71531-3

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Court of Appeals
Division I
State of Washington

NO. 71531-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

AUSTIN STEIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE BRUCE HELLER

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The defendant was convicted of Second-Degree Felony Murder for beating to death Bill Smith. He raises the following issues on appeal:

1. The defendant contends that his conviction must be reversed because, he claims, that while testifying, Deputy Eric Gagnon and Detective Jeanne Walford opined that he was guilty of murder. Should this claim be rejected because the officers did not express an opinion as to the defendant's guilt, and their testimony was properly admitted?

2. The defendant contends that the trial court erred in refusing to allow him to introduce evidence that 30 years ago, as a teenager, Bill Smith got a tattoo of a swastika. Should this Court reject the defendant's assertion that he has a constitutional right to present any relevant evidence regardless of any other rule of evidence?

3. After closing arguments had been completed and the jury had begun deliberations, defense counsel asked that the trial court provide the jury with an additional instruct on self-defense. Should this Court reject the defendant's claim that his trial counsel was constitutionally ineffective for failing to timely ask for a particular self-defense instruction that the trial court was not required to give?

4. Should this Court find that the defendant has failed to show that multiple trial court errors occurred and that he suffered such substantial prejudice that he can avail himself of the "cumulative error" doctrine?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

A jury found the defendant guilty as charged to felony murder in the second degree. CP 1, 143. He received a standard range sentence of 196 months. CP 173.

2. SUBSTANTIVE FACTS

Thomas Cummings and Jacqueline Mead lived together in a rural area of Covington. 10RP[1] 53. On their property was a trailer in which the victim, Bill Smith, lived. 10RP 58. Cummings let Smith move into the trailer about three months before his death so that Smith could get his life together and stop drinking. 10RP 59, 85. Smith was a 48-year-old hardcore alcoholic who at the time of his death weighed just 155 pounds and had a blood alcohol level of .43. 12RP 104, 144-45. On the other hand, the defendant, who admitted to beating Smith to death but claimed he did so in self-defense, is a 26-year-old former weightlifter and football

[1] The verbatim report of proceedings is cited as follows: 1RP--10/21/13; 2RP—10/30/13; 3RP—10/31/13; 4RP—11/4/13; 5RP—11/4/13 (voir dire); 6RP—11/5/13; 7RP—11/6/13; 8RP—11/6/13 (voir dire); 9RP—11/7/13; 10RP—11/12/13; 11RP—11/13/13; 12RP—11/14/13; 13RP—11/18/13; 14RP—11/19/13; 15RP—11/20/13; 16RP—11/21/13; 17RP—2/7/14.

player who weighed 230 pounds at the time of the murder. 12RP 3; 14RP 160, 168. The defendant met Smith just three or four days before Smith's death. The defendant was introduced to Smith by a mutual friend, Anthony Hedin, as both Hedin and the defendant obtained construction work through a temp agency. 10RP 16, 19-20.

On November 3, 2012, Hedin and the defendant went to visit Smith at his trailer. 10RP 21. Smith, who was there with a young girl he considered his girlfriend (Katarina Krogness, age 20), was drunk. 10RP 21-22, 39; 13RP 22. While the four were hanging out together, the defendant said something to Katarina that made Smith think he was hitting on her. 10RP 22-23. Smith got angry and told Hedin and the defendant to leave. 10RP 23. He grabbed a hammer and drunkenly waved it around. 10RP 23-24. Smith was using the "N word" and yelling "F-you" at the defendant. 10RP 23-25. The defendant was yelling "fuck you" back at Smith as he exited the trailer and walked away with Hedin. 10RP 23-25, 41-42.

Hedin and the defendant walked back to Hedin's house where the defendant spent the night. 10RP 26-27. The next day, Smith called and apologized and asked Hedin and the defendant to come over for drinks. 10RP 27-28. Hedin declined because he had things he had to do that day. 10RP 28. The defendant left Hedin's house, telling Hedin he was going to

his father's house in Tukwila. 10RP 29. Hedin never saw the defendant again, although he called Smith's phone at around 5:30 that day, only to have the defendant answer Smith's phone. 10RP 29-30; 11RP 46-49. When Hedin asked why the defendant had Smith's phone, the defendant responded "Bill who?" and professed that his name was Anthony. 10RP 30, 50. Hedin knew that was "BS," at which point the defendant started threatening Hedin and Hedin hung up. 10RP 30, 51.

When Thomas Cummings came home that day around two o'clock that afternoon, he entered his house and heard someone — the defendant -- knocking on the back window. 10RP 60-61. When Cummings contacted the defendant, who he did not know, the defendant appeared to be high on something and mumbled something about alcohol. 10RP 61-63, 82-83. Cummings took the defendant inside to give him a cup of coffee to sober him up, but the defendant ended up going back outside. 10RP 62-64.

Cummings and the defendant then began talking on the front porch, with the defendant saying something about having been in a fight with Smith the day prior. 10RP 65. When Cummings asked the defendant about the blood on his shirt and arms, the defendant said that he had been in a fight with "Anthony" in the woods behind Safeway, had been left there, and that is why he came to the house. 10RP 67. He then said that

he had done something stupid and he would never see his daughter again. 10RP 67.

At this point, Landon Huffman, Cummings' neighbor, came outside. 10RP 68. Cummings then went back to Smith's trailer to see if he was okay. 10RP 69. Upon entering the trailer, Cummings saw blood everywhere and Smith face down on the floor, dead, with a large wound to the back of his skull. 10RP 70, 72, 96. Around his head was a large pool of blood. 10RP 95.

