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SUPREME COURT NO. 99842-6

NO. 79368-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM MARION,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mary Roberts, Judge

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# PETITION FOR REVIEW

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WASHINGTON CASES

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner William Marion asks this Court to grant review of the court of appeals' substitute unpublished decision in State v. Marion, No. 79368-3-I, filed May 3, 2021 (Appendix A). The court of appeals granted in part and denied in part Marion's motion for reconsideration on that same date (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review warranted to answer whether a showup video depicting a Black defendant handcuffed, spotlit, and surrounded by mostly White police—where identity is not at issue—is overly prejudicial and tantamount to the defendant appearing shackled before the jury?

2. Is this Court's review warranted to decide whether evidence of a particular neighborhood's dangerousness and unsafe reputation is admissible for the objective element of self-defense—whether the accused acted reasonably in defending himself—where the accused can testify he subjectively feared for his safety, given the neighborhood?

3. Is this Court's review warranted to further clarify the law on first aggressor instructions following State v. Grott, 195 Wn.2d 256, 458 P.3d 750 (2020), where Marion's case presents a different factual scenario?

4. Should this Court also review the issues Marion raised in his Statement of Additional Grounds for Review?

C. STATEMENT OF THE CASE

The prosecution charged Marion with first degree assault of Gary Fuller and second degree assault of Lonzell Felder. CP 1-8. Marion's first trial ended in a hung jury and a mistrial was declared. CP 220-21. Marion's second trial also ended in a mistrial after the prosecution elicited a comment on Marion's right to silence. RP 576-77. Only on its third attempt was the prosecution able to obtain convictions against Marion. CP 423-30.

Marion is a slight Black man, 5'5" or 5'6" tall and only 115 pounds. RP 1105-06, 1591. Marion carries a small, folding utility knife on his belt for use at work. RP 1589. On May 22, 2016, Marion was on his way home by bus after purchasing a new cell phone. RP 1589-90, 1593. Around 10:00 p.m., Marion transferred busses in Rainier Beach, a neighborhood in Seattle that Marion is familiar with. RP 1590-91, 1597. Marion explained his perception that the neighborhood is a dangerous one, with a lot of gang activity. RP 1594-95. Marion previously had his jaw broken in the nearby Safeway parking lot. RP 1595. The trial court, however, excluded testimony from several other witnesses who would have corroborated Marion's testimony that the neighborhood can be dangerous, particularly for young Black men like Marion. CP 131-32.

As Marion waited at the bus stop, he played music aloud on his phone. RP 1593. Another young man at the bus stop, Lonzell, who is much

taller than Marion (6'1"), became irritated with Marion about the music. RP 993, 1593. Soon a Metro bus driver, Fuller, passed by on his way to use the transit restroom, prompting Lonzell to complain to Fuller about Marion. RP 1595-96. Though Fuller is about Marion's height, he is significantly heavier than Marion—more than 185 pounds at the time. RP 1520.

When Fuller walked by again after using the restroom, Marion heard Fuller "saying something to the effect of, people like that, you know, need to be punched out or knocked out or something like that." RP 1597. When Marion heard the threat, he was afraid. RP 1598-99. He "didn't think nobody was joking," especially "in an area like that at 10 o'clock at night." RP 1597.

Marion snapped into "self-preservation mode," opening his work knife inside his coat pocket, prepared to defend himself if needed. RP 1599-1600. Lonzell called out that Marion had a knife. RP 1600. The next thing Marion knew, Fuller charged at him, grabbed him by the throat, and pinned him against the bus shelter. RP 1600. Marion barely managed to get the knife out of his pocket because Fuller was on him in a matter of seconds. RP 1601. When Fuller finally let go of Marion after a minute or so, Marion dropped the knife and left. RP 1609-11. Marion maintained he did not initiate the fight with Fuller: "I was trying to defend myself." RP 1611.

The prosecution's version of events differed significantly. Lonzell agreed he became irritated with Marion because he was standing too close and playing music without headphones. RP 904-06, 970-71. After multiple requests for Marion to back up, however, Lonzell claimed Marion took out a knife and held it at his waist. RP 905, 920.

Around this time, Fuller walked by to use the restroom. RP 914-15. Lonzell approached Fuller as he exited the restroom a minute or two later. RP 921. Marion had put the knife away by then. RP 921-22. Lonzell testified that, in a serious tone loud enough for Marion to hear, Fuller told him, "some people need to get knocked out." RP 939, 977. Lonzell testified Marion then punched Fuller in the face and they began to fight. RP 922-23. Lonzell said Marion pulled out his knife and began stabbing Fuller in the stomach. RP 923.

Fuller testified, as he walked by to use the transit restroom, he noticed two men who appeared to be "goofing around." RP 1441-42, 1445. Lonzell apparently told Fuller that Marion had a knife. RP 1445-46. But Fuller did not believe Lonzell and did not see a knife, so Fuller continued on to the restroom. RP 1445-46. When Fuller exited the restroom, Lonzell asked for his help. RP 1447. Fuller testified Marion started yelling, "I can go anywhere I want," and then walked into Fuller as if walking through him. RP 1448. Marion said, "get your hands off me," hit Fuller twice in the face,

and a fight ensued. RP 1449-50. Fuller denied ever threatening Marion that some people need to get knocked out. RP 1505.

Another young man, De'Aris Lyles, saw the altercation from across the street and ran over to see what was happening. RP 1052. He observed Marion and Fuller wrestling, with a "knife interlocked between both their hands," noting, "nobody, like, had an upper hand." RP 1052, 1067.

Police arrived soon after Marion left. RP 835. Lonzell and Lyles provided descriptions of Marion. RP 837-38, 1224-26. Police located Marion nearby and detained him. RP 1106-08. Lonzell and Lyles both positively identified Marion in a showup. RP 847, 1076. Over defense objection, the trial court admitted video of the showup, depicting Marion handcuffed, spotlit, and surrounded by police officers. RP 856-57; Ex. 1.

At trial, Marion denied ever drawing a knife on Lonzell and asserted he acted in self-defense when he stabbed Fuller, in response to Fuller's threat and ensuing attack. RP 1611-13, 1695-1700. Marion's jury was instructed on the law of self-defense. CP 448-52. Over defense objection, the trial court also gave the prosecution's "first aggressor" instruction. CP 450; RP 1543-46, 1659. After deliberating for more than a day, the jury found Marion guilty as charged. CP 641-42; RP 1737-38.

On appeal, Marion challenged the first aggressor instruction, exclusion of the neighborhood evidence, and admission of the unduly

prejudicial showup video. The court of appeals affirmed Marion's convictions, but reversed his sentence, which is significantly impacted by State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). Opinion, 23-24.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. This Court's review is necessary to answer whether a showup video depicting a Black defendant handcuffed, spotlit, and surrounded by police—where identity is not in dispute—is overly prejudicial and tantamount to the defendant appearing shackled before the jury.

