Supreme Court No. 99510-9
Court of Appeals No. 80565-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WEI WANG,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Wei Wang requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Wang, No. 80565-7-I, filed on January 25, 2021. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Washington cases hold that an out-of-court statement qualifies as an excited utterance only if it is made soon after a startling event and the declarant had no opportunity to reflect and consciously fabricate a lie. An out-of-court statement qualifies as a present sense impression only if it is contemporaneous with the event described and unembellished by premeditation, reflection, or design. Here, while speaking to 911, Zhen Wang consciously fabricated a lie. The trial court admitted the statement as both an excited utterance and a present sense impression. The Court of Appeals affirmed. Does the Court of Appeals' opinion conflict with cases from this Court and the Court of Appeals, warranting review? RAP 13.4(b)(1), (2), (4).

2. The constitutional right to present a full defense includes the right to present evidence relevant to the defense. Here, the trial court excluded evidence of the family members' relative immigration

statuses. The evidence was highly probative of the defense because it illuminated the power dynamics within the family. The Court of Appeals affirmed the trial court's ruling, reasoning that exclusion of the evidence did not prevent Wang from arguing his theory of self-defense to the jury. Should this Court grant review and hold exclusion of the evidence violated Wang's constitutional right to present evidence relevant to his defense? RAP 13.4(b)(1), (2), (3), (4).

3. When the defendant presents evidence that he used force in self-defense, the State must prove the absence of self-defense beyond a reasonable doubt. Here, Wang testified he used force against his mother-in-law in self-defense when she repeatedly grabbed and squeezed his genitals, causing him extreme pain. After Wang's arrest, the police confirmed that his genitals were injured. Wang did not intend to injure his mother-in-law but struck her only in an attempt to break free from her grip on his genitals. Did the State fail to prove beyond a reasonable doubt that Wang acted in self-defense?

4. A deadly weapon is defined by the sentencing statute as an "implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." RCW 9.94A.825. The statute also provides

a list of examples of *per se* deadly weapons. Id. Here, the court enhanced Wang's sentence by 24 months based on the allegation he used a chair during commission of the crime. But a plain reading of the statute does not include chairs, and the list of *per se* deadly weapons does not share similar characteristics to chairs. Is the question of whether a chair can qualify as a "deadly weapon" under the statute an issue of substantial public interest warranting review? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Wei Wang and Zhen Wang were married. RP 829, 1717. Zhen has two children from a prior relationship and the couple have a young son named George. RP 830, 1717. Zhen's mother Xiamin Yu and her father Wenxiang Wang lived in a condominium nearby. RP 827, 1360. Yu often spent the night at Wang and Zhen's house in order to help out with the children. RP 844, 853, 1359, 1364.

The Wangs' marriage was good, but soon after they married, they began having arguments. RP 833-35, 1718, 1726-27. Zhen had tight control of their finances and pressured Wang to wire money from his business in China into an account over which she had exclusive control. RP 1720-24. Zhen took Wang's credit cards, passport, real estate certificate, and Chinese identification card and driver's license

away from him. RP 1726. Although Wang was frustrated by Zhen's efforts to control him and their finances, he still loves her. RP 1718.

One day in August 2017, after the couple argued, Zhen called the police and said Wang had struck her, although she was not injured. RP 843, 1053-54. Wang was arrested and went to jail. RP 844, 1728. Zhen obtained a restraining order against him. RP 847-48.

Notwithstanding the restraining order, Zhen asked her mother to bail Wang out of jail and Yu agreed. RP 845-48, 1130, 1146, 1363, 1738. Wang was aware of the restraining order and thought he would be staying with his father-in-law but Zhen insisted that he return home. RP 1386, 1740-43. After bailing him out of jail, Zhen insisted that Wang listen to her about everything. RP 1756.

One night in September 2017, Wang and Zhen discussed divorce. RP 852, 1180, 1767. Zhen told Wang he must sign a document relinquishing custody of his son. RP 1183-84, 1769. Wang did not want to sign the document but she threatened to call the police if he did not, so he did. RP 1769. Zhen told Wang he must move out. RP 1516.

That night, Yu slept at the couple's residence. RP 853-55, 1359. The next morning, Zhen left the house to drive her daughter to school. RP 854. Wang woke up and went to speak to Yu because she had said

she would help him find a place to stay. RP 1771. He asked her for help and money, but Yu refused. RP 1772-73. Wang thought about his cell phone and bank cards, which were by the bed in the master bedroom. RP 1774. He thought he could call a friend and ask to stay at his place. RP 1786. Wang tried to go around Yu to get his belongings, but Yu moved to the narrow opening of the hallway to block his passage. RP 1775. She told him to wait until Zhen returned. RP 1775.

Wang tried to get through to the master bedroom but Yu pushed him back to the living room. RP 1775. His foot kicked a small wooden stool that was near the front door. RP 1775. Wang tried to push Yu out of the way, but she grabbed him and scratched him with her nails. RP 1776, 1781. She grabbed his shirt and they tussled back and forth and then she grabbed his penis, as if to crush it. RP 1779. That was very shocking and painful. RP 1779-83. He panicked, thinking she could seriously injure him. RP 1783. He picked up the wooden stool and hit her with it. RP 1783. He just wanted to end the attack and the pain and get out of her grip. RP 1784. He was not trying to injure her. RP 1784.

When Wang hit Yu with the stool, she let go of him. RP 1786. He went into the hallway but Yu followed and grabbed his penis again, causing intense pain. RP 1788. They struggled and went into the

bathroom. RP 1788. When Yu bent down and tried to bite Wang's penis, he grabbed a plastic stepstool and hit her in the mouth. RP 1791. She let go. RP 1792. He left the bathroom and she continued to follow him, still trying to grab him. RP 1793-94. They pushed each other in the hallway and fell to the floor in the small bedroom. RP 1793-94. Although Yu was injured, she grabbed Wang's penis again and squeezed, causing extreme pain. RP 1794, 1798-99. She then grabbed a wooden barstool and they tussled over it, causing it to break in two. RP 1797. The stool might have hit her in the head as they struggled over it. RP 1799. Finally, Yu let go and Wang left the room. RP 1799. Yu was sitting on the floor. RP 1800. Wang did not call 911 because he knew Zhen would soon return. RP 1802.

Wang had no intent to injure Yu; he hit her only in self-defense when she grabbed or tried to bite his penis. RP 1805, 1812-14. He was not aware of the extent of her injuries. RP 1813-13.

Wang grabbed his phone, wallet, and a large envelope containing his passport and an ownership certificate for his real estate in China. RP 1801-04. He left the house. RP 1805.

Zhen returned home about 14 minutes after she had left. RP 856. She heard her mother calling and found her on the floor in the small

bedroom in a pool of blood, with a laceration on her lip and an indentation on the side of her head. RP 856-58. Zhen called 911. RP 859. When the police responded, she lied and said that Wang had been living with her father. RP 1148-49.

When Wang was arrested the next day, he had lacerations on his torso, head, neck, hands, shin, and penis. RP 993-95, 1498-50, 1594-96, 1777. He was charged with one count of first degree assault and one count of attempted first degree premeditated murder, both with deadly weapon enhancement allegations. CP 40-41.

Prior to trial, the court admitted, over defense objection, Zhen's 911 call as both an excited utterance and a present sense impression. RP 282-300; Exhibit 5.

The State moved to exclude evidence of the immigration status of Wang, Zhen, and Zhen's parents. RP 311. Defense counsel objected, arguing the family members' relative citizenship status was critical to the defense because it played a major role in the family dynamics. RP 313-18. The court excluded the evidence, ruling the citizenship status of the family members was not relevant. RP 323-24.

Yu testified but could not say what happened during the incident, as she had no memory of it. RP 1366.

Wang testified that he struck Yu in self-defense because she repeatedly grabbed and squeezed his genitals, causing him extreme pain. RP 1776-99. The jury was instructed on self-defense. CP 133-36.

The jury found Wang guilty of first degree assault while armed with a deadly weapon but acquitted him of attempted first degree murder. CP 112-13, 116.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The trial court abused its discretion in admitting the recording of Zhen's 911 call because it did not qualify as a present sense impression or an excited utterance.

Contrary to the trial court's ruling, Zhen's 911 call did not qualify as a present sense impression or an excited utterance because Zhen blatantly lied to the operator during the call.

A present sense impression is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." ER 803(a)(1). An excited utterance is "[a] statement 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).

The key to both hearsay exceptions is spontaneity. Present sense impression statements must grow out of the event reported and in some

way characterize that event. Martinez, 105 Wn. App. at 783 (citing Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939)). "The statement must be a 'spontaneous or instinctive utterance of thought,' evoked by the occurrence itself, unembellished by premeditation, reflection, or design. It is not a statement of memory or belief." Martinez, 105 Wn. App. at 783 (quoting Beck, 200 Wash. at 9-10). The admissibility of a present sense impression rests upon the assumption that its contemporaneous nature precludes misrepresentation or conscious fabrication by the declarant. Martinez, 105 Wn. App. at 783.

Similarly, the "excited utterance" 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." Chapin, 118 Wn.2d at 686 (internal quotation marks and citation omitted). The stressful circumstances are believed to operate temporarily to overcome the ability to reflect and consciously fabricate. State v. Dixon, 37 Wn. App. 867, 872, 684 P.2d 725 (1984).

To qualify as an excited utterance, the declarant must have made the statement while under the stress of excitement caused by the startling event or condition. Chapin, 118 Wn.2d at 687. "This element

is the essence of the rule." Id. The key is spontaneity because as the time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases. Id. at 688. The longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought. Id.

The ultimate inquiry in determining whether the statement was sufficiently spontaneous is whether the declarant had the time and opportunity between the startling event and the utterance to reflect and consciously fabricate a lie about the incident. State v. Briscoeray, 95 Wn. App. 167, 174, 974 P.2d 912 (1999). If the record shows the declarant *did in fact* consciously falsify a portion of the statement, the statement cannot qualify as an excited utterance. Id.; State v. Brown, 127 Wn.2d 749, 758-59, 903 P.2d 459 (1995).

In Brown, T.G. called 911 to report she had been raped. Brown, 127 Wn.2d at 751. When the police arrived, she told them she was abducted, forced into her neighbor Brown's apartment, and then raped by four men. Id. The statements were admitted as an excited utterance. Id. at 752. At trial, however, T.G. explained she had actually gone to Brown's apartment willingly, in order to perform fellatio in exchange for money. Id. It was not until she entered Brown's apartment that four

men grabbed her and raped her. Id. T.G. lied to the police because she did not think they would believe she was raped if they knew she had agreed to perform sex for money. Id. at 753.

On review, this Court held T.G.'s statement did not qualify as an excited utterance. Id. at 759. T.G. plainly "had the time and opportunity between the startling event and the utterance to reflect and consciously fabricate a lie about the incident." Briscoeray, 95 Wn. App. at 174 (citing Brown, 127 Wn.2d at 759). The fact "that she had the opportunity to, and did in fact, decide to fabricate a portion of her story prior to making the 911 call renders erroneous the trial court's conclusion that the content of her call was admissible as an excited utterance." Brown, 127 Wn.2d at 759. Even if only a portion of the statement was consciously fabricated, the requirements of the rule were not satisfied and the entire statement was inadmissible. Id. at 758-59.

Here, as in Brown, Zhen's statement to the 911 operator is not either a present sense impression or an excited utterance because Zhen had the opportunity to, and did in fact, consciously fabricate a portion of her story. The spontaneity requirement of both rules is not satisfied.

Zhen told the 911 operator that Wang had "come over" to the house and tried to kill her mother. RP 280, 867. This was a consciously

fabricated lie. Zhen knew that Wang had not "come over" to the house but had spent the night in the spare bedroom. RP 848, 1744. Zhen knew Wang was not supposed to be at the house because of the restraining order. Notwithstanding the restraining order, Zhen had asked her mother to bail Wang out of jail and insisted he stay at the house. RP 845-48, 1130, 1146, 1363, 1386, 1738-43. In fact, Zhen also lied to the responding police officers and told them Wang had been living with her father. RP 1148-49.

In sum, Zhen's statement to the 911 operator did not qualify as either a present sense impression or an excited utterance because Zhen consciously and deliberately fabricated a portion of her story. Brown, 127 Wn.2d at 758-59; Briscoeray, 95 Wn. App. at 174; Martinez, 105 Wn. App. at 783. This Court should grant review and reverse.

2. The trial court abused its discretion in excluding relevant information about the family members' relative immigration status.

The trial court abused its discretion in excluding evidence of the family members' relative immigration status. The evidence was relevant because it illuminated the power dynamics within the family. The evidence was necessary to the defense because it countered Zhen's portrayal of Wang as a controlling and violent domestic batterer. Had

the jury heard the evidence, it would more likely have believed Wang's testimony that he acted in self-defense.

An accused in a criminal trial has a fundamental state and federal constitutional right to present evidence relevant to the defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)); Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); U.S. Const. amends. XIV, VI; Const. art. I, § 22.

Here, evidence regarding the family members' relative immigration status was relevant to the defense because it played a major role in the power dynamics within the family. RP 313-18. Zhen had the highest status in the family because she was a United States citizen. RP 314. She had sponsored both her parents and Wang when they immigrated from China. RP 314-15. Zhen used her superior citizenship status, as well as her superior financial resources, to control Wang and her parents. RP 314. Because she had sponsored them all, she had the ability to withdraw that sponsorship. RP 315. She used this power as leverage, threatening to send her family members back to China if they did not do what she wanted. RP 316. As defense counsel

argued, this information was critical to the defense because it countered Zhen's portrayal of Wang as an aggressive, controlling domestic violence batterer who was more likely to have injured his mother-in-law intentionally rather than in self-defense. RP 315-19.

Because the evidence was relevant and necessary to the defense, the court erred in excluding it. Jones, 168 Wn.2d at 720.

3. The State did not disprove self-defense beyond a reasonable doubt.

The State bore the burden to prove beyond a reasonable doubt that Wang assaulted Yu with the intent to inflict great bodily harm. CP 132; RCW 9A.36.011(1)(c). The State did not carry its burden because the record establishes that Wang acted reasonably in self-defense.

Self-defense negates the element of intent. State v. McCullum, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983). The State has the burden of disproving self-defense beyond a reasonable doubt. Id. at 496; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV.

The use of force is lawful "when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary." CP 133; RCW 9A.16.020(3).

A person acting in self-defense may use the degree of force that a reasonably prudent person would use under the circumstances appearing to him or her at the time. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The definition of "reasonableness" incorporates both subjective and objective characteristics. It is subjective in that the jury is entitled to stand in the shoes of the defendant, considering all the facts and circumstances known to him or her. It is objective in that the jury must use this information to determine what a reasonably prudent person similarly situated would have done. State v. Walker, 136 Wn.2d 767, 772-73, 966 P.2d 883 (1998); State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993).

All relevant facts and circumstances known to the defendant at the time of the assault should be considered. State v. Allery, 101 Wn.2d 591, 682 P.2d 312 (1984); State v. Wanrow, 88 Wn.2d 221, 240, 559 P.2d 548 (1977) (plurality opinion). The jury must consider the circumstances as they appeared to the defendant, not those that actually existed. State v. Theroff, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980); State v. Miller, 141 Wash. 104, 250 P. 645 (1926).

A person has a right to use force to defend himself against the danger of mere injury. State v. L.B., 132 Wn. App. 948, 953, 135 P.3d

508 (2006). A person who inflicts great bodily harm in self-defense need not himself fear "great bodily harm." Id. That standard is too high "for one who tries to defend himself against a danger less than great bodily harm but that still threatens injury." Id.

Here, Wang reasonably used force in self-defense. The altercation began when Wang tried to push past Yu in the hallway so that he could retrieve his belongings in the bedroom. RP 1776, 1781. He did not strike her until after she grabbed and squeezed his penis as if she was trying to "crush" it. RP 1779. When Yu grabbed Wang's penis, it caused him extreme pain and shock. RP 1779-83. He tried to push her aside, but she held on tighter to his genitals. RP 1873. He panicked, thinking she could seriously injure him. RP 1783. Only then did he pick up the wooden stool and hit her with it. RP 1783. He was simply trying to avoid any further pain and injury. He just wanted to end the attack and the pain and break free from her grip. RP 1784. He did not intend to injure Yu. His intent was either to get her to let go of him or to cause her to lose consciousness temporarily, without injury. RP 1784.

When Wang hit Yu with the stool, she did let go of him. RP 1786. But that was not the end of the danger. Wang went into the hallway, but Yu followed and grabbed his penis again, causing intense

pain. RP 1788. Wang hit Yu in the mouth with the plastic stepstool in the bathroom only after she tried to bite his penis. RP 1791. When he left the bathroom, she followed, still trying to grab him. RP 1793-94. Even after the two fell onto the floor in the small bedroom, and even though Yu was now injured herself, she grabbed his penis again and squeezed, causing intense pain. RP 1794, 1798-99. Yu grabbed the wooden barstool in the bedroom and the two tussled over it. RP 1797-99. The barstool broke in two and might have hit her in the head. RP 1799. It was only at that point that Yu finally let go. RP 1799.

In sum, Wang acted reasonably in self-defense in attempting to stop the pain and injury Yu caused when she grabbed and held onto his genitals, and the threat of further serious injury.

4. A chair does not fit within the plain meaning of the sentencing statute's definition of "deadly weapon."

The State alleged Wang was "armed with a deadly weapon" while committing the crime. CP 40-41. The "deadly weapon" was allegedly a chair. CP 40-41. But according to the plain meaning of the statute, a chair does not qualify as a "deadly weapon."

The Sentencing Reform Act defines a "deadly weapon" as

> an implement or instrument which has the capacity to inflict death and from the manner in which it is used, *is likely to produce or may easily and readily produce death.* The

> following instruments are included in the term deadly weapon: Blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver, or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

RCW 9.94A.825 (emphasis added).

To discern the plain meaning of an undefined statutory term, the Court may rely on a dictionary definition. Nissen v. Pierce Cty., 183 Wn.2d 863, 881, 357 P.2d 45 (2015). Here, the statute defines a deadly weapon as an "implement" or "instrument," both of which are not statutorily defined. RCW 9.94A.825. The dictionary definition of an implement is "a device used in the performance of a task: tool, utensil." Merriam Webster, "Implement," https://www.merriam-webster.com/dictionary/implement (last accessed May 28, 2020). An instrument is similarly defined as a "a mechanical tool or implement." Dictionary.com, "Instrument" (last accessed May 28, 2020).

In accordance with these definitions, the Court of Appeals has recognized that the statutory language "bespeaks instruments on the person which are *designed* to injure or kill." State v. Ross, 20 Wn. App. 448, 453, 580 P.2d 1110 (1978) (emphasis added); accord State v. Shepherd, 95 Wn. App. 787, 792, 977 P.2d 635 (1999). An ordinary

chair that is part of the ordinary furnishings of a house does not clearly fit within this plain meaning.

The legislature's purpose in creating the deadly weapon enhancement was "to recognize that armed crime, including having weapons available to protect contraband, imposes particular risks of danger on society." State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007). This intent is not served by applying the statute too broadly to encompass ordinary instruments and implements found in the home. Ross, 20 Wn. App. at 454. "[N]ot all instruments capable of producing bodily harm are deadly weapons." Id. at 453.

At issue in Ross was whether a motor vehicle qualified as a "deadly weapon" under the statute. Id. The court concluded the legislative intent behind the statute would not be served by labeling a motor vehicle a "deadly weapon" because "[p]eople will still use them as before, and there would seem to be no limit on the crimes that could be committed with an automobile." Id. at 454. Similarly here, a chair is an everyday object that has obvious and beneficial non-deadly uses. The legislature's intent to dissuade armed crime is not served by including "chairs" within the gambit of "deadly weapons" warranting an enhancement. See Ross, 20 Wn. App. at 454.

The deadly weapon enhancement statute refers to "instruments" and "implements," the plain meaning of which do not include chairs. RCW 9.94A.825. Further, the items listed as *per se* deadly weapons do not share similar characteristics to chairs. And the legislature's intent to discourage people from carrying and using dangerous weapons is not served by enhancing a person's sentence because they used a chair when committing a crime.

An ordinary chair does not qualify as a "deadly weapon" under the statute. Wang's deadly weapon enhancement must be vacated. Ross, 20 Wn. App. 455.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 18th day of February, 2021.

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FILED
1/25/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. WEI WANG, Appellant.	DIVISION ONE No. 80565-7-I UNPUBLISHED OPINION

DWYER, J. — Wei Wang appeals from the judgment entered on a jury's verdict finding him guilty of assault in the first degree with a deadly weapon enhancement. He contends that the trial court erroneously admitted evidence, that the exclusion of immigration evidence denied him the opportunity to present a defense, and that insufficient evidence supported both his conviction and the deadly weapon enhancement. Finding no error, we affirm.

I

In 2017, Wei Wang and Zhen Wang were a married couple living together in Shoreline. They lived with one of Zhen's daughters from a previous marriage and their young son. Zhen's parents, Xiamin Yu and Wenxiang Wang, also lived in Shoreline, in a condominium. Zhen's mother, Yu, would often go to Wang and Zhen's house to care for the children.

On several occasions, while the couple was arguing, Wang physically abused Zhen. In June 2017, after Wang restrained and slapped Zhen, he

threatened to kill Zhen and her family if she reported the incident. Zhen sought medical treatment but did not report that Wang had hit her. In August 2017, during another argument, Wang hit the back of Zhen's head while he restrained her on their bed. After Wang released her, Zhen ran from the room and called the police. Wang fled but was arrested upon his return to the house.

After his arrest, a no-contact order prohibited Wang from having any contact with Zhen. However, upon Zhen's request, Yu bailed Wang out of jail. Despite the no-contact order, Wang returned to the home he shared with Zhen and slept in a spare room while she remained in the master bedroom.

The night of September 13, 2017, Wang and Zhen argued and discussed divorce. Yu was staying over to help Zhen with the children. The next morning, Zhen woke up late and had to rush to take her daughter to school. Realizing that she had forgotten her wallet, Zhen returned home immediately after dropping her daughter off. She had been out of the home for approximately 15 minutes.

When Zhen arrived home, the family's second car was missing. Upon entering the house, she found blood and broken objects strewn throughout the living room, hall, and bathroom. Zhen heard Yu calling for her and found her in a bedroom, lying on the floor in a pool of blood. Yu's head was knocked in on the left side, she had a large laceration on her face, and several of her teeth had been knocked out. Yu was largely unable to move or speak.

Zhen telephoned 911 for help. On the phone with the 911 dispatcher, Zhen repeatedly exclaimed that her mother's blood was everywhere and pleaded for help. Zhen told the 911 operator that she could see "through [Yu's] skull" and

could see her mother's "brain stuff coming out." The 911 operator instructed Zhen to use a towel to apply pressure to Yu's wound. While Zhen was applying pressure to Yu's head wound, Yu communicated to her by moving a finger that Wang had caused her injuries. Yu relayed this information by telling the operator, "[S]he said my husband come over here and kill her." Zhen went on to provide Wang's name and the license plate of the missing family vehicle. She told a second operator that Wang had attacked Yu, repeating "I know it's him. It's him. He killed my mom. He killed my mom." Zhen told the operator she had a protection order against Wang. Zhen then asked the operator to protect her father at the condominium because Wang would "go over there and kill my dad." Zhen then pleaded for help until the paramedics arrived.

Yu suffered a fractured skull, brain contusions, head and facial fractures, lacerations to her scalp and face, and teeth avulsions. Yu's skull was eventually reconstructed with titanium mesh. Because of the brain damage she suffered, Yu has no memory of what occurred after Zhen left the house on September 14.

On September 15, Wang was apprehended in the family car in a motel parking lot in Beaverton, Oregon. Wang had lacerations on his torso, head, neck, hands, shin, and penis. He was charged with one count of first degree assault and one count of attempted first degree premeditated murder. For both counts, the State alleged that Wang was armed with a deadly weapon—a chair—and alleged a domestic violence relationship between Wang and the victim.

At trial, Wang testified as follows. On the morning of September 14, he tried to retrieve his cell phone and bank cards from the master bedroom but Yu

blocked his passage and refused to let him enter. According to Wang, when he tried to push Yu out of the way, she grabbed and scratched him before grabbing and squeezing his penis. This caused Wang concern that Yu would seriously injure him. As a result, he picked up a wooden stool and hit her body and arm. Yu then released his penis from her grip but followed Wang to a bathroom, where she again grabbed and squeezed his penis. Yu then attempted to bite Wang's penis and he hit her in the mouth with a plastic step stool. Again, Yu let go of Wang's genitals and Wang exited the bathroom. However, Yu continued to follow Wang into a small bedroom where the two fought over a wooden stool, which caused the stool to break. Wang testified that the stool "might have hit her head" during the struggle. Eventually, Yu let go of the stool. Yu told Wang that Zhen would be back in a minute. Wang walked into the master bedroom and took his cell phone and bank card, as well as other items including Yu's cell phone, and Zhen's forgotten wallet, and left the house.

The trial court admitted evidence of Zhen's 911 call as consisting of present sense impressions or excited utterances.[1] The trial court excluded evidence of the family's immigration status.[2] The jury convicted Wang of assault in the first degree and found both the deadly weapon enhancement and the domestic violence relationship by special verdicts. The jury acquitted Wang of attempted murder in the first degree.

[1] Prior to trial, the trial court indicated that the statements were admissible under both the excited utterance and present sense impression exceptions to the hearsay rule. During trial, the trial court ruled that the entire call was admissible as consisting of excited utterances.

[2] Wang, Zhen, and her parents are all originally from China. Zhen is a United States citizen.

Wang appeals.

II

Wang contends that the trial court erred in admitting the recording of Zhen's 911 call. This is so, he asserts, because "Zhen's statement to the 911 operator did not qualify as either a present sense impression or an excited utterance because Zhen consciously and deliberately fabricated a portion of her story." We disagree.

We review a trial court's determination that a hearsay exception applies for an abuse of discretion. State v. Magers, 164 Wn.2d 174, 187, 189 P.3d 126 (2008). An abuse of discretion occurs, in an evidentiary sense, when the trial court's ruling is manifestly unreasonable or based on untenable grounds or reasons. State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014). We may affirm the trial court on "any correct ground." State v. Gresham, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

Pursuant to ER 803(a)(2), "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" may be admissible as an exception to the hearsay rule.

> 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." The utterance of a person in such a state is believed to be "a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock," rather than an expression based on reflection or self interest.

State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992) (citation omitted) (quoting 6 JAMES HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1747, at 195 (1976)).

A statement qualifies as an excited utterance if (1) a startling event occurred, (2) the declarant made the statement under the stress or excitement of the event, and (3) the statement relates to the event. Magers, 164 Wn.2d at 187-88. Accordingly, when there is evidence that a declarant has intentionally fabricated statements, those statements are not excited utterances. State v. Brown, 127 Wn.2d 749, 757-58, 903 P.2d 459 (1995).

A present sense impression is "[a] statement 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 admissibility of a statement of a present sense impression is based upon the assumption that its contemporaneous nature precludes misrepresentation or conscious fabrication by the declarant." State v. Hieb, 39 Wn. App. 273, 278, 693 P.2d 145 (1984), overruled on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986).

The recording of the 911 call contains two levels of hearsay. During the call, Yu communicated to her daughter, Zhen, by wiggling her finger when Zhen asked her if Wang had done this to her, creating one level. Zhen then repeated this to the 911 operator, creating a second level of hearsay. Prior to trial, the court addressed both levels of hearsay, considered both the present sense impression and excited utterance exceptions to the hearsay rule, and ruled that the statements were admissible pursuant to either exception. During trial, the

court ruled that all of the statements on the call were admissible as excited utterances.

On appeal, Wang challenges the admissibility of Zhen's statements to the 911 operator. Wang asserts that Zhen's statements to the 911 operator cannot have been made while Zhen was still under the stress of a startling event because she "blatantly lied" by telling the 911 operator that Wang had "come over" to the house when, in fact, Wang had been living at the house.

Zhen initiated the 911 call at issue immediately after finding her mother badly injured and lying in a pool of her own blood. Zhen yelled to the operator that there was "blood everywhere" and repeatedly exclaimed that she needed help. To proceed with the call, the 911 operator had to ask Zhen to "[s]top talking and answer [the operator's] questions." These initial statements were excited utterances. Zhen discovered her badly injured mother, and while under the stress of that startling event, made statements related to that event.

As the call continued, the operator began to ask Zhen questions about Yu's condition and instructed her to use a towel to apply pressure to Yu's head wound. Zhen described Yu's current condition and her own actions as she held the towel to Yu's head. Anticipating that the operator would inquire into the mechanism of the injury, Zhen communicated with her mother using Chinese and hand gestures. Zhen then described to the operator what she believed Yu had communicated to her saying, "[S]he said my husband come over here and kill her." These statements were present sense impressions. Zhen uttered the statements describing her mother's condition and explaining her mother's

communication immediately after she perceived it. The trial court had no reason to believe that Zhen was fabricating or misrepresenting Yu's statements to her, nor any reason to believe that Yu had lied to Zhen.[3] Cf. Brown, 127 Wn.2d at 758 (trial court erred in admitting evidence of victim's 911 call after victim had testified that she had decided to lie to the police prior to making the call).

The trial court correctly ruled that Zhen's statements during the call fell within recognized exceptions to the hearsay rule. Her initial statements were excited utterances. The additional information she provided to the 911 operator describing Yu's condition and explaining Yu's communications were present sense impressions. Wang's argument to the contrary fails.

III

Next, Wang asserts that the trial court's decision to exclude evidence of his own and family members' respective immigration statuses infringed upon his right to present a defense. We disagree.

Our Supreme Court has explained that a contention that an evidentiary ruling violated a defendant's constitutional right to present a defense is reviewed pursuant to a two-step process. State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). First, we review the challenged evidentiary rulings under an abuse of discretion standard. Then, if necessary, we review de novo whether

[3] Zhen later testified that she lied to responding officers when they arrived at the house by telling them that Wang had been living with her father and had come to the house to attack her mother. The trial court had not yet heard this testimony when the evidentiary rulings at issue were made. Furthermore, Zhen's later decision to lie about where Wang had been staying does not establish that she misrepresented her mother's communication during the 911 call. More to the point, we focus on the information before the trial judge at the time of the challenged ruling. Wang never sought reconsideration of that ruling after Zhen testified about later deceiving the police. Thus, the fact is immaterial to our resolution.

such rulings violate a defendant's constitutional right to present a defense. See Arndt, 194 Wn.2d at 797-812.

Here, Wang does not contend that the trial court's ruling regarding immigration status violated the applicable rule of evidence.[4] Hence, we proceed directly to considering whether it violated his right to present a defense.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). "A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing Chambers, 410 U.S. at 294). However, defendants have "no constitutional right to present *irrelevant* evidence." Jones, 168 Wn.2d at 720.

When determining whether the right to present a defense has been violated, "the State's interest in excluding evidence must be balanced against the defendant's need for the information sought to be admitted." Arndt, 194 Wn.2d at 812. It would violate a defendant's right to present a defense to bar the admission of evidence that, "if excluded, would deprive defendants of the ability

[4] Immigration evidence in a criminal case is governed by ER 413(a). When immigration status is an essential element of, or a defense to, a criminal charge, it is admissible regardless of its potential for prejudice. When immigration status is offered to show bias or prejudice, it is admissible when, following a procedure laid out in ER 413(a)(1)-(4), the trial court determines that its "probative value outweighs the prejudicial nature of evidence of immigration status." ER 413(a)(4). In all other instances, immigration evidence is presumptively inadmissible. State v. Bedada, 13 Wn. App. 2d 185, 198, 463 P.3d 125 (2020). Wang did not file a pretrial motion including an offer of proof of relevancy of the proposed evidence, as is required by ER 413(a), to offer immigration status to show bias or prejudice of a witness.

to testify to their versions of the incident." Jones, 168 Wn.2d at 721. However, a trial court may bar the admission of evidence that, if excluded, would not completely bar a defendant from offering relevant evidence that would enable the defendant to present the defense theory of the case to the jury. See Arndt, 194 Wn.2d at 814 (concluding that Arndt's right to present a defense was not violated in a murder and arson case when only some of her proffered evidence was excluded and she was able to argue her defense theory).

Here, Wang contends that evidence of the family's immigration status was necessary to his self-defense claim because it explained the family's power dynamics in order to "counter" the State's narrative that he was an abusive husband. Specifically, he asserts that because, of the family members, only Zhen was a United States citizen, she had power over both her parents and him.

However, the record establishes that Wang was permitted to, and did, in fact, argue his theory to the jury that he acted reasonably in self-defense.[5] Immigration status evidence was not necessary for Wang to testify that his mother-in-law grabbed and squeezed his genitals and that he was afraid he would suffer serious harm.

Because Wang was allowed to proffer sufficient evidence to argue his defense theory to the jury, and did, in fact, argue his theory to the jury, his right to present a defense was not violated. See Arndt, 194 Wn.2d at 813-14 (concluding that there was no violation of Arndt's right to present a defense

[5] In his next claim of error, Wang contends on appeal that the record "establishes" that Wang acted reasonably in self-defense. This argument would be impossible had Wang not had the opportunity to present evidence of his theory.

because Arndt was able to advance her defense theory through the presentation of some, though not all, of her proposed supporting evidence).

IV

Wang contends that the State failed to prove beyond a reasonable doubt that he had the requisite intent to inflict great bodily harm. We disagree.

Due process requires that the State prove every element of a crime beyond a reasonable doubt. State v. Johnson, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). To determine whether sufficient evidence supports a conviction, an appellate court must "view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." State v. Homan, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences must be interpreted in favor of the State and most strongly against the defendant. Salinas, 119 Wn.2d at 201. Additionally, an appellate court "must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." Homan, 181 Wn.2d at 106.

To prove first degree assault as charged, the State was required to establish that Wang assaulted Yu with the intent to inflict great bodily harm and that the assault resulted in great bodily harm. Former RCW 9A.36.011(1)(c) (1997).[6] Wang raised a self-defense claim, shifting the burden to the State to

[6] The version of RCW 9A.36.011 in effect at the time is cited. RCW 9A.36.011 was amended effective June 11, 2020.

prove the absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

"Evidence of self-defense is evaluated 'from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.'" Walden, 131 Wn.2d at 474 (quoting State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). Reasonable force in self-defense is justified when there is an appearance of imminent danger. State v. Bradley, 141 Wn.2d 731, 737, 10 P.3d 358 (2000). The degree of force used is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. Walden, 131 Wn.2d at 474.

Wang argues that the State failed to provide sufficient evidence to refute his claim of self-defense and thus to prove that he intended to cause great bodily harm. A successful claim of self-defense negates criminal intent. State v. Brown, 94 Wn. App. 327, 343 n.4, 972 P.2d 112 (1999) (because a person acting in self-defense is acting lawfully, proof of self-defense negates the element of intent), aff'd, 140 Wn.2d 456, 998 P.2d 321 (2000).

Therefore, the State was required to disprove the self-defense claim beyond a reasonable doubt in order to prove that Wang assaulted Yu with intent to cause great bodily harm. See State v. Grott, 195 Wn.2d 256, 266, 458 P.3d 750 (2020); accord State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984).

To refute the claim of self-defense, the State produced evidence of the extent of the force that Wang used. The jury saw photographs of blood splatter and broken objects in the home and heard testimony about the extent of Yu's

injuries—including life-threatening head injuries. The jury was therefore free to conclude that even if Yu was the aggressor, the minor injuries suffered by Wang did not justify the force that he used. Further, the jury was entitled to disbelieve Wang's testimony. We defer to the trier of fact on issues of credibility of witnesses and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Because a rational finder of fact could conclude that Wang did not act in self-defense but, rather, intended to cause Yu great bodily harm, sufficient evidence supports the conviction.

V

Finally, Wang asserts that a chair cannot be a weapon for purposes of the deadly weapon enhancement and that, accordingly, the deadly weapon enhancement must be vacated. We disagree.

Because Wang did not object to the jury instructions or the special verdict form, our review is limited to whether a constitutionally sufficient quantum of evidence supported the deadly weapon enhancement. Evidence is sufficient to support an enhancement if, when viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements beyond a reasonable doubt. Salinas, 119 Wn.2d at 201.

The trial court instructed the jury, that for purposes of the special verdicts, a deadly weapon is "an implement or instrument that has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." See RCW 9.94A.825. It further instructed that:

> The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

See RCW 9.94A.825.

Neither party presented any evidence suggesting that a wooden chair was one of the specific items listed. Therefore, the jury had to find beyond a reasonable doubt that the chair used by Wang had the capacity to inflict death and from the manner in which it was used, was likely to produce or could have easily produced death.

Here, the evidence taken in the light most favorable to the State shows that Wang repeatedly struck Yu's head with a heavy wooden chair. Given the size and weight of the chair and the fact that Yu did indeed suffer life-threatening injuries, there was sufficient evidence to allow the jury to find that the chair had the capacity to inflict death and was likely to or could have easily and readily done so. See State v. Barragan, 102 Wn. App. 754, 761, 9 P.3d 942 (2000) (factors relevant to determining whether the object constituted a deadly weapon include the area of the victim's body targeted, the degree of force used, the defendant's stated intent, and the injuries actually inflicted).

That chairs have an ordinary purpose other than producing death does not change this analysis. Wang points to cases holding that motor vehicles are not deadly weapons, State v. Shepherd, 95 Wn. App. 787, 977 P.2d 635 (1999), and State v. Ross, 20 Wn. App. 448, 580 P.2d 1110 (1978), and contends that

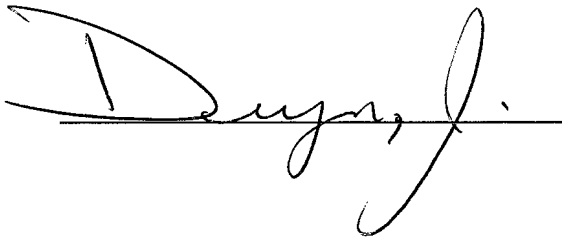
because chairs are not specifically designed for deadly use, they are outside the scope of the enhancement. However, the cited cases rely on the exclusion of the word "vehicle" in the enhancement statute's definition of deadly weapon although it does appear in the criminal code's definition of deadly weapon. See Shepherd, 95 Wn. App at 793 (citing Ross, 20 Wn. App at 454). Ross explains:

> Had the legislature intended, it could have specifically included motor vehicles within the enhanced penalty statute. Cf. RCW 9A.04.110(6). There is no question that an automobile may be a lethal weapon, but that does not mean it is a deadly weapon within the statute.

20 Wn. App. at 454.

Unlike motor vehicles, chairs do not appear in RCW 9A.04.110(6) and thus their absence from the weapons specifically listed in RCW 9.94A.825 does not indicate a legislative intent that chairs can never fall within the meaning of deadly weapon. Accordingly, Wang's argument to the contrary fails.

Affirmed.



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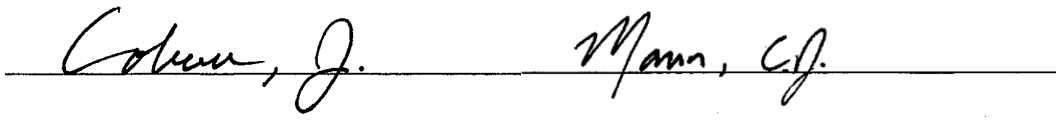

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