief, he moved to exclude all out-of-court statements from Ms. Weis, Ms. Kent, and Ms. Colangelo, among others. CP 13. He argued that the statements were hearsay and did not fall within the "excited utterance" exception to the rule against hearsay. CP 20-23. The State, in contrast, moved to admit the recordings of the two 911 calls, which contained statements of Ms. Weis, Ms. Kent, Ms. Colangelo, and 911 operators and first responders. The State argued the statements were admissible as excited utterances or present sense impressions. CP 418-19.

During the hearing on motions in limine, the State played the recordings of Ms. Weis's and Ms. Kent's 911 calls. RP (5/19/15) 15-17; ex. 51. Apparently believing only an authentication issue was being discussed at that point, Mr. Alexander's counsel said he was "not aware of

an objection" he could make in light of the fact that "Ms. Weis and Ms. Kent would be present to identify themselves." RP (5/19/15) 17. The court accordingly ruled that it would admit the 911 calls. RP 17-18.

At trial, the State played a brief portion of the recording during Ms. Weis's testimony for identification purposes, but did not publish the evidence at that time. RP (5/26/15) 128. The next morning before trial continued, Mr. Alexander's attorney stated, "I would care to renew my objection with regard to 911 calls particularly." RP (5/27/15) 4. The court told him that he had not previously objected, and he said, "May I object then?" At first the judge said "no," but then she asked, "What is the new objection?" RP (5/27/15) 4. Mr. Alexander objected on the basis that the statements were hearsay and that they were cumulative in light of the fact that the witnesses were testifying to the same facts on the stand. RP (5/27/15) 4. The court overruled the objections, stating:

> At this point, I'm going to overrule that objection. So far as I know, at least part of this is admissible because the witness has testified. The State just chose not to publish that portion of the 911 call at the time, and that part of the 911 call is in at least. Ms. Kent's portion I'm going to reserve on until we see her body sitting in the chair and testifying, but then that's going to come in, too."

RP (5/27/15) 4-5.

During Ms. Kent's testimony, the State noted it was about to play the recording of the 911 calls. RP (5/27/15) 96-97. Mr. Alexander again

objected, saying, "I would object to the production of [exhibit] 51 as it is cumulative evidence, and the witness is testifying to the contents thereof." RP (5/27/15) 97. The court overruled the objection and the State played the recordings. RP (5/27/15) 97. Because the trial court reached and rejected Mr. Alexander's objections on their merits, the issues are adequately preserved.

ii. *The trial court abused its discretion in overruling the objections.*

The trial court abused its discretion in overruling the objections, because the 911 calls contained inadmissible hearsay and were cumulative of the live evidence.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801 (c). During their respective 911 calls, Ms. Weis and Ms. Kent described what Ms. Colangelo allegedly said about what happened in the car. Ex. 51. The 911 operators also repeated some of those statements to first responders. *Id.* Those declarations were out of court statements offered for their truth, and were accordingly inadmissible hearsay in the absence of an exception. ER 802.

The State claimed the statements fell within the "present sense impression" and "excited utterance" exceptions. But most of the statements did not fall within these exceptions.

The "present sense impression" exception permits the admission of hearsay statements "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1). "The statement must be a spontaneous or instinctive utterance of thought," not based on reflection, memory, or belief. *State v. Martinez*, 105 Wn. App. 775, 783, 20 P.3d 1062 (2001) (internal quotation omitted). "An answer to a question is not a present sense impression." *Id.*

The "excited utterance" exception permits the admission of hearsay statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). "This exception is based on the idea that under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control." *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (internal quotation omitted).

A statement falling within the excited utterance exception must be a spontaneous response to external shock, not one based on reflection. *Id.*

For example, a trial court did not abuse its discretion in admitting a 911 call under this exception where the victim-caller repeatedly says she's afraid, is emotional, "has a difficult time tracking what the 911 operator is saying," and is "not ... calmly and clinically describing the situation...." *State v. Rodriguez*, 187 Wn. App. 922, 940-41, 352 P.3d 200 (2015). And there was no abuse of discretion in admitting statements in another case where the witness "was excited when she called 911; she sounds frantic, and [the defendant and victim] can be heard fighting in the background." *State v. Jackson*, 113 Wn. App. 762, 770, 54 P.3d 739 (2002).