The trial court admitted video of Marion's showup identification for the first time at Marion's third trial, over defense objection to it being overly prejudicial, irrelevant, and cumulative. RP 856. The video was then played during testimony by the prosecution's very first witness, Officer Jason Atofau. RP 856-58. The video shows Marion handcuffed and restrained by two armed, uniformed police officers. Two spotlights are trained on Marion. The officers move Marion next to a marked patrol vehicle, open the backdoor, and prepare to force Marion inside. Two more uniformed officers stand close by, and several other patrol vehicles can be seen. Ex. 1.


Ex. 1 (approx. 10:36:26).

The video was only minimally relevant, at best, where Marion's identity was not in doubt or otherwise in dispute. Marion did not assert an identity defense, but rather claimed self-defense to the alleged assault of Fuller. RP 1597-99. Marion denied drawing a knife on Lonzell, but did not deny he was present at the bus stop that night and interacted with Lonzell. RP 1593-97. The fact of Lonzell's and Lyles's positive showup identifications were introduced through multiple witnesses' testimony and another video. RP 847, 859-60, 933-34, 1076, 1224-25, 1263. The video was therefore not an important component of the prosecution's case.

Conversely, the video was highly prejudicial, showing Marion—a Black man—restrained and surrounded by primarily White police officers.

The video viscerally depicted Marion's alleged dangerousness, singling him out as the guilty party, and in turn undermining his credibility and self-defense claim. Indeed, showup identifications, in which the suspect is presented singly to an eyewitness, have been "widely condemned" because they are inherently suggestive. Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 996 (1987).

Furthermore, this Court very recently recognized in State v. Jackson, 195 Wn.2d 841, 851, 467 P.3d 97 (2020):

> [T]he use of shackling as a means of control and oppression, primarily against people of color, has run rampant in the history of this country. Shackles and restraints remain an image of the transatlantic slave trade and the systematic abuse and ownership of African persons that has endured long beyond the end of slavery. Shackles and restraints also represent the forced removal of Native people from their homelands through the Trail of Tears and the slave labor of Native people. We recognize that although these atrocities occurred over a century ago, the systemic control of persons of color remains in society, particularly within the criminal justice system.

(Citation omitted.) Jackson expanded on this Court's longstanding precedent that criminal defendants are "entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances." State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967 (1999). Handcuffing or restraining the accused during trial undermines the presumption of innocence. Id. at 844. It also

"tends to prejudice the jury against the accused" because it singles out the defendant as a particularly dangerous or guilty person—just like a showup identification—threatening his right to a fair trial. Id. at 845.

On appeal, Marion argued admission of the showup video was tantamount to him appearing handcuffed and restrained in front of the jury. Br. of Appellant, 40-45. The court of appeals rejected Marion's claim, reasoning no authority established "a trial court errs by admitting evidence showing a defendant handcuffed after being detained by police officers." Opinion, 13. The court distinguished Finch on the basis that "the show-up video gave no indication of the trial judge's opinion as to whether Marion was dangerous." Opinion, 14. The court ultimately concluded the shackling cases "are entirely inapposite." Opinion, 14.

This Court has never addressed the question of whether an exhibit that depicts the accused handcuffed and restrained undermines the presumption of innocence in the same manner as shackling at trial. This issue is particularly important in a case like Marion's, where the showup video was not an essential component of the prosecution's case because Marion asserted self-defense and so his identity was not in dispute.

As Marion emphasized below, in determining whether evidence is unfairly prejudicial under ER 403, "the linchpin word is 'unfair.'" State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987) (quoting State v. Bernson, 40

Wn. App. 729, 736, 700 P.2d 758 (1985)); Br. of Appellant, 39. Unfair prejudice "means an undue tendency to suggest a decision on an improper basis." State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). This Court should answer whether evidence depicting the defendant handcuffed and restrained rises to the level of unfair prejudice when identity is not in dispute. Review is warranted under all four RAP 13.4(b) criteria.

2. This Court's review is warranted to answer the unresolved question of whether evidence regarding a neighborhood's dangerousness and unsafe reputation is relevant to whether the accused acted reasonably in defending himself.

Marion asserted he acted in self-defense to the charge of first degree assault of Fuller. The jury must evaluate evidence of self-defense from the standpoint of a reasonably prudent person, "knowing all the defendant knows and seeing all the defendant sees." State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) (quoting State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). This standard incorporates both objective and subjective elements. Id. The subjective portion requires the jury to stand in the accused's shoes and consider all the facts and circumstances known to him at the time. Id. The objective portion requires the jury to use this information to determine what a reasonably prudent person similarly situated would have done. Id. "Accordingly, the degree of force used in self-defense is limited to

what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." Id.

At Marion's trial, the court properly admitted evidence regarding the subjective element: Marion's own perception that the neighborhood was dangerous, along with evidence that he had his jaw broken in the nearby Safeway parking lot. RP 1245-46, 1595. Marion testified he was waiting for the bus rather than walking several blocks to the light rail station because "it's a neighborhood that's not very safe." RP 1594-95. He explained, "[t]here's a lot of, you know, gang activity and stuff." RP 1594-95.

Marion testified, when he heard Fuller's threat that some people "need to be punched out or knocked out or something like that," he "didn't think that nobody was joking." RP 1597. He explained, "in an area like that, I don't take—I—I wouldn't think anybody was joking in an area like that at 10 o'clock at night." RP 1597. Marion snapped into "self-preservation mode," given the threat, the neighborhood, and his still-healing jaw. 1599-1600. He reiterated, "it's 10 o'clock at night, and this is Rainier—Rainier and Henderson. Uh, this—it's not a joking thing when somebody starts talking about assaulting you in a place like that." RP 1599.

However, the trial court erroneously excluded evidence regarding the objective element of self-defense: that the neighborhood was, in fact, dangerous, particularly for young Black men like Marion. RP 131. Marion

was prohibited from introducing the following testimony regarding the neighborhood's dangerousness and unsafe reputation:

- A Seattle firefighter would testify the area has been nicknamed the "Guns and Knives Club" by firefighters who have responded there. RP 11; CP 265.

- A Seattle police officer would testify, "I would say that it's a high crime and violence area. We have a majority of our assaults, robberies, you know, it's a lot better than it use[d] to be, but at that time, it was pretty high impact. And I've worked there off and on for almost 30 years." CP 265; RP 125.

- Lonzell, who is very familiar with the area, would testify it is a "hot spot" and can be dangerous, especially for young black men at night. He would further testify he is fully on guard there at night. CP 265, RP 125-26.

- Lyles, who is also familiar with the area, would testify there is a lot of gang activity in the area and young black men can be targets. CP 265-66, RP 126.

- Crime statistics for the Rainier Beach neighborhood showing there were 81 violent crimes in 2016 alone (homicide, rape, robbery, and aggravated assault). CP 266, 286. This would corroborate the other witnesses' testimony. RP 127.

Marion contended at trial, as he did on appeal, that this evidence was "relevant to the jury regarding the objective determination of whether or not his actions were reasonable in light of the locations and circumstances." CP 264; Br. of Appellant, 30-35.