Cummings, Huffman, who was armed with a .45, and Mead, then tried to keep the defendant from leaving until the police arrived. 10RP 72-76. Huffman asked the defendant if he had been back in the trailer, and he responded that he had not, claiming that he had just come down the street, seen a bunch of people and thought there was a party going on so he came on over. 10RP 139. At one point, the defendant walked across the street, at which point Cummings threatened that if he did not stay on the property, Cummings was going to "kick his ass." 10RP 75. The defendant then came over and hit Cummings in the head while Cummings was on the phone with 911. 10RP 76, 86. Mead then noticed that the defendant had Smith's cell phone, at which point the defendant dropped the phone in a planter and left it there. 10RP 77, 111-12. The police arrived shortly thereafter. 10RP 79.

As three uniformed officers approached on foot, with guns drawn, they observed the defendant pacing in front of Cummings' house with his hands in his pockets. 10RP 155-57. Despite the officers repeatedly identifying themselves and ordering the defendant to take his hands out of his pockets, the defendant ignored their orders and simply paced back and forth. 10RP 158. He finally partially complied by getting on his knees, at which point he was handcuffed. 10RP 158. One of the responding officers described the defendant's demeanor as being obstinate, but not confused. 10RP 166, 180.

While being read his Miranda rights, he told the officer that they had the wrong man. 10RP 94. He told another officer "I know I fucked up," but he otherwise refused to engage in any meaningful conversation with the responding officers. 10RP 171, 176.

When detectives arrived at the scene and tried to interview the defendant, he first told them that he had wet himself. 11RP 58. He then refused to go into the police van, proclaiming that the police were going to assault him. 11RP 59. He then engaged in a process of what one detective described as manipulative behavior. 11RP 61. He would refuse to answer even the simplest of questions, he insulted the detectives repeatedly, he would talk about other subjects, including how smart he was and how much he knew about the law. 11RP 61-62, 164-65. He also

proclaimed that he did not even know why the detectives were talking to him, indicating as well that he was being detained only because he was Black. 11RP 62, 71.

When informed that someone was dead, the defendant wanted to know who it was and claimed that the detectives had to prove that the person was dead. 11RP 68. At one point he said he had not been drinking at all, while at another point he said he had had one beer. 11RP 69. He refused to be recorded, acted like he was surprised when the detectives asked him about the blood on his hands and shirt, and he tried to hide his face and hands when he was being photographed. 11RP 73-74, 81-83.

Ultimately he admitted to the detectives that he had been over at Smith's trailer a few times, including the day prior when Smith had gotten jealous about him interacting with Katarina and that Smith had chased he and Hedin away with a hatchet. 11RP 77-78. He said that he came over today after missing a bus and that everything was "cool." 11RP 78-79. The two made up and had a beer together. 11RP 79, 98. Asked directly if there had been any fights, arguments or altercations between himself and Smith, the defendant said no, although he said that he saw blood in the trailer and that Smith had told him that he had injured his foot. 11RP 79. The defendant was adamant that Smith was upright and uninjured when he left the trailer, although he joked that Smith was never healthy because he

was an alcoholic. 11RP 80. He also claimed that he had not touched Smith's cell phone. 11RP 81. While being booked into jail, the defendant refused to unclench his fists to allow detectives to swab the blood on his hands. 10RP 174. Ultimately testing confirmed the stains on the defendant's hands were blood, with DNA testing showing the blood came from Smith. 11RP 145-50.

Inside the trailer, police found a wooden chair lying on the floor that had been broken apart. 11RP 31. Blood-covered dowels from the chair were snapped off and lying near the victim's head. 11RP 31, 33. There was also a fold-down table that had a broken leg so that the table top was leaning over towards the ground – with blood spatter on the underside of the table. 11RP 31-33. There was no blood spatter on the top of the table. 12RP 49.

There was impact spatter -- blood spatter created from an object hitting a blood supply -- that was very low to the ground on the walls of the trailer in a 365 degree radius from Smith's body. 12RP 49-52, 58, 64-65. The impact spatter was thicker in some areas than others, an indication that there had been multiple blows to the blood source and thus the spatter had been replenished with more blood. 12RP 52. The blood impact spatter suggested that the blood-letting event had occurred very near to or on the floor of the trailer. 12RP 81-82. No gun was found in

the trailer. 11RP 41. An autopsy would show that Smith had bruising on his arms consistent with fending off blows. 12RP 107-10. Smith did not have any scrapes or abrasions on his fists consistent with having been in a fight. 12RP 107-10. Smith had directional abrasions on his torso suggesting that he had been drug across a rough surface. 12RP 110-11. He had significant bruising on his torso, abdomen and chest, along with multiple broken ribs on both sides of his chest. 12RP 111-15, 141. While this level of damage could be caused by a fist, the amount of force necessary with fists alone would be significant. 12RP 116.

Smith also had internal hemorrhaging to his neck muscles consistent with strangulation. 12RP 115-18. The most severe injuries, however, were to Smith's head.

Along with substantial lacerations and bruising to the face and head, Smith's skull was fractured literally in half, from one ear all the way over his head to the other ear. 12RP 125-36. Called a hinge-type fracture, Smith's skull was broken into a front half and a back half, an injury that would take a significant amount of force to cause as the skull is a hard thick surface. 12RP 136-37. Smith also had deep blood hemorrhaging all over his brain area. 12RP 137-39. The injuries to the head and brain suggested multiple blows with significant force were rained upon Smith. 12RP 135.

The Defense Case

The defendant testified that he had met Smith a few days prior when he and Hedin stopped by Smith's trailer for some drinks. 14RP 119-21. The defendant stopped by Smith's trailer again the day before Smith's death. 14RP 122. He, Hedin, Smith and Krogness sat around talking and drinking whiskey and beer. 14RP 123. As the defendant put it, Smith was relaxed and he "has a gift of gab." 14RP 123.

At some point, the defendant said something about Krogness being cute, which caused Smith to start screaming that he was trying to take his girl. 14RP 126. Smith called the defendant a "nigger" and told him to get the "fuck out." 14RP 127. The defendant tried to calm Smith down, telling him that he was not trying to get Krogness. 14RP 127. Hedin and the defendant then went outside as Smith took a hammer and was waving it around. 14RP 129. The defendant and Hedin then walked back to Hedin's house. 14RP 130. Asked if he was angry at Smith, the defendant said no, that he just took it as Smith being drunk. 14RP 131.