None of the statements made during Ms. Weis's 911 call fall within these exceptions. Ms. Weis placed the call 10 to15 minutes after the incident. RP (5/26/15) 128. She calmly reported a past event to the operator. Ex. 51, track 1. She was composed and reflective, not stressed or scared, as she responded to questions posed by the dispatcher. *Id.* The 911 operator then calmly repeated the allegations to the fire department representative, whom he had added to the call. *Id.* The fire department representative asked Ms. Weis questions, which she answered slowly and deliberately, trying to remember exactly what happened. *Id.* These statements were all inadmissible hearsay, not spontaneous statements made in response to external shock.

Chapin is instructive. There, a nurse's aide was charged with raping a nursing home patient who had Alzheimer's disease. *See Chapin*, 118 Wn.2d at 683-85. The day after the alleged rape, the patient was walking with a "painful gait," and his rectal area was "very red and irritated and swollen." *Id.* at 684-85. When the patient saw the defendant walk by his room, the patient shouted obscenities and threw a water pitcher at him. *Id.* at 684. The defendant walked by again a short while later, and the patient again got angry. *Id.* Later that day, when the patient's wife was visiting him, the defendant walked into the room and the patient "immediately started shouting at him and threatening him." *Id.* The patient's wife tried to calm him down, and he uncharacteristically began crying. His wife asked him why he didn't like the defendant, and he said, "Raped me." *Id.*

The trial court admitted the statement under the excited utterance exception to the rule against hearsay, but this Court reversed. *Chapin*, 118 Wn.2d at 685. The Court held that the requirement that the statement was made while the declarant was in an excited state caused by a startling event was not met. *Id.* at 689. The alleged rape had occurred a day or so earlier, and the patient had appeared calm at points between the alleged incident and the statement at issue. *Id.* And even if the startling event could be characterized as the repeated sightings of his attacker, those

sightings provoked anger, not excitement. *Id.* at 689-90. Furthermore, the patient "made the statement, 'Raped me', after calming down from being angry, not from being excited, and in response to a question from his wife." *Id.* at 691.

Similarly here, even assuming Ms. Weis was initially in an excited state caused by the shock of seeing Ms. Colangelo getting out of the car (a fact never shown), she made all of her statements 10 to15 minutes after the incident and was very calm at that point. She reflected upon what happened and responded to questions. She never sounded excited, nervous, or scared, and she did not make any spontaneous statements in response to physical shock. Ex. 51, track 1. The recording should have been excluded as inadmissible hearsay.

As to the recording of Ms. Kent's 911 call, some of Ms. Kent's statements could fall within the excited utterance exception, because she sounds agitated and is describing what she is presently witnessing regarding Ms. Colangelo's physical condition. Ex. 51, track 2. However, other statements Ms. Kent made were inadmissible hearsay because they describe alleged *prior* incidents. *Id.*; *see State v. Brush*, 183 Wn.2d 550, 561, 353 P.3d 213 (2015) (holding that victim's daughter's testimony relating her mother's description of an event that happened earlier probably did not fit within a hearsay exception). Furthermore, some

statements made during the call were those of calm 911 operators relating double hearsay, and therefore also fail to satisfy any exception. Ex. 51, track 2.

Although some of Ms. Kent's statements fit within the excited utterance exception, the entire recording should have been excluded as cumulative. Ms. Kent provided live testimony about the same events she described in the recording. RP (5/27/15) 94-98; RP (5/28/15) 6-7. Accordingly, the recorded statements were excludable under ER 403. *See Saldivar v. Momah*, 145 Wn. App. 365, 396-97, 186 P.3d 1117 (2008) (holding trial court did not abuse its discretion in excluding cumulative evidence under ER 403). Ms. Weis's statements, in addition to being inadmissible hearsay, were similarly cumulative of her live testimony. RP (5/26/15) 120-31; Ex. 51, track 1.