The excluded neighborhood evidence established the reasonableness of Marion's fear and the amount of force he used. The objective evidence of the neighborhood's dangerousness also went directly to whether Marion had

reasonable grounds to believe he was in actual danger of injury.[1] It is easy enough for the accused to testify he was fearful. Marion wanted to demonstrate his fear was legitimate. In 2016, the neighborhood saw a lot of gang activity, which, according to both Lonzell and Lyles, made young Black men like Marion targets for violence. Such evidence was critical in Marion's case where, based on the prosecution's evidence, Marion responded to Fuller's verbal threat with force. A jury might doubt such a response was reasonable, unless it understood the neighborhood was objectively dangerous, consistent with Marion's perception. With exclusion of the evidence, however, the jury could assess only how Marion felt, not whether his fear was *reasonable*.

The trial court excluded the evidence on the basis that "I don't have any reason to think that the information that they have to offer was information that was known to Mr. Marion at the time. And—and all that is relevant is what was known to him at the time." RP 131. The court of appeals upheld exclusion of the evidence on the same grounds, "Because there was no evidence that Marion had knowledge of the information that was contained in the testimony excluded by the trial court, this information was immaterial to Marion's self-defense claim." Opinion, 9.

[1] See CP 451 ("A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.").

There is essentially no case law on point. Below, Marion analogized to self-defense cases where the "defendant may introduce evidence of the victim's violent disposition to prove the victim acted in a violent manner at the time of the crime." State v. Hutchinson, 135 Wn.2d 863, 886, 959 P.2d 1061 (1998); Br. of Appellant, 33-35. Such testimony tends to show the defendant's state of mind and indicate whether he had reason to fear bodily injury. State v. Duarte Vela, 200 Wn. App. 306, 319, 402 P.3d 281 (2017). Marion did not make this analogy to suggest the neighborhood evidence established *Fuller's* propensity for violence. See Opinion, 9-10 (incorrectly characterizing Marion's argument as such). Rather, Marion wanted to demonstrate, given the neighborhood, he legitimately feared attack when he heard Fuller's threat that he needed to get "knocked out." RP 924.

Regardless, the court of appeals misperception of Marion's argument highlights the need for guidance on this issue. Where the accused is subjectively fearful in a particular neighborhood, does objective neighborhood evidence become relevant to corroborate the reasonableness of the accused's fear and the reasonableness of the amount of force used? Washington courts have never answered this question before, which implicates the accused's constitutional right to present a defense (RAP 13.4(b)(3)), and so review is warranted. See also RAP 13.4(b)(4).

3. Marion's case presents this Court an opportunity to further clarify the law on first aggressor instructions in a different factual scenario than *Grott*.

The trial court gave the prosecution's first aggressor instruction over defense objection. CP 450; RP 1543-44, 1659. The prosecution's theory for the instruction was Marion could not initiate the fight by punching Fuller and then claim he needed to defend himself with a knife. RP 1544-45. Marion challenged the instruction on appeal, arguing it was not supported by any evidence that Marion made a provoking act towards Fuller before the final alleged assault. Br. of Appellant, 14-25.

While Marion's case was pending in the court of appeals, this Court decided Grott, clarifying the law on first aggressor instructions. Before Grott, a rule had developed in the court of appeals that the provoking act necessary for a first aggressor instruction could never be the "actual assault." See, e.g., State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948 (2011).

This Court held such bright-line rules are "rarely appropriate" when analyzing first aggressor instructions. Grott, 195 Wn.2d at 275. The proper inquiry instead "must be fact specific and based on the evidence presented at trial." Id. at 274-75. While this Court did not outright reject the "actual assault" rule, it held the rule should not be applied in cases like Grott's, "where the defendant engaged in a course of aggressive conduct, rather than a single aggressive act." Id. at 271.

Grott began shooting at Thomas who was inside his parked car with a woman. Id. at 262. The woman exited the car, hid, and recalled Grott "shouting, reloading his gun, and continuing to shoot" at Thomas for "a good four minutes." Id. at 263. The evidence showed Thomas was also armed, and therefore the jury "could conclude that once Thomas pulled out his gun, Grott had a reasonable fear of imminent harm and continued shooting in self-defense, ultimately killing Thomas." Id. at 273. "But if Grott provoked the need to defend himself by firing the first shots, then self-defense was not legally available to him." Id. at 273-74.

This Court explained, "One cannot simultaneously engage in an act of first aggression and an act of lawful self-defense because an act of first aggression is an 'intentional act reasonably likely to provoke a belligerent response' *by* the victim, while lawful self-defense requires a 'subjective, reasonable belief of imminent harm *from* the victim.'" Id. at 272 (quoting 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 16.04, at 256 (4th ed. 2016); State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009)). This Court distinguished cases where the defendant took a single aggressive act (like firing a single shot) from cases like Grott's, where the defendant engaged in a course of aggressive conduct. Id. at 271-72.

This Court determined Grott "engaged in a course of aggressive conduct, firing 48 shots over the course of several minutes and pausing to reload multiple times." Id. at 273. Consequently, there was evidence from which the jury could reasonably determine Grott provoked the need to act in self-defense. Id. Indeed, "Grott fired several shots before Thomas even realized Grott was there." Id. Because Grott fired the first shots, which constituted the first act of aggression between Grott and Thomas, "self-defense was not legally available to him," and the first aggressor instruction was proper. Id. at 273-74.

This Court's decision on Grott significantly clarified the law on first aggressor instructions. However, it is but one factual scenario in which the old "actual assault" rule no longer applies. As this Court recognized in Grott, the facts of self-defense cases are often complicated and not amenable to bright-line rules. Id. at 272. Marion's case, with its distinct facts, offers this Court an opportunity to further clarify this area of law.

Marion's case should be distinguishable from Grott. Under the prosecution's theory, Marion attacked Fuller out of the blue. But this was not a prolonged attack, like in Grott, where Grott fired 48 shots over several minutes, including time to stop and reload. Rather, all three of the prosecution's key witnesses—Fuller, Lonzell, and Lyles—testified the altercation happened incredibly fast, in a manner of seconds. RP 926, 1067,

1449. Lonzell testified Marion hit Fuller twice and they tumbled to the ground. RP 925-26. Lonzell recalled, "it was just like this is so fast. Like, it was just—everything was happening, like, fast." RP 926. Lyles testified, "once they tumbled," the entire altercation lasted only about 45 seconds. RP 1067. Fuller, too, described Marion "charging at me and continuing to hit me," then "he's still coming at me." RP 1449. Thus, Marion took no initial act towards Fuller that was likely to provoke a belligerent response.[2]

The court of appeals in Marion's case concluded, however, "it is immaterial that the altercation between Marion and Fuller may have lasted for a short period of time." Opinion, 6. The court reasoned "[i]t is the course of conduct, not the length of time at issue, that our Supreme Court focused on in announcing the rule of Grott," and so concluded the first aggressor instruction was warranted. Opinion, 6. But Grott did not answer this specific question, where the altercation is exceedingly brief and there is no time for the accused to pause and reflect, as there was in Grott. See, e.g.,

[2] The prosecution contended in its briefing below that the first aggressor instruction was properly given because of Marion's threatening actions towards *Lonzell*, not Fuller. Br. of Resp't, 15-16. However, case law remaining intact following Grott recognizes the provoking act cannot "be an act directed toward one other than the actual victim, unless the act was likely to provoke a belligerent response from the actual victim." State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). By all accounts, Marion had put his knife away by the time Fuller got involved. RP 921-22. Fuller did not see the knife and did not believe Marion had one. RP 1445-47, 1502-08. Fuller thought the two men were just "goofing around." RP 1445. Any of Marion's alleged actions towards Lonzell were therefore not likely to provoke a belligerent response from Fuller. The court of appeals, correctly, did not buy into the prosecution's argument, instead analyzing Marion's actions towards Fuller only. Opinion, 4-6. However, the prosecution's argument demonstrates the need for this Court's further guidance following Grott.