The defendant testified that the next day Smith called and apologized. 14RP 133. Later that day, the defendant went back over to Smith's because he had time to kill before catching a bus to go to his father's house. 14RP 133-34. Smith invited the defendant inside and the two sat and talked. 14RP 137. There were "no hard feelings." 14RP 137.

"He is a friendly dude, I am a friendly guy, so we just...started talking about the Seahawks" and "we were drinkin" whiskey and beer. 14RP 137-38.

The defendant said everything was fine with the exception that at one point Smith was outside on the phone talking with a person the defendant believed was Smith's daughter. 14RP 139. When he came inside, the defendant said Smith seemed upset, so the defendant thanked Smith for having him over and he got up to leave. 14RP 140. The defendant said Smith then pleaded with him to stay, telling him that he wasn't kicking him out. 14RP 140. The defendant agreed to stay until the next bus was due. 14RP 141.

Asked how the fight started, the defendant said that Smith, who he said was really drunk, was outside and that when he came inside he was mumbling about people not believing him. 14RP 141, 168. The defendant asked Smith if he was okay, at which point Smith said "don't fucking talk to me like that," and started towards the defendant "aggressively." 14RP 142. As the defendant stood up, Smith punched him in the head, dazing him. 14RP 143. The defendant pushed Smith back as Smith continued punching the defendant. 14RP 143. The defendant claims that Smith was cursing at him and telling him that he was going to "blow your fucking head off." 14RP 144. Although the

defendant had no idea if Smith even had a gun, at this point, he claimed, he was in fear for his life. 14RP 145-46, 166.

The defendant's "instinct," he said, was to grab Smith, at which point the two fell to the ground and began fighting each other, kicking, punching and clawing at each other. 14RP 145-47, 167, 188. The defendant claimed that at this point, his memory of the incident became hazy. 14RP 147. He remembered Smith swinging at him and hitting him, and he fought back hitting Smith, stopping only when he saw the blood. 14RP 147-49. The defendant says he then grabbed Smith's phone to call for help but never did, for a reason he could not provide. 14RP 151-52.

The defendant admitted that he had not been injured during the fight. 14RP 156. Asked specifically why he killed Smith, the defendant responded, "[b]ecause he was going to shoot me." 14RP 160.

On cross, when asked at what point he believed the threat from Smith was over, since Smith was flat on his back on the ground, the defendant replied, "I don't know," that he just stopped his assault when he saw all the blood. 14RP 196. Although he claimed that his memory of events after the fight were hazy, he said that he was rude to the police because they were rude to him and he admitted that he did not tell the police what had happened. 14RP 157. "I was just confused," he claimed. 14RP 157.

To explain the defendant's behavior after the murder, his lying to the police and civilian witnesses, his evasive answers to simple questions, his belligerent attitude towards the police, and his failure to tell anyone that he had been fighting for his life, the defense called Forensic Psychologist Megan McNeal. 14RP 5-7. After interviewing the defendant and performing a few tests, McNeal opined that the defendant suffered from acute stress response – a state of shock to a traumatic event and that this explained his behavior after he killed Smith. 14RP 14, 32, 36.

Additional facts are included in the sections they pertain.

C. ARGUMENT

1. THE DEFENDANT HAS FAILED TO SHOW THAT DEPUTY ERIC GAGNON OR DETECTIVE JEANNE WALFORD EXPRESSED THEIR PERSONAL OPINION THAT HE WAS GUILTY OF MURDER

The defendant contends that his conviction must be reversed because, he asserts that while testifying, Deputy Eric Gagnon and Detective Jeanne Walford expressed their personal opinion that he was guilty of murder. The defendant's claim is without merit. Neither officer expressed their personal opinion as to the defendant's guilt, and their testimony was properly admitted.

a. The Trial Court's Pretrial Ruling

The parties were agreed that the defendant's erratic abusive lying behavior after he killed Bill Smith was relevant.

The defense intended to, and did present, the testimony of Forensic Psychologist Megan McNeal to opine that the defendant's unusual behavior after he killed Bill Smith was due to him suffering an acute stress response to the traumatic event, i.e., that he was dazed, confused and in shock at the killing of Smith. See 2RP 28-29; 14RP 5-105.

The State sought to have a number of the officers who dealt with the defendant that night describe the defendant's actions and his demeanor (the defense agreed this was admissible; see 2RP 48) and to be allowed to express their opinion that the defendant's behavior was not what they normally had run across in dealing with victims or witnesses to traumatic events. See CP 204-07 (State's Trial Memorandum); 2RP 28-34.

The trial court indicated that the CrR 3.5 hearing testimony would be used to determine whether the State could lay the foundation for admission of the opinion testimony, i.e., whether they had personal observations of the defendant and prior experience dealing with victims and witnesses to traumatic events. 2RP 48-49.

In regards to Deputy Gagnon, the court heard testimony that he had been a police officer for four years, that he had previously spent ten years

active duty in the Coast Guard, and that he spent 60 plus days at Ground Zero – the World Trade Center 911 disaster. 2RP 49-50, 55. Deputy Gagnon indicated that he had dealt with many people who have been in traumatic situations both as a police officer, where he said he dealt with trauma on a regular basis, and when he was in the military, where he said a number of his friends had been killed.[2] 2RP 55-56. He also testified that he had received training in both the military and police academy in how to deal with people who have experienced trauma. 2RP 65. He then went on to describe, as one of the arresting officers, his interactions with the defendant on the night of Smith's murder. 2RP 56-58.

After hearing the testimony of Deputy Gagnon, the court ruled that the State had laid a proper foundation for the deputy to provide lay opinion testimony regarding the defendant's actions and demeanor following the killing of Smith. 3RP 11. Because Detective Jeanne Walford was unavailable for trial, a video deposition previously taken was presented to the court as a basis for the court's ruling.