Moreover, the trial court erred in concluding that Ms. Weis's and Ms. Kent's 911 calls were admissible because the declarants testified at trial and were subject to cross-examination. RP (5/27/15) 4-5. This fact would have been dispositive if the objection had been based on the Confrontation Clause, but it is irrelevant in evaluating a hearsay objection. *See Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (explaining that testimony can violate the prohibition against hearsay without violating the confrontation clause, and vice versa).

"An out-of-court-statement is hearsay when offered to prove the truth of the matter asserted, *even if the statement was made and acknowledged by someone who is an in-court witness at trial.*" *State v. Clinkenbeard*, 130 Wn. App. 552, 569, 123 P.3d 872 (2005) (emphasis added). In sum, the trial court abused its discretion in admitting the 911 calls because they were cumulative of live testimony and were filled with hearsay statements that did not fall within any exception to the rule against hearsay.

b. The statements of the officer and detective constituted improper opinion testimony.

The trial court also abused its discretion in overruling Mr. Alexander's objections to an officer's statements and a detective's statements opining on the cause of Ms. Colangelo's injuries. Witnesses "may not testify as to the guilt of defendants, either directly or by inference." *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002). The Court of Appeals rejected this argument, but this Court should grant review and reverse. Slip Op. at 8-9.

E. CONCLUSION

Brian Alexander respectfully requests that this Court grant review.

Respectfully submitted this 10th day of March, 2017.

/s Lila J. Silverstein
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Attorney for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRIAN FRANK ALEXANDER, Appellant.	No. 74015-6-I DIVISION ONE UNPUBLISHED OPINION FILED: February 27, 2017

BECKER, J. — Brian Alexander appeals his conviction for second degree assault against his former girlfriend, KC. KC suffered substantial injuries while riding with Alexander in his car. At first, she reported that Alexander beat her up. Later, she recanted. She testified at trial that the injuries were the accidental result of Alexander's efforts to prevent injury when she grabbed the wheel and tried to jump out of the car. Relying on the recantation evidence, Alexander argued that he had lawfully used force in defense of self and others. Alexander now contends the trial court erroneously refused to instruct the jury on the additional defense theory that Alexander lawfully used force to prevent damage to his car. We find no abuse of discretion.

Around 10 p.m. on an August night in 2014, a woman walking through Magnuson Park observed KC coming towards her while "stumbling" and "falling." The woman saw that KC was "streaked in blood from her head" and had a gash

above her left eye. The woman offered to call for medical aid, but KC said she did not want the police to come. KC was "panicked" and was "saying that a man had beaten her and dropped her off, and she couldn't find her keys."

The woman walked with KC to a nearby apartment complex. KC went inside. About five minutes later, the woman called 911 and reported her interaction with KC, including KC's statements that she had been beaten up and did not want the police to come.

Once inside her apartment building, KC went to her neighbor's unit, where she took shots of vodka and a Valium. She then went to the unit of a different neighbor, her friend RK. KC took a sewing kit and attempted to stitch up the cut above her eye. RK observed that in addition to the cut, KC "had injuries to her leg, her neck; her ear was bleeding; one earring had been torn out" and "one eye was almost swollen shut." KC told RK that "Brian had thrown her out of a car" and "he had grabbed her by the neck and banged her face on the instrument panel of the vehicle before throwing her out of the vehicle." KC had dated Alexander on and off for several years, and was dating him at the time. RK called 911 and reported that KC had been beaten up by a man named Brian.

Police officers went to the apartment. They observed that KC was intoxicated. She told the officers that "she was accidentally punched in the face by her boyfriend." She was taken to a hospital later that night and treated for her injuries. A detective recorded an interview with KC a few days later and took pictures of her injuries. On August 22, 2014, the State charged Alexander with assault in the second degree with a domestic violence allegation.