State v. Villanueva-Gonzalez, 180 Wn.2d 975, 985, 329 P.3d 78 (2014) (considering these factors in determining whether "multiple assaultive acts constitute one course of conduct" for double jeopardy purposes). Review is therefore warranted, because Marion's case is potentially in conflict with Grott and, furthermore, presents a significant question of constitutional law and public importance. RAP 13.4(b)(1), (3), (4). Additional guidance for courts and practitioners in the wake of Grott would be highly useful.

4. This Court should also accept review of the issues Marion raised in his Statement of Additional Grounds for Review.

In his Statement of Additional Grounds, Marion advanced several arguments: (1) the court erred in denying his motion to dismiss based on double jeopardy and governmental misconduct after the prosecutor elicited a comment on Marion's silence (SAG, 1); (2) his right to a jury of his peers was violated because there were no African Americans in the jury pool (SAG, 1); (3) the court erred in denying his request for a continuance before his third trial (SAG, 2); (4) the court violated his confrontation rights by allowing Lyles's previous testimony to be read into the record at his third trial (SAG, 2); (5) Lyles's characterization of Marion as the "aggressor" constituted an improper opinion on guilt (SAG, 2); (6) the court erred in refusing to use his proposed juror questionnaire (SAG, 3); (7) the court should have dismissed a juror who may have overheard a conversation

between the prosecutor and a witness (SAG, 3); (8) the court erred in excluding evidence of a workplace complaint against Fuller (SAG, 5); (9) the self-defense instructions failed to state the jury should consider Marion's subjective impressions of the situation (SAG, 5); (10) the prosecutor improperly argued Marion was the only person with a deadly weapon during the altercation with Fuller, where Fuller's fists could also be deadly weapons (SAG, 6); and (11) cumulative error necessitated a new trial (SAG, 6). The court of appeals rejected Marion's arguments. Opinion, 15-23. Marion also respectfully requests review of these issues.

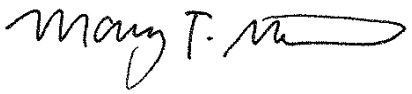
E. CONCLUSION

For the reasons discussed above, this Court should grant review, reverse the court of appeals, and remand for a new trial.

DATED this 2nd day of June, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



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# Appendix A

FILED
5/3/2021
Court of Appeals
Division I
State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br>Respondent,<br>v.<br>WILLIAM LEWIS MARION,<br>Appellant. | DIVISION ONE<br>No. 79368-3-I<br>UNPUBLISHED OPINION |

DWYER, J. — William Marion appeals from his convictions of assault in the first degree and assault in the second degree, both with deadly weapon enhancements. Marion's primary arguments on appeal are that the trial court erred by (1) giving a first aggressor instruction to the jury, (2) excluding certain evidence regarding the character of the neighborhood where the assaults occurred, and (3) admitting video evidence of his show-up identification. Marion also advances numerous arguments in his statement of additional grounds. Because Marion does not establish an entitlement to relief on any of these claims, we affirm his convictions. However, because a recent decision of our Supreme Court indicates that Marion is entitled to be resentenced, we remand the cause to the superior court for such action.[1]

[1] Marion's claim that he must be resentenced was raised for the first time in a motion filed after the filing of our opinion in this matter. However, because the issue was raised on direct appeal, Marion is entitled to relief.

I

On May 22, 2016, at approximately 10:00 p.m., William Marion waited at a bus stop in the Rainier Beach neighborhood of Seattle. Another individual, Lonzell Felder, was also at the bus stop. As Marion and Felder were waiting for a bus to arrive, Marion played music loudly over the speakers of his cell phone. Marion also walked "back and forth" within several feet of Felder. Felder began to feel uncomfortable because he did not know Marion and "it was late at night." Felder told Marion to "back up" several times. According to Felder, Marion responded, "you want me to back up; you want me to back up?" Marion then pulled out a knife.

Felder put his backpack in front of his chest because he "[d]idn't feel safe." Felder testified that he was afraid of the knife and felt threatened by Marion.

Gary Fuller, an on-duty Metro bus driver, parked the bus he was driving at the bus stop and walked toward a restroom located nearby. According to Fuller, as he was approaching the restroom, Felder said to him, "you got to help me out" and "this guy's got a knife, and he won't leave me alone." Fuller did not see the knife and thought Marion and Felder were "goofing around." However, Fuller noticed that Marion "had his hand in his pocket kind of—kind of strangely." Fuller then went into the restroom for several minutes.

After Fuller exited the restroom, Felder said to him, "you've got to help me. This guy's got a knife, and he's not going to leave me alone." According to Felder, Fuller responded by saying that "some people deserve to get knocked [out]." However, Fuller denied saying this.

According to Fuller, Marion started yelling that "he could go anywhere he wanted" and then walked into Fuller "like he was going to walk through me." Marion then punched Fuller in the head and face and, according to Felder, "they started fighting normally [before] they fall [sic] to the ground." While they were on the ground, Marion took out the knife and stabbed Fuller numerous times. Felder then telephoned the police.

De'Aris Lyles, a passerby, noticed the altercation between Marion and Fuller as he was crossing the street near the bus stop and "[saw] them pile over." Lyles ran over to the bus stop. Felder informed him that Marion had a knife. Lyles testified that he "could see blood on the bus driver" and Marion was "snarling and . . . biting at the bus driver's face," saying, "I'm going to fuck you up, I'm going to fuck you up." Lyles and Felder "were just screaming to let him go."

Marion and Fuller eventually separated and Marion "took off hightailing" and ran down an alleyway. After police officers arrived at the bus stop, Fuller, Lyles, and Felder provided a description of Marion to the officers. Shortly thereafter, an individual matching Marion's description was detained by police officers. An officer noticed that Marion had blood on his lips. Police officers then placed handcuffs on Marion's wrists and Marion expressed his belief that the stop was based on racial profiling.

Both Felder and Lyles agreed to participate in a show-up identification and police officers drove them to the location where Marion had been detained. Lyles testified that he identified Marion as the individual who stabbed Fuller based on Marion's face and clothing. During the show-up identification, Marion refused to

turn his face toward Felder, so Felder was unable to make out his "full face." Nonetheless, Felder identified Marion based on his clothing. Marion was then placed under arrest.