Detective Walford was a detective with the Major Crimes Unit, had been an officer for 17 years, had spent seven years as a patrol officer and had previously spent time on the Special Assault Unit. CP 216-17, 250. She also worked as a sketch artist for the police department for many

[2] At trial, Deputy Gagnon explained that he was a combat medic in the military and had been an EMT since 1996. 10RP 191.

years. CP 250. Particularly through her work on the Major Crimes Unit, Special Assault Unit and as a sketch artist, Detective Walford had come in contact with thousands of victims and witnesses of violent crime during her career, with many of these contacts being very intimate type contacts. CP 250. Although she testified that she had no formal training in psychology, the detective testified that she did have a number of psychology classes as part of her degree in Law and Justice. CP 255. Like Deputy Gagnon, the detective testified as to her contacts with the defendant on the night of Smith's murder. See CP 216-58. Specifically, the defendant refused to open his eyes when being photographed, he refused to respond to the question as to whether he was injured or not, and he refused to unclench his fists when swabbed for blood and officers were required to hold his fingers apart. CP 225-27, 232. The defendant also screamed in pain when the detective touched him with gauze soaked in a liquid, although the liquid turned out to be water. CP 254.

After reading the entire transcript of the deposition, the court ruled that the State had laid a proper foundation for the detective to provide lay opinion testimony regarding the defendant's actions and demeanor following the killing of Smith. 6RP 17.

b. The Testimony To Which The Defendant Objects

On appeal, the defendant objects to the following testimony of Deputy Gagnon:

> Q: Now Deputy, have you dealt with, not just in the context of being a sheriff's deputy but in your background as well, with people who have been – who have suffered trauma immediately after they've encountered that trauma?
>
> A: Yes, I have.
>
> Q: In what context?
>
> A: When I was in the Coast Guard I spent, excuse me. I spent 60 days at Ground Zero.
>
> Q: And have you dealt with people who have been the targets of crime – violent crime?
>
> A: Yes, I have.
>
> Q: And do you – when you arrive at the scene, are you one of the first people to deal with them?
>
> A: Yes.
>
> Q: And can you tell us, please, what has been your experience with them? Is there a standard response that they all have? Are they all different? Is there a – a common thread that you see among these people?
>
> A: Normally when – normally when somebody...has just been involved in a trauma, let's say a family member has passed away or they have been a victim of a horrendous crime, they're looking for help. They want – and just because of our society – our cultural and our society, they look –

Defense: I'm going to object.

Witness: -- people –

Court: Overruled.

A: They look for people who represent help. Nurses, police officers, firefighters and so on and so forth. They normally have a difficult time making decisions that help them in the immediate sense, meaning they're kind of – they're in a – they are in a state where they are, you know, almost locked and that's why they're looking for somebody to help them through that immediate circumstance.

Q: And can you tell us what your experience was of the defendant and his demeanor on this night?

A: When we were contacting the defendant, he – his actions came across as I wanted to get away from me. I want to get away from you particularly, the police –

Defense: I'm going to object to that.

Witness: -- and –

Court: Sustained.

Q: What did you observe of the defendant?

A: I watched him walk towards two fully uniformed police officers with patrol rifles. Not following any of the commands that were given immediately. Act in a manner that when he pulled his hands out almost to instigate some – some type of response from the police officers.

Gives me kind of part of what I – part compliance when I tell him to get down on the ground, face down. He does that by kneeling. And then he finally lays down on the ground. And when we take him back and when I put him behind the – the firetruck, he immediately makes this, you know – and I read him the rights, he immediately makes a

statement you've got the wrong guy. Like he's trying to throw me off –

Defense: Objection.

Court: Sustained.

Defense: I move to strike.

Court: Stricken.

Q: So when he said you've got the wrong guy, was that in response to any question that you'd asked?

A: No.

Q: He volunteered that?

A: Yes.

Q: And when he talked about you can find my ID in my back pocket, was that in response to any question you asked?

A: No.

Q: And he volunteered that?

A: Yes.

Q: Was there anything about your interactions with him that reminded you of your interactions with people who have been victims of traumatic crime?

A: They're – they're not consistent with each other. He was acting opposite of what I have experience in from trauma victims.

10RP 197-200.

On appeal, the defendant objects to the following testimony of Detective Walford:

> Q: Well, with these thousands of people that you've worked with, what are some of the reactions you've seen when they've been working with you after something traumatic happened to them?
>
> A: Shock or disbelief, maybe crying, sometimes repetitive. The only time I've seen people really angry maybe angry victims or witnesses is when they don't want the subject arrested. I've seen that more in domestic violence cases.

CP 251-52. Asked about her experience with the defendant, the detective responded:

> He was more – he was pretty direct and a little more obstinate I think. He didn't ask a lot of questions, didn't seem overly upset. He liked to be in control, I think.

CP 252.

> Q: What makes you say that you thought he liked to be in control?
>
> A: That he, you know, wanted to read every bit of that search warrant before he was going to even allow me to put hands on him. He was trying to close his fist when I was trying to collect, you know, blood or evidence from his hands…[t]hings like that.
>
> Q: In your experience, was there anything about what he was doing that was consistent with what you've seen from others who have been victims or witnesses of violent or traumatic crimes?
>
> …

A: Well, he didn't act like a victim.

Q: How so?

...

A: He wasn't – he was just more upset with the process. He wasn't acting apologetic or anything or even really curious about – he just wanted, you know – all right. He wanted to read the warrant word for word, which isn't typical actually. I've not had that happen a lot. And, to be honest, I thought maybe once we were done reading it, that there would be more stalling, but he was okay after that.