In a "To whom it may concern" letter dated September 20, 2014, KC retracted what she had earlier said about the incident. According to the letter, she was having a panic attack while inside the car and hit the windshield while struggling to stop the car and get out. She said that Alexander pulled her by the neck to get her back into the car, acting with a desire to protect her, not to hurt her:

> In retrospect, I can not remember real detail as I was under the influence. In addition I was severely grieving my son . . . whom I lost last Feb. and I lost myself in tears and panic attack, unable to breathe in the car.
>
> In complete upset, I took control of the steering wheel so that I may get out of the car. In the midst of my panic attack, I unbuckled my seatbelt, and figured I would rather die on the highway . . . As a method of protection for the lives of myself and himself, Brian continued driving, pulling me by my neck back into the car. Again I grabbed the wheel hitting the curb and wanting to get out and hit the windshield.
>
> It is my belief that at no point was it Brian's intention to purposefully wound, hurt, or injure me in any way.

She reiterated these points in an interview recorded by defense counsel for Alexander.

At trial in May 2015, the State called KC as a witness. She testified that on the day in question, August 11, 2014, she spent time with Alexander, visiting friends and family. She said that while he was driving her home, she became upset and emotional and wanted to get out of the car. "I felt really panicked and claustrophobic, and I was going to jump out of the car. I took my seatbelt off. We started like wrestling. . . . He was trying to pull me back. I had the door open, and I was like grabbing at the wheel . . . . I hit my head when I pulled the wheel, and we hit the curb. I hit the windshield. . . . My seatbelt was off. I bit him. Um,

it was just a—it was just a fight of him trying to keep me in and pull me back and me wanting to jump out and die into oncoming traffic." She said Alexander, "obviously upset" with her behavior, dropped her off a few blocks from her apartment and threw her bag out of the car. She did not recall being in contact with Alexander since then except to receive a necklace that had been ripped off her neck in the struggle.

The prosecutor confronted KC with transcripts of her interview with the detective a few days after the incident. The transcripts prompted KC to recall that she did have contact with Alexander to tell him that she was not "pressing charges." The prosecutor took KC through the statements she made to the detective describing an intentional assault:

> A. So I initially said I got punched in the face twice. I don't know. It's a blur. We were in the car and I was bound by a seatbelt.
> Q. And?
> A. And that he pulled my hair and kept punching me in the face and jaw.
> Q. And go on to the next page. 2 through 4.
> A. I kept trying to get out of the car even when it was moving, and that just made him hit me more, and he finally stopped up the street from my house. . . . I'm trying to get out of the car, and he pushed me and I—I left. I got out. I was by that time covered in blood. Okay. Was the car still moving? No. Okay.
> Q. Okay. 12 through 13.
> A. Oh, yeah, it was scary. It was scary enough that I just wanted to jump out on to the freeway.
> Q. Then 20 through 21.
> A. Um, I mean it could happen in a matter of seconds; it could happen in a matter of minutes. You know, once you're hit by a man, it goes black, you're just . . .

After going through the transcript with KC, the prosecutor asked her: "Brian hit you that night, didn't he?" KC denied it. "No, not that I believe. I mean technically, you know, there was not like direct hits." KC recalled writing her

letter of recantation and giving it to defense counsel because she was "feeling really guilty" about the statement she gave the detective. She again insisted that Alexander had been trying to protect her. "What happened in that vehicle was what is in that letter of recantation."

Alexander did not testify. His defense theory relied on KC's recantation testimony to argue that he had used only as much force as necessary to prevent KC from hurting herself or causing an accident.

Alexander proposed to instruct the jury that force is lawful not only when used in self-defense but also "when used in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary." The court determined the evidence did not support a defense of property instruction:

> THE COURT: . . . Even no matter how I construe the evidence so far, there's no evidence that [KC] was damaging the defendant's property.
>
> . . . .
>
> THE COURT: Except in a joke sense of damaging it by colliding with the windshield.
>
> [DEFENSE COUNSEL]: No, no. No, no. I'm thinking of her reaching over and grabbing the steering wheel, and that would be a malicious interference with his property, that is his vehicle, and therefore endeavoring to bring trauma or damage to that car. He has a right to protect his proprietary interest in that vehicle.
>
> THE COURT: No. I do not believe that somebody has the right to beat somebody else to prevent them from grabbing the steering wheel. It would be different perhaps if he found her bashing the car with a hammer. All I can really say is he may have legitimately and arguably feared for his own life or hers. I think that's all that's at issue, not damage to the car.
>
> . . . .
>
> [DEFENSE COUNSEL]: She grabbed the wheel though, your Honor. . . . Her statements were, then I turned my attention to

the steering column, grabbed at the wheel, and things erupted or got more—

THE COURT: Yeah. I'm just not with you on that. I'm with you on, I was afraid I was going to die or she was, but I'm not with you on, I was afraid my car might get scratched or something. It's just not going to do it for me.

Okay. Onward to—but your concerns are noted. Okay. I'm definitely not going to be instructing on malicious mischief or—

[DEFENSE COUNSEL]: Trespass.

THE COURT: —damage to property on this record.

The jury convicted Alexander. His principal argument on appeal is that the court erred by refusing to give the proposed instruction on preventing lawful use of force to prevent malicious interference with property.

The use of force on the person of another is not unlawful when used "by a party about to be injured . . . in preventing or attempting to prevent . . . a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary." RCW 9A.16.020(3). "Malice" means "an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12). Malice may be inferred from "an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty." RCW 9A.04.110(12).

A criminal defendant is entitled to an instruction on his or her theory of the case if some evidence supports the instruction. State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010).

We review de novo a refusal to give a proposed jury instruction if the refusal was based on a ruling of law. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). If the refusal was based on a factual dispute, we review for

an abuse of discretion. Walker, 136 Wn.2d at 772. Here, Alexander does not contend, and the record does not suggest, that the trial court misunderstood the law. The issue is whether the court abused its discretion by determining there was no evidence to support the instruction offered by Alexander.

The State contends there was no evidence that KC acted with malicious intent to harm the car. We agree. The alleged assault occurred in Alexander's car while he was driving. KC testified that when she unbuckled the seatbelt and tried to get out of the moving vehicle, Alexander used force to protect her from harm by pulling her back in. She consistently portrayed her state of mind inside the car as emotional and upset. While a jury might infer that KC was trying to crash the car when she grabbed the steering wheel, nothing in her testimony suggests that she was trying to harm the car as distinct from harming herself or Alexander.

Alexander cites a portion of cross-examination by defense counsel in which KC was asked, "Upon reflection back, is it your perception that your behavior could have brought trauma not only to Mr. Alexander and his vehicle but to others on the roadway?" She replied, "Absolutely." This excerpt shows that KC later realized that damage to the car was among the potential consequences of grabbing the steering wheel, but it does not support characterizing her conduct that night as a "malicious" interference with the car.

In any event, the jury convicted Alexander of intentional assault despite having been correctly instructed on self-defense and defense of others. On this record, the jury could not have reasonably found that Alexander used lawful force

to protect his car once they found he did not use lawful force to protect himself and KC. We conclude the court did not abuse its discretion in refusing to give the requested instruction.

Alexander contends the court abused its discretion in admitting the 911 calls placed by the two witnesses who first encountered KC after she got out of Alexander's car. This argument was not adequately preserved. The court considered whether to admit the calls during a hearing on motions in limine, and Alexander at that time stated that he was not aware of an objection he could raise. In addition, the testimony from these witnesses that was most damaging to Alexander was their live testimony at trial. Even assuming the 911 calls were hearsay, as Alexander now argues, he has not persuasively identified how he was prejudiced by their admission.

Alexander contends the court abused its discretion by allowing the detective and one of the other officers to testify, based on their training and experience, that KC's facial injuries were consistent with being punched in the face rather than with hitting the windshield. Witnesses may not testify as to the guilt of defendants, either directly or by inference. State v. Olmedo, 112 Wn. App. 525, 530, 49 P.3d 960 (2002), review denied, 148 Wn.2d 1019 (2003). Here, the officers were not offering an opinion that Alexander was guilty of assault. Their testimony was properly based on their experience with car accidents. The most significant witness on this issue was the emergency room physician. He testified without objection that the severe bruising around KC's eyes could have been caused by hitting a windshield but was more consistent

with being punched. In view of his testimony, we cannot conclude that the outcome of the trial would have been different if the officers' testimony had been excluded.

Affirmed.

Becker, J.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74015-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: March 10, 2017