Fuller was treated at Harborview Medical Center. He had four stab wounds, bites on his head, and his shoulder was injured. Additionally, Fuller's diaphragm was lacerated and his injured spleen had to be removed. He was hospitalized for six days.

The State charged Marion with two counts of assault: assault in the first degree of Gary Fuller and assault in the second degree of Lonzell Felder, both with deadly weapon enhancements, "to-wit: a knife." The case proceeded to trial. A mistrial was declared after deliberations resulted in a hung jury. The case went to trial again. The second trial ended in a mistrial after the prosecutor elicited an impermissible comment on Marion's constitutional right to silence. At the conclusion of a third trial, a jury found Marion guilty on both counts as charged. The trial court imposed a sentence of 276 months of incarceration.

Marion appeals.

II

Marion contends that the trial court erred by giving a first aggressor instruction to the jury. According to Marion, the first aggressor instruction was not supported by any evidence that Marion initiated a provoking act toward Fuller before the actual assault and, thus, the instruction was not warranted. We disagree.

Whether sufficient evidence was adduced to warrant a first aggressor instruction is a question of law reviewed de novo. State v. Anderson, 144 Wn. App. 85, 89, 180 P.3d 885 (2008). Moreover, "when determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." State v. Wingate, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005).

A trial court does not err by giving a first aggressor instruction "[w]here there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense." State v. Riley, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). Further, "[t]he provoking act must be intentional." State v. Kidd, 57 Wn. App. 95, 100, 786 P.2d 847 (1990). Although we have previously expressed a bright-line rule that a provoking act cannot be the "actual assault," Kidd, 57 Wn. App. at 100, our Supreme Court has recently clarified that this rule "cannot be applied in cases . . . where the defendant engaged in a course of aggressive conduct, rather than a single aggressive act." State v. Grott, 195 Wn.2d 256, 271, 458 P.3d 750 (2020).[2]

Marion contends that the first aggressor instruction was not justified because "[t]he two punches were an inextricable part of the final assault."

[2] In Grott, the defendant, over the course of several minutes, fired 48 shots from a gun at an individual who was sitting in a car, pausing to reload multiple times. 195 Wn.2d at 262-63. During the trial, a witness "testified that [the defendant] fired several shots before [the victim] even realized [the defendant] was there." Grott, 195 Wn.2d at 273. After the shooting, a loaded gun was discovered under the victim's body. Grott, 195 Wn.2d at 263-64. The Supreme Court held that a first aggressor instruction was justified because the defendant "engaged in a course of aggressive conduct, firing 48 shots [from his gun] over the course of several minutes and pausing to reload multiple times." Grott, 195 Wn.2d at 273.

However, a jury could have reasonably determined that Marion engaged in a course of aggressive conduct that provoked any need for him to use force against Fuller. Indeed, Fuller testified that, after he exited the restroom, Felder approached him, saying, "you've got to help me. This guy's got a knife, and he's not going to leave me alone." Then, according to Fuller, Marion started screaming, "I can go anywhere I want," and walked toward Fuller "like he was going to walk through me." After Marion walked into Fuller, Marion "threw up his hands and said, 'Get your hands off me.'" Marion then punched Fuller twice in the "[f]ace and head." According to Felder, Marion and Fuller "started fighting normally [before] they fall [sic] to the ground." While they were on the ground, Marion stabbed Fuller four times with a knife. This evidence supports a view that Marion "engaged in a course of aggressive conduct, rather than a single aggressive act." Grott, 195 Wn.2d at 271.

Marion claims that he did not engage in a course of aggressive conduct because, unlike the altercation in Grott, which lasted several minutes, Marion's altercation with Fuller "happened incredibly fast, in a manner of seconds." However, it is immaterial that the altercation between Marion and Fuller may have lasted for a short period of time. It is the course of conduct, not the length of time at issue, that our Supreme Court focused on in announcing the rule of Grott. Pursuant to that authority, the instruction was warranted.

The trial court did not err.

III

Marion asserts that the trial court erred by excluding (1) testimony of a Seattle firefighter that the Rainier Beach neighborhood had been nicknamed the "Knives and Guns Club," (2) testimony of a Seattle police officer that the neighborhood was a "high crime and violent area" and that, in 2016, 81 violent crimes occurred in the neighborhood, (3) testimony from Felder that the area was a "hot spot" and could be "a dangerous place for young, black men at night," and (4) testimony from Lyles that "a lot of gang activity" occurred in the area and that "black young men can be targets."[3] Because this evidence was not relevant to whether Marion acted reasonably in using force against Fuller, the trial court did not err by excluding it from evidence.

The right to present a defense is guaranteed by both the United States and Washington Constitutions. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. "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). However, [t]hese rights are not absolute." Jones, 168 Wn.2d at 720.

[3] The State contends that, contrary to Marion's assertion, the trial court permitted Felder and Lyles to testify that Rainier Beach was a dangerous neighborhood. However, the trial court did not permit Felder and Lyles to testify specifically that Rainier Beach was a "hot spot," had a lot of gang activity, and was dangerous for young black men. Prior to the third trial, the trial court ruled that "as far as the issue of whether the—this Court's ruling on how much can come out about the dangerousness of the neighborhood, the information that was elicited during the first trial and that that is contemplated this time is essentially the same." During the first trial, Marion questioned Felder about whether one would "be more on guard . . . in that area of town, knowing what you know about it," and Felder responded, "Knowing what I know about it, [one] would." Further, Lyles, upon being asked by Marion if he was "on edge" in the neighborhood, responded, "Me, not so much because I know the area, but if you weren't from around there you probably would be." Thus, although the trial court permitted Felder and Lyles to testify as to the dangerousness of the Rainier Beach neighborhood, the extent to which they could testify to the neighborhood's character was limited.

Indeed, "[d]efendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence." Jones, 168 Wn.2d at 720.

A claim that evidentiary rulings violated a defendant's constitutional right to present a defense are reviewed pursuant to a two-step process. State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). First, the challenged evidentiary rulings are reviewed under an abuse of discretion standard. Arndt, 194 Wn.2d at 797. Then, if necessary, the rulings are reviewed de novo to determine whether they violated a defendant's constitutional right to present a defense. Arndt, 194 Wn.2d at 797-98.

Here, the trial court excluded the testimony from the firefighter and police officer because it did not "have any reason to think that the information . . . was information that was known to Mr. Marion at the time. And—and all that is relevant is what was known to him at the time." Further, the trial court ruled that

> Mr. Felder and Mr. Lyles[] may testify as to, similarly, things that were going on in their minds. What information they had that informed how they acted that night to describe the full scenario but not general testimony about the neighborhood from their perspective because, again, it's not relevant.

Consistent with these rulings, the trial court both permitted Marion to testify that, in his perception, Rainier Beach was a dangerous neighborhood and admitted evidence that Marion's jaw had previously been broken in the area.

Marion does not contend that the evidence excluded by the trial court was known to him when he used force against Fuller. Rather, he asserts that this evidence was relevant to the objective portion of a claim of self-defense because

the evidence tended to show "that the neighborhood was, in fact, dangerous." Marion is wrong.

"The use of force is lawful and justified where the defendant has a 'subjective, reasonable belief of imminent harm from the victim.'" Grott, 195 Wn.2d at 266 (quoting State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009)). As such, self-defense

> incorporates both objective and subjective elements. The subjective portion requires the jury to stand in the shoes of the defendant and consider *all the facts and circumstances known to him or her*; the objective portion requires the jury to use *this information* to determine what a reasonably prudent person similarly situated would have done.

State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) (emphasis added).

In other words, to be material to a claim of self-defense, evidence must have a tendency to show what was known to the defendant when he or she used force. Because there was no evidence that Marion had knowledge of the information that was contained in the testimony excluded by the trial court, this information was immaterial to Marion's self-defense claim.

Next, Marion asserts that the evidence tending to demonstrate that Rainier Beach was a dangerous neighborhood should have been admitted because the "evidence was akin to evidence of [a] victim's propensity for violence." Although "[e]vidence of a victim's propensity toward violence that is known by the defendant is relevant to a claim of self-defense," State v. Duarte Vela, 200 Wn. App. 306, 319, 402 P.3d 281 (2017), Washington courts have not permitted evidence of a neighborhood's character to be used to establish a victim's

propensity for violence. Indeed, if a defendant could establish a victim's propensity for violence merely by presenting evidence of a neighborhood's character, people in certain neighborhoods would be afforded less protection under the law solely based upon the area in which they live, work, or happen to travel through. We decline to adopt a rule that would noxiously discriminate against individuals on this basis.

Accordingly, the trial court did not err by excluding certain evidence that tended to show that Rainier Beach was a dangerous neighborhood.

IV

Marion contends that the trial court erred by admitting a video of his show-up identification because the video was unduly prejudicial, showing him handcuffed, standing in a spotlight, and surrounded by police officers. [4]

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[4] The State claims that Marion did not properly object to the show-up identification video because, at trial, he did not assert the specific ground that he now asserts as to why the video was inadmissible. Specifically, after the State moved to admit the video of Marion's show-up identification into evidence, the following exchange occurred between Marion's attorney and the trial court:

> [Defense]: And we would object to hearsay and foundation, cumulativeness, overly prejudicial, and relevance.
>
> The Court: Are these additional objections or not?
>
> [Defense]: They're—they're the previous objections.
>
> The Court: Okay. If—if you could clarify when you're making additional objections, that would be helpful. Exhibit 1 is admitted.

According to the State, Marion's attorney's statement that he was making the "previous objections" refers to the objections raised during the second trial. At that trial, Marion did not object to the show-up identification video on the specific ground that it depicted him handcuffed, surrounded by police, and standing in a spotlight. However, Marion did raise this specific objection prior to the first trial:

> The Court: . . . . Okay. Moving on. We have the 3.6 issue regarding the showup.
>
> [Defense]: Defense is asking the court to exclude the identifications of Mr. Felder and Mr. Lyles at the showup . . . .
>
> . . . .
>
> When at the scene, Mr. Marion is handcuffed. He's in front – he's surrounded by four officers that are in uniform. He is next to a uniformed, marked patrol car. There's a spotlight that is shining directly on him and on the face.

Moreover, according to Marion, the video was only minimally relevant because his identity was not in dispute. We hold that the trial court did not err by admitting the show-up identification video into evidence.

"[A] trial court's evaluation of relevance under ER 401 and its balancing of probative value against prejudicial effect . . . under ER 403 [are reviewed] with a great deal of deference, using a 'manifest abuse of discretion' standard of review." State v. Luvene, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995) (quoting State v. Russell, 125 Wn.2d 24, 78, 882 P.2d 747 (1994)). Although, "[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

Here, the show-up identification video was relevant to whether Marion was properly identified by Lyles and Felder as the individual who stabbed Fuller. Indeed, after Marion was detained by police officers, both Lyles and Felder agreed to participate in a show-up identification. During the show-up identification, Felder was able to see Marion's clothing but could not make out his "full face." A police officer "tr[ied] to get [Marion] to face the police car so [Felder] could see him, and [Marion] would turn to face away." Thus, the video was relevant to whether Lyles and Felder had a proper opportunity to observe and identify Marion as the individual who assaulted both Felder and Fuller.

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Thus, it appears that the trial judge and defense counsel may have been "talking past one another" in the quoted exchange from the third trial. While the trial judge may have considered the "previous objections" to be those interposed during the second trial, as the State contends, it is equally possible that defense counsel interpreted the question as pertaining to *all* previous objections—those raised during or before either of the two prior trials. There is no way for us to resolve this ambiguity. Accordingly, we treat the objection as being properly preserved.

Moreover, contrary to Marion's assertion, Marion's identity was put at issue during the trial. Notably, Marion's attorney questioned Felder regarding his poor eyesight and ability to identify Marion during the show-up identification:

> Q I want to go back to your eyesight, Mr. Felder. You said that you had pretty bad eyesight, right?
>
> A Uh-huh.
>
> Q And you don't wear any glasses or contact lenses; is that correct?
>
> A No.
>
> Q And you had some difficulty when you were doing the show-up identification seeing the individual, right?
>
> A Uhm, he wouldn't turn his full face, so, I couldn't, like, make out his full face.
>
> Q Okay. And, they had lights on him; is that right?
>
> A Yes.
>
> Q And you said in direct testimony that you never actually saw his full face, right?
>
> A Yes.
>
> Q So, you were making the identification based on the clothing—
>
> A Yes.

Shortly thereafter, Marion's attorney also questioned Felder about a Facebook post in which Felder described Marion as potentially being Mexican even though Marion is Black:

> Q You also posted on Facebook the night of this incident, too, right?
>
> A Uhm, yes.

. . . .

Q Okay. And, on your postings—well, Mr. Marion to you, when you had to describe him, do you recall—do you recall describing him you thought as maybe Mexican?

A Uhm, yeah, I—I think I did.

Clearly, Marion questioned Felder concerning his ability to identify "the individual" detained by police officers during the show-up identification. As such, Marion's identity as the perpetrator was at issue at trial.

Nonetheless, according to Marion, the trial court erred by admitting the show-up identification video because it was unduly prejudicial. In support of his argument, Marion cites to two published decisions that involved defendants who were ordered by the trial court to be handcuffed or shackled at or prior to trial. In particular, Marion cites to the Supreme Court's opinion in State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967 (1999), wherein the issue was whether a trial court abused its discretion by ordering a defendant to be shackled during his trial. In addition, Marion cites to Division Three's opinion in State v. Early, 70 Wn. App. 452, 462, 853 P.2d 964 (1993), in which the court stated that, during a trial, "handcuffing should not be permitted except to either prevent escape, prevent the accused from injuring others or to maintain a quiet and peaceable trial."

Marion asserts that, although he "was not handcuffed or restrained during trial, . . . the effect was the same when the trial court admitted the video of [his] showup identification." Not so. Neither of the opinions cited by Marion indicate that a trial court errs by admitting evidence showing a defendant handcuffed after being detained by police officers. Indeed, in Early, Division Three held that a trial

court did not err by refusing to order a mistrial where the jury panel saw the defendant in handcuffs during jury selection. 70 Wn. App. at 462. Moreover, as the Supreme Court explained in Finch, "[w]hen the court allows a defendant to be brought before the jury in restraints the 'jury must necessarily conceive a prejudice against the accused, *as being in the opinion of the judge* a dangerous man, and one not to be trusted, even under the surveillance of officers.'" 137 Wn.2d at 845 (emphasis added) (quoting State v. Williams, 18 Wash. 47, 51, 50 P. 580 (1897)). To the contrary, in this case, the show-up identification video gave no indication of the trial judge's opinion as to whether Marion was dangerous. The cases relied on by Marion are entirely inapposite.

We have previously explained that a jury's knowledge of a defendant's custody status does not prejudice the defendant in the same way that being shackled in front of the jury during a trial might do so:

> [A]lthough references to custody can certainly carry some prejudice, they do not carry the same suggestive quality of a defendant shackled to his chair during trial. Jurors must be expected to know that a person awaiting trial will often do so in custody. . . . In this case, a reasonable juror would know that a defendant in a first degree murder trial was not likely to be released pending trial unless he paid a substantial amount of bail, regardless of whether he was later found to be innocent.

State v. Mullin-Coston, 115 Wn. App. 679, 693, 64 P.3d 40 (2003), aff'd, 152 Wn.2d 107, 95 P.3d 321 (2004).

Similarly, jurors should be expected to know that a person, upon being detained for the suspected stabbing of another, will likely be placed in handcuffs by the police.

The trial court did not abuse its discretion by admitting the video into evidence.

V

Marion also raises numerous claims of error in his statement of additional grounds. None of these claims have merit.

A

Marion first asserts that, after the second trial ended in a mistrial, the trial court erred by denying his motion to dismiss based on double jeopardy and governmental misconduct under CrR 8.3(b). We disagree.

During the second trial, Marion moved for a mistrial because the prosecutor commented on his right to remain silent. The trial court granted the motion. Subsequently, Marion filed a motion to dismiss based on double jeopardy and governmental misconduct under CrR 8.3(b). The trial court denied that motion.

"'Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.'" State v. Cochran, 51 Wn. App. 116, 119, 751 P.2d 1194 (1988) (quoting Oregon v. Kennedy, 456 U.S. 667, 676, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982)). "This standard merely calls for the court to make a finding of fact by inferring the existence or nonexistence of intent from objective facts and circumstances." Cochran, 51 Wn. App. at 119. Furthermore, "[a] determination of whether certain actions constitute intentional misconduct is a finding of fact

which will not be disturbed unless it is clearly erroneous." Cochran, 51 Wn. App. at 120.

The trial court's ruling met this standard. In particular, the trial court found that "[t]he prosecutor's line of questioning was not made in bad faith, was neither flagrant nor ill intentioned, and was not an effort to goad defense into moving for mistrial." Indeed, after the mistrial was declared, the prosecutor informed the trial court that he, in good faith, believed in a different interpretation than the trial court of the case law regarding the right to remain silent. The trial court accepted this explanation as truthful. Thus, the court's finding of fact was supported by the record.

The trial court also did not err by denying Marion's motion to dismiss under CrR 8.3(b). Under that rule, a trial court "may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." A trial court's decision on a motion to dismiss under CrR 8.3(b) is reviewed for manifest abuse of discretion. State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). Here, the trial court concluded that there was no governmental misconduct because the "State's actions were neither ill-intentioned, nor made in bad faith."

The trial court's ruling was supported by the record. Thus, the trial court did not err by denying Marion's motion to dismiss based on a violation of CrR 8.3(b).

B

Marion next contends that his right to a jury of his peers was violated because there was not a single African-American in the jury pool. However, "[t]he absence of any particular group of people on a jury does not violate a defendant's right to a jury of his peers, unless there are circumstances indicating purposeful discriminatory exclusion." State v. Barron, 139 Wn. App. 266, 280, 160 P.3d 1077 (2007). Because Marion cites to no evidence of purposeful discriminatory exclusion, he does not establish the claimed error.

C

Marion next asserts that the trial court erred by denying his motion for a continuance before the third trial commenced. Marion is wrong.

A trial court's decision to grant or deny a motion for continuance is reviewed for abuse of discretion. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). Prior to the third trial, Marion's attorney moved for a continuance, explaining that "Mr. Marion's having a difficult time trying to process everything. He is very concerned. He feels like he's kind of railroaded through the system, has not had a chance to really understand what everything means." The trial court denied the motion:

> I am not hearing a compelling reason to continue the case at this point in time. Everybody was ready a week ago, more than a week ago. Really nothing has changed other than we started a trial and then ended it. I would like to complete jury selection today. And if there is something more specific, I guess I would always be willing to hear it. But, I'm not hearing a—a reason to continue. And—and of course there is reason on both sides for the parties to want the matter to be resolved. And it has been over two years. So, at this point in time I'm going to deny the motion.

The trial court's decision was not manifestly unreasonable or based on untenable grounds or reasons. See Stenson, 132 Wn.2d at 701. Accordingly, the trial court did not err by denying Marion's motion for a continuance.

D

Marion next contends that the trial court erred by permitting an individual other than Lyles to read the testimony that Lyles gave during the first trial. According to Marion, this testimony was hearsay and the jury was not able to observe Lyles' body language in order to gauge the credibility of the testimony. However, Lyles' testimony was properly admitted under ER 804(b)(1),[5] which provides an exception to the hearsay rule for certain former testimony. Thus, the trial court did not err by admitting Lyles' testimony. Moreover, the trial court did not err in exercising control over the mode of the evidence's presentation. See ER 611(a); State v. Hakimi, 124 Wn. App. 15, 19, 98 P.3d 809 (2004) (mode of giving testimony within discretion of trial judge).

E

Marion next avers that Lyles' statements that Marion was the "aggressor" in the altercation between Marion and Fuller constituted improper opinion testimony.[6] In support of his argument, Marion asserts that "[n]o witness, lay or

[5] ER 804(b)(1) provides that the following evidence is admissible when a hearsay declarant is unavailable:

> *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

[6] For example, Lyles testified that "it was easy to tell the Defendant was the aggressor." "Well, [Marion] was definitely the aggressor," and "You could tell [Fuller] wasn't the aggressor in the situation."

expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). However, "opinion testimony is not improper when it does not directly comment on the defendant's guilt, is otherwise helpful to the jury, and is based on reasonable inferences from the evidence." State v. Yarbrough, 151 Wn. App. 66, 93, 210 P.3d 1029 (2009).

Lyles first noticed the altercation between Marion and Fuller when he was crossing the street and "[saw] them pile over." Lyles then observed blood on Fuller, Marion snarling and biting at Fuller's face, and Fuller asking for help. Given Lyles' observations, his comments that Marion was the aggressor did not directly comment on Marion's guilt, were helpful to the jury, and were based on reasonable inferences from his personal observations. There was no error in their admission.

F

Marion next argues that the trial court erred by denying his request to use a proposed juror questionnaire. In his trial brief, Marion argued that the questionnaire was appropriate because "many people are not inclined to share their views regarding violence, self-defense and race." The trial court denied Marion's request. "[A]bsent an abuse of discretion and a showing that the rights of an accused have been substantially prejudiced, a trial court's ruling on the scope and content of *voir dire* will not be disturbed on appeal." State v. Davis, 141 Wn.2d 798, 826, 10 P.3d 977 (2000). Marion fails to demonstrate how the

trial court's decision was an abuse of discretion or how it substantially prejudiced his rights. No error is established.

G

Marion next asserts that the trial court should have dismissed an unidentified juror who may have heard the prosecutor speak to a witness outside of the courtroom. Appellate courts "review[] the trial court's determination of whether to dismiss a juror for abuse of discretion." State v. Depaz, 165 Wn.2d 842, 852, 204 P.3d 217 (2009). Here, the prosecutor informed the trial court that an unidentified juror may have overheard the prosecutor as he was speaking to a witness outside of the courtroom. The trial court then asked the entire jury whether any of the jurors overheard the prosecutor speaking to the witness. No juror answered in the affirmative. The trial judge acted properly. There was no abuse of discretion.

H

Marion next contends that the trial court erred by denying his request to question Fuller about a Metro complaint that may have been filed against him.[7] We disagree.

"This court reviews the trial court's determination of the relevance of prior acts for abuse of discretion." State v. Sexsmith, 138 Wn. App. 497, 505, 157 P.3d 901 (2007).

[7] According to Marion's defense attorney, Fuller, during a pretrial interview, indicated that a bus passenger had filed a Metro complaint against him for grabbing the passenger's arm after the passenger had taken another individual's phone.

At trial, Marion argued that the Metro complaint filed against Fuller was relevant to whether Fuller was aware of a Metro policy that "they can't threaten to have contact or have contact with individuals." In turn, Marion asserted that this was relevant to the question of whether Fuller threatened Marion by stating that "some people deserve to get knocked [out]."[8] The trial court denied Marion's request to question Fuller about the Metro complaint but permitted Marion to question Fuller about his knowledge of the Metro policy. In doing so, the trial court reasoned that the evidence of the Metro complaint against Fuller was inadmissible as a prior act under ER 404(b) and that its relevance, if any, was outweighed by its prejudicial effect. The trial court did not abuse its discretion by denying Marion's request to question Fuller about a Metro complaint that was potentially filed against him, especially given that the court allowed the witness to be questioned regarding his knowledge of the policy at issue. There was no error.

I

Marion next avers that the prosecutor improperly stated that Marion was the only person with a deadly weapon during the altercation with Fuller.[9] This was improper, according to Marion, because Fuller's hands were deadly

[8] In his statement of additional grounds, Marion also claims that Fuller lied when he denied making any statements to the effect that Marion deserved to get knocked out. However, "[q]uestions of credibility are left to the trier of fact and will not be overturned on appeal." State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964 (1998). Thus, assuming that Marion assigns error to Fuller's testimony, Marion does not establish an entitlement to relief.

[9] Marion does not cite to any portion of the record wherein the prosecutor made such a statement. In any event, had the prosecutor made such a statement, it would not have been improper.

weapons and Marion's knife—which had a three-inch blade—was not a deadly weapon. We disagree.

By statute,

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6).

Because hands are not a weapon, device, instrument, article, or substance, they need not be considered to be deadly weapons. On the other hand, a knife with a three-inch blade might, under certain circumstances, be a deadly weapon because it could be used in a manner capable of causing death or substantial bodily injury. No error is shown.

J

Marion next contends that the trial court's instructions on self-defense misstated the law insofar as they did not state that the jury could consider Marion's subjective impressions of the facts and circumstances. However, the trial court's instructions clearly provided that a defendant is entitled to act on appearances in defending himself:

> A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.[10]

[10] This instruction followed the Washington Pattern Jury Instruction:

> A person is entitled to act on appearances in defending [himself] [herself] [another], if [he] [she] believes in good faith and on reasonable grounds that [he] [she] [another] is in actual danger of injury, although it afterwards might develop

Accordingly, the trial court did not fail to instruct that a person is entitled to act on appearances.

VI

Finally, Marion asserts that cumulative error entitles him to a new trial. "The cumulative error doctrine applies when several trial errors occurred and none alone warrants reversal but the combined errors effectively denied the defendant of a fair trial." State v. Jackson, 150 Wn. App. 877, 889, 209 P.3d 553 (2009). Because multiple trial errors did not occur, the cumulative error doctrine does not apply.

VII

After our opinion in this matter was filed, Marion filed a motion for reconsideration in which he requests, for the first time, that we remand the matter for resentencing in light of our Supreme Court's decision in State v. Blake, No. 96873-0, slip op. at 29-30 (Wash. Feb. 25, 2021), http://www.courts.wa.gov/opinions/pdf/968730.pdf, ___ Wn.2d ___, 481 P.3d 521 (2012). Because resentencing appears to be warranted, we remand the cause to the superior court for Marion to be sentenced in a manner consistent with the Blake decision.

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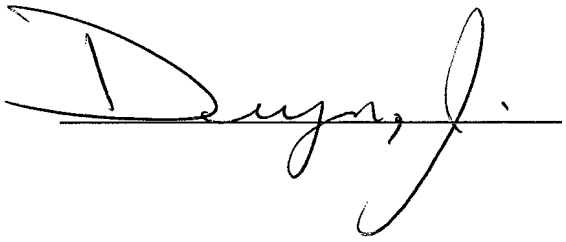
that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 17.04 (4th ed. 2016).

The convictions are affirmed. The sentences are reversed. The cause is remanded to the superior court for further proceedings consistent with this opinion.



WE CONCUR:

# Appendix B

FILED
5/3/2021
Court of Appeals
Division I
State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>WILLIAM LEWIS MARION,<br><br>Appellant. | No. 79368-3-I<br><br>ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSINSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINION |

William Marion has filed a motion for reconsideration of the opinion filed on February 16, 2021. The State of Washington has filed a response. Marion has also filed a motion to supplement the record. The court has determined that the motion for reconsideration shall be granted in part and denied in part, the motion to supplement the record shall be granted, the opinion shall be withdrawn, and a substitute opinion shall be filed. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is granted in part and denied in part; and it is further

ORDERED that the motion to supplement the record is granted; and it is further

ORDERED that the opinion filed on February 16, 2021, is withdrawn; and it is further

ORDERED that a substitute opinion shall be filed.

Dwyer, J.

Coleman, J. Mann, C.J.

## NIELSEN KOCH P.L.L.C.

## June 02, 2021 - 10:57 AM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 79368-3 |
| **Appellate Court Case Title:** | State of Washington, Respondent v. William Lewis Marion, Appellant |

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**Comments:**

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