CP 253.

c. The General Legal Principles

Testimony in the form of an opinion or inference is admissible under certain circumstances. See, e.g., ER 701;[3] ER 702.[4] This is true even where the opinion "embraces an ultimate issue to be decided by the trier of fact." State v. Quaale, 182 Wn.2d 191, 197, 340 P.3d 213 (2014) (citing ER 704). The opinion evidence must be "otherwise admissible"

[3] ER 701 permits a lay witness to testify in the form of opinions or inferences that are "rationally based on the perception of the witness," are "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue," and are not based on scientific, technical, or other specialized knowledge. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

[4] ER 702 permits an expert witness to provide opinion testimony where the opinion is based on scientific theory that is generally accepted in the scientific community and the testimony would be helpful to the trier of fact. State v. Rafay, 168 Wn. App. 734, 784, 285 P.3d 83 (2012), rev. denied, 176 Wn.2d 1023 (2013).

and is therefore subject to the requirements of ER 401,[5] ER 403,[6] ER 701, and ER 702. State v. Jones, 59 Wn. App. 744, 750 n.2, 801 P.2d 263 (1990), rev. denied, 116 Wn.2d 1021 (1991). At the same time, as a general rule, no witness, lay or 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). But opinion testimony about a defendant's behavior "is admissible if it is prefaced with a proper foundation: personal observations of the defendant's conduct, factually recounted by the witness, that directly and logically support the conclusion." State v. Day, 51 Wn. App. 544, 552, 754 P.2d 1021, rev. denied, 111 Wn.2d 1016 (1988).

For example, in a DUI case, an officer was permitted to opine that the suspect was "obviously intoxicated," and could not drive safely because the officer's opinion was based on his observations and field sobriety testing and because it was opinion as to an ultimate *fact* rather than an opinion that the defendant was guilty. City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993), rev. denied, 123 Wn.2d 1011

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[5] Under ER 401, "[e]vidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence." State v. Thomas, 150 Wn.2d 821, 858, 83 P.3d 970 (2004).

[6] Under ER 403, relevant evidence is admissible unless its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994).

(1994). In contrast, in State v. Garrison, the trial court properly refused to allow the proprietor of a burglarized tavern to give his opinion as to whether Garrison was one of the parties who participated in the burglary of his tavern. The Court stated that:

> The question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.

71 Wn.2d 312, 315, 427 P.2d 1012 (1967).

Other cases are instructive here. In State v. Davis, 175 Wn.2d 287, 290 P.3d 43 (2012), the defense presented four experts who opined about the defendant's mental state shortly after Davis murdered the victim, including the fact that he was mentally impaired and suffered from posttraumatic stress disorder.[7] Davis, 175 Wn.2d at 323. The State was allowed to call the officer who interviewed the defendant just six days after the murder. The officer testified that he had interviewed hundreds of suspects in his 26 years on the force. He then discussed his interactions with the defendant during the interview and was allowed to opine that Davis showed no confusion and that there was nothing about the interview that gave him cause for concern about Davis' mental state. Id. at 324.

[7] Here, the defense expert testified that acute stress reaction is akin to PTSD but that it lasts for only a few days. 14RP 71-72.

The Supreme Court rejected Davis' "inadmissible lay opinion" challenge, holding that "[i]t is well established in Washington that a lay witness may testify concerning the sanity or mental responsibility of others, so long as the witness' opinion is based upon facts he personally observed, and the witness has testified to such facts." Id. at 327 (quoting State v. Crenshaw, 27 Wn. App. 326, 332-33, 617 P.2d 1041 (1980), aff'd, 98 Wn.2d 789 (1983)).

In Crenshaw, the trial court was found not to have abused its discretion in admitting lay person testimony that the defendant "seemed very normal" on the day he decapitated his wife. Crenshaw, at 332-33. In State v. Craven,[8] a baby assault case, a hospital social worker was allowed to opine that the suspect would not make eye contact and that her "behavior was somewhat unusual from what I normally saw. She wasn't crying...She seemed sort of withdrawn to me." In State v. Day, supra, detectives were permitted to testify that the defendant showed "very little emotion" when informed of his wife's death and were allowed to opine that his reactions were "inappropriate." In State v. Allen,[9] a detective was

[8] 69 Wn. App. 581, 849 P.2d 681, rev. denied, 122 Wn.2d 1019 (1993).

[9] 50 Wn. App. 412, 749 P.2d 702, rev. denied, 110 Wn.2d 1024 (1988).

permitted to opine that the defendant's grief over her husband's death did not appear to be sincere.[10]

Finally, the decision to admit evidence is left to the sound discretion of the trial court. A trial court's decision to admit evidence will be overturned only upon a finding of an abuse of discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." Id. An abuse of discretion is shown only when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

d. Neither Officer Opined That The Defendant Was Guilty Of Murder

In all of the above cases, the defense argued that the testimony was improperly admitted opinion evidence and prejudicial. But, "[i]n almost any instance, a defendant can complain that the admission of potentially incriminating evidence is prejudicial in that it may contribute to proving beyond a reasonable doubt he committed the crime with which he is

[10] The defendant relies on State v. Haga, 8 Wn. App. 481, 507 P.2d 159, rev. denied, 82 Wn.2d 1006 (1973), a murder case where the court ruled that an ambulance driver should not have been allowed to opine that Haga's failure to show signs of grief over his wife's death was "unusual." But as this Court noted in Allen, the witness was being asked to testify as an expert under ER 702, but he did not qualify as such. Allen, at 417. Here, there was no evidentiary foundational objection raised at trial or on appeal.

charged." Day, at 549 (citing State v. Bernson, 40 Wn. App. 729, 736, 700 P.2d 758, rev. denied, 104 Wn.2d 1016 (1985)). The fact that testimony or evidence can be used to argue guilt does not make that testimony or evidence an opinion on guilt, the singular challenge raised here.

Neither Deputy Gagnon or Detective Walford opined that they believed the defendant was guilty of murder or that he did not act in self-defense. Their opinions regarding their observed behavior of the defendant simply provided the jury with an understanding that he was not acting as other persons they have dealt with who have witnessed or been subjected to traumatic experiences. This was not an expression that they believed the defendant was guilty of murder or that he had not acted in self-defense.

All of the officers' observations were admissible and relevant, that the defendant repeatedly lied, that he was evasive, argumentative and hostile. It is certainly not startling that the officers would say this is not characteristic behavior of persons who have just been exposed to trauma.

The defense presented their own witness, Forensic Psychologist Megan McNeal, and argued that the defendant's behavior evidenced that he was in a state of shock. The State argued that the defendant's behavior evidenced his guilt. Both were permissible arguments to make,

conclusions to be drawn from the evidence. The opinion evidence of Gagnon, Walford and McNeal pertained to the defendant's behavior, it was not an opinion that he was guilty or innocent of murder.

e. Any Error Was Harmless

Evidentiary error is not prejudicial "unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Here, the jurors were instructed that any opinion should be given the weight the jurors deemed appropriate based on the circumstance.[11] All of the facts supporting Gagnon, Walford and McNeal's opinions were before the jurors to evaluate. There is nothing so prejudicial about any of their opinions that can be said to have materially affected the trial.

2. THE DEFENDANT'S CLAIM THAT HE HAS A CONSTITUTIONAL RIGHT TO PRESENT ANY RELEVANT EVIDENCE REGARDLESS OF THE RULES OF EVIDENCE IS WITHOUT MERIT

The defendant contends that he has a constitutional right to present any evidence that has any evidentiary value regardless of the rules of

[11] A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to the facts. You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness. CP 124.

evidence. Specifically, the defendant contends that he had a constitutional right to present evidence that when Bill Smith was a teenager, some 30 years prior, he got a tattoo of a swastika. This claim should be rejected. The defendant's attempt to admit the fact that Smith had such a tattoo was a thinly veiled attempt to admit highly prejudicial evidence. The trial court properly exercised its discretion and denied the defendant's request to admit the evidence – no constitutional right was violated.

a. The Facts

Among the many tattoos Smith had on his body was a tattoo of a swastika.[12] 2RP 21; 3RP 26. Smith, who was 48 at the time he was murdered, got the tattoo[13] when he a teenager because his best friend got one. 2RP 22. Even though the defendant did not know of the existence of the tattoo, counsel sought to admit evidence that Smith had the tattoo to support his self-defense claim. 2RP 24-25. Specifically, the defense stated that evidence that Smith had a swastika tattoo was being offered to show that Smith was a racist and thus he was a violent person and thus it

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[12] On appeal, the defense asserts that Smith had two swastika tattoos. This is not supported by the record. At trial, despite the fact that autopsy photos showed Smith's entire body, defense counsel asserted that he "believe[d]" Smith might have two swastika tattoos, instead of just one, because witness statements were conflicting on where the tattoo(s) may be located. 2RP 24; 3RP 26.

[13] The swastika, also known as the gammadion cross or manji, is a sacred symbol in Hinduism and Buddhism, and has been commonly used in various cultures since Neolithic times. Adopted by the Nazi Party, the symbol became stigmatized in most Western countries, although it remains a commonly used symbol in various religions. http://en.wikipedia.org/wiki/Swastika.

was likely that he was the first aggressor in the fight in the trailer. 3RP 25. The defense presented no other evidence that Smith was somehow aligned with the Nazi Party or otherwise embraced Nazi Party ideals.

In ruling on the motion, the court stated that if there were evidence that Smith was a member of a racist party or espoused racist views near the time of the murder, evidence of a swastika might be relevant and admissible. 3RP 25. But here, the court said, where the evidence is merely that Smith got a tattoo 30 years prior, the extreme prejudice engendered by the symbol was too great to allow for admissibility without the defendant providing a greater nexus to the crime. 3RP 26, 28. This, however, was only a tentative ruling. The court added that, "I'm not excluding it categorically; I'm just saying that before I admit it, the defense is going to have to connect that swastika to what happened here." 3RP 26. "I want to see how the case unfolds in terms of this racial motive," "you can raise it again, but for now, it's out." 3RP 28. The defendant never raised the issue again.

b. The Issue Has Been Waived

Where a defendant does not seek a final ruling on a pretrial motion after a court has issued a tentative ruling, the issue has been waived. State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994). In Riker, pretrial, the court tentatively ruled that certain testimony was not admissible. At trial,

Riker did not call the witness to testify or ask the court to make a final ruling on the admissibility of the testimony. The Supreme Court held that this constituted waiver of the issue on appeal. This case is no different. The trial court made a tentative ruling and invited the defendant to raise the issue again at trial – he did not. This issue has been waived.

c. The Constitutional Claim

The defendant argues that his constitutional right to put on a defense trumps well-established rules of evidence and allows for the admission of any relevant evidence. This argument fails.

The Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution have been interpreted to include the right to present a defense. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). It is well settled, however, that the right to present a defense is not absolute. Montana v. Egelhoff, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996); Maupin, at 924. For example, the right to present a defense does not extend to irrelevant or inadmissible evidence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

The Court has been circumspect when assessing whether the exclusion of certain evidence amounts to a constitutional violation. Crane v. Kentucky, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). Even where Confrontation Clause rights are implicated, a trial

judge still retains wide latitude and may exclude prejudicial evidence or evidence that may confuse the issues. Delaware v. Van Arsdall, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); see also Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 798 (1988) (an accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence -- court properly excluded defense witness for a willful discovery violation); United States v. Scheffer, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998) (rules excluding evidence do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve -- rule excluding polygraph evidence proper exercise of legitimate State interest in ensuring that only reliable evidence is presented at trial).

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999) is particularly relevant. Finch was convicted of capital murder for the killing of a friend of his estranged wife and a police officer. During the State's case-in-chief, a friend of the defendant testified that Finch told him that he deliberately shot the police officer. Finch sought to rebut this evidence with testimony from another person who would testify that, in a separate conversation, Finch told her that he did not intend to kill the officer. The

trial court excluded the testimony as self-serving hearsay and Finch appealed.

First, the Supreme Court noted that the out-of-court statement of Finch was hearsay and inadmissible under the rules of evidence. Finch, 137 Wn.2d at 824. The Court noted that:

> The problem with allowing such testimony is that it places the defendant's version of the facts before the jury without subjecting the defendant to cross-examination. This deprives the State of the benefit of testing the credibility of the statements and also denies the jury an objective basis for weighing the probative value of the evidence.

Id. at 825. Still, Finch argued that the exclusion of the evidence denied him his right to compulsory process. But the Court stated the firmly established rule that "[a] defendant's right to admit evidence pursuant to his right to compulsory process is subject to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Id. (citing Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The Court held that the right to compulsory process did not trump the rules of evidence and allow the defendant to tell his story and escape cross-examination. Thus, the trial court did not abuse its discretion in excluding the testimony. Id.

Here, the defendant was not prevented from putting on a defense or prevented from arguing a particular theory of the case. Rather, the defense was denied admission of but a single piece of evidence under firmly rooted rules of evidence. There was not constitutional issue at stake and no constitutional violation.

d. Applying The Rules Of Evidence

The defendant offered evidence that Smith had a swastika tattoo to support his self-defense claim. Specifically, he sought to show that Smith possessed the character trait of being a violently aggressive racist, and thus, Smith was the likely aggressor in the fight that led to Smith's death.

Generally, the use of character evidence to show that a person acted in conformity with that character is not allowed. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984) (citing ER 404). Still, under certain circumstances, proof of the character of a victim is permitted. Specifically, as pertinent here, the rule provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except...[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused." ER 404(a)(2).

In a self-defense case, a victim's reputation for violence may be admissible *if* the defendant had knowledge of the victim's reputation at the

time of the slaying. State v. Callahan, 87 Wn. App. 925, 934, 943 P.2d 676 (1997). The evidence would be admissible to show why the defendant's fear of the victim was reasonable. Id.

Here, the defendant did not assert that he possessed any knowledge that Smith might have a reputation for violence. Therefore, the tattoo was not admissible as evidence that the defendant reasonably feared Smith.

Nonetheless, in a self-defense case, evidence of a victim's violent character may also be relevant to show that the victim was the primary aggressor. Callahan, 87 Wn. App. at 934. This is the claim that was being made here.

The methods of proving character are set forth in ER 405. The character of a person, if admissible, may be proven by one of two ways, testimony as to reputation (ER 405(a))[14] or by specific instances of conduct (ER 405(b)).

Evidence rule ER 405(b) provides that "[i]n cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." However, "[i]n criminal cases, character is rarely an essential element of the charge, claim, or defense. For character to be an

[14] Reputation evidence must be based on a witness's personal knowledge of a victim's reputation in a relevant community during a relevant time period. Callahan, at 934. At trial, the defendant did not assert that he had any such reputation evidence that Smith was an aggressively violent racist.

essential element, character must itself determine the rights and liabilities of the parties." State v. Kelly, 102 Wn.2d 188, 196-97, 685 P.2d 564 (1984) (citations omitted). "[C]haracter is not an essential element of a self-defense claim." Id. at 197.[15]

As applied here, the defendant's proffered evidence that Smith getting a tattoo showed his character as an aggressively violent racist, was not admissible. But even absent the limitations of ER 404 and ER 405, the defendant's proffered evidence would not have been admissible.

Here, the following "facts" and "logical connections" would have to be made to even make the evidence of the tattoo relevant.

> (1) When Bill Smith was a teenager, his best friend got a swastika tattoo for an unknown reason.
>
> (2) When Smith was a teenager, he got a swastika tattoo because his best friend did.

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[15] See also State v. Hutchinson, 135 Wn.2d 863, 886-87, 959 P.2d 1061 (1998) (in murder case with a self-defense claim, Supreme Court held that the trial court correctly excluded witnesses from testifying regarding specific acts of violence by the victim because "specific acts may be used to prove character only where the pertinent character trait is an essential element of a claim or defense," and "specific act character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense ... Proof, or failure of proof of the character trait, standing alone, would not satisfy any element of the charge, claim, or defense. It was therefore not essential and the evidence was properly limited to opinion or reputation."); State v. Alexander, 52 Wn. App. 897, 898-901, 765 P.2d 321 (1988) (in assault trial, court properly excluded prior specific acts of violence committed by the victim stating that "Dunne's [the victim] character trait of violence is not an essential element of Alexander's claim of self-defense. The self-defense issue could be resolved without any evidence of, or reliance upon, a character trait of Dunne or the defendant. Therefore, while Dunne's reputation for violence is admissible under ER 405(a), specific acts of violence by Dunne are not admissible under ER 405(b).").

(3) In addition to getting a swastika tattoo because his best friend did, Smith also got the tattoo because he espoused to the ideals and beliefs of the Nazi Party.

(4) All believers in Nazi Party ideals and beliefs are racists.

(5) All believers in Nazi Party ideals and beliefs are aggressively violent.

(6) Smith had the characteristics of being an aggressively violent racist when he was a teenager and obtained a swastika tattoo.

(7) Smith possessed these same character traits 30 years later.

(8) Smith possessed the character trait of being an aggressively violent racist even when he invited a Black man, the defendant, into his residence on three or four consecutive days to drink and talk.

(9) Smith was an aggressively violent racist when he invited a Black man, the defendant, into his residence to drink and talk on the day he was murdered, including when, according to the defendant, Smith begged him to stay longer and drink with him.

It is true that to be "relevant" under ER 401, evidence need only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." This, the defendant asserts, is all he needs. However, as can be seen from the sequence of necessary conclusions listed above, this proposition is tenuous at best. This is particularly true when one considers the fact that Smith invited the

defendant into his home as a friend, and defense counsel told the court that their theory of the case was that Smith was a drunk, that he would get violent when he drinks, that he was possessive of Krogness and that Smith blamed the defendant for their breakup.[16] 2RP 8, 23; 3RP 16-17.

Even where evidence is deemed relevant, it is not necessarily admissible. The right to put on a defense and admit evidence is still limited by the general rules of evidence, including ER 403. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Under ER 403, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury."

Here, the relevance, if any, was minimal. A man of middle age can hardly be said to possess the same ideals and beliefs that one did as a teenager – if Smith ever possessed those ideals here. On the other hand, one would be hard pressed to find a more reviled group to associate with

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[16] The defendant's reliance upon State v. Nelson, 152 Wn. App. 755, 771-72, 219 P.3d 100 (2009), rev. denied, 168 Wn.2d 1028 (2010) is misguided. The case actually supports the trial court's position here. Nelson was charged with operating an unlicensed kennel and animal fighting. The trial court admitted evidence that Nelson had multiple tattoos of dogs on his body, including a large tattoo on his back showing two pit bulls fighting. The Court of Appeals upheld the trial court's ruling because the State presented the very evidence that is lacking here – a clear nexus to the crime. In Nelson, along with eight dogs, the State seized from the defendant's property a plethora of dog fighting paraphernalia including dog fighting magazines, muzzles, veterinary supplies to treat dog wounds, syringes, surgical blades, etc., as well as having an expert witness in dog fighting testify that it is common for persons involved in dog fighting to exhibit tattoos of animals fighting. Nelson, at 763, 771-72.

than the Nazi Party. Thus, the potential for prejudice, as the trial court found, was immense.[17]

A trial court's decision to exclude evidence is reviewed for abuse of discretion. State v. Luvene, 127 Wn.2d 690, 706-07, 903 P.2d 960 (1995). While reasonable minds might disagree with the trial court's evidentiary ruling, that is not the standard. State v. Willis, 151 Wn.2d 255, 264, 87 P.3d 1164 (2004). An abuse of discretion is shown when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." Hopson, supra. The trial court did not abuse its discretion here.

In any event, considering the defense theory of the case was that Smith and the defendant were friends and the fight broke out because Smith was drunk and jealous, and considering the fact that suppression of the tattoo did not prevent the defense from raising arguing Smith was a violent aggressive racist, any error was harmless.

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[17] The defendant asserts that a simple limiting instruction could have cured any prejudice. This is problematic for two reasons.

First, as the Supreme Court has stated, while it is presumed that juries follow the court's instructions, no instruction can "remove the prejudicial impression created by evidence that is inherently prejudicial and is of such a nature as to impress itself upon the minds of the jurors." State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190, 192 (1987) (citing State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). This is such evidence.

Second, it is unknown how you would craft a limiting instruction here. After all, the very purpose of admitting evidence of the swastika was to create in the minds of the jurors the idea that Smith was an aggressively violent racist.

3. THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS WITHOUT MERIT

The defendant contends that his conviction must be reversed because his attorney was constitutionally ineffective for failing to ask for a jury instruction that the trial court was not required to give. This proposition cannot be supported.

To prevail in an ineffective assistance of counsel claim, a defendant must satisfy a two prong test. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

First, the defendant must show that counsel's performance was constitutionally deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Id. The test to determine whether counsel was constitutionally ineffective requires a showing that counsel's representation fell below an objective standard of reasonableness based on a consideration of all of the circumstances. Id. at 688. A reviewing court will presume until proven otherwise that counsel acted appropriately. Id.

Second, the defendant must show that the deficient performance prejudiced him. This requires a showing that counsel's errors were so serious that there is a reasonable probability that the outcome of trial would have been different. Id. Jury instructions are sufficient if they are

supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole, the instructions properly inform the jury of the applicable law. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). It is also generally required that the "to convict" instruction contain all the elements essential of the crime, and that technical words or expressions are defined. Id.; State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984).

Here, a charge of felony murder was submitted to the jury. CP 128-29; RCW 9A.32.050(1)(b). As such, the jury was instructed that to convict the defendant it had to find that he committed or attempted to commit the crime of second degree assault, and that in the course of and in furtherance of that crime, or in the immediate flight from that crime, he caused the death of Bill Smith. CP 128-29. A person commits second degree assault when he intentionally assaults another and thereby recklessly inflicts substantial bodily harm. CP 130; RCW 9A.36.021(1)(a).

The jury was also instructed on the law of self-defense. Pertinent here, the defendant proposed, and the court gave, WPIC 17.02. In pertinent part, the instruction reads as follows:

> It is a defense to the charge of Assault in the Second Degree that the force used was lawful as defined in this instruction.

> ***The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured, and when the force is not more than is necessary.***
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

CP 136 (emphasis added); CP 100; WPIC 17.02. This instruction comports with the law as codified at RCW 9A.16.020. In pertinent part, the statute provides as follows:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful ... [w]henever used by a party about to be injured ... in preventing or attempting to prevent an offense against his or her person ... in case the force is not more than is necessary.

RCW 9A.16.020(3).[18]

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[18] The jury was also provided the following additional instructions:

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. CP 138; WPIC 17.05.

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended. CP 137; WPIC 16.05.

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat. Retreat should not be considered by you as a "reasonably effective alternative." CP 139; WPIC 17.05.

The defendant does not dispute that the self-defense instructions given were the proper instructions to give where felony murder is charged based on intent to commit second degree assault. In such a situation, a person is entitled to use force to defend himself and prevent an injury less than great or serious physical injury or death. State v. McCreven, 170 Wn. App. 444, 465-66, 284 P.3d 793 (2012), rev denied, 176 Wn.2d 1015 (2013) (citing State v. Slaughter, 143 Wn. App. 936, 942, 186 P.3d 1084 (where a defendant is charged with felony murder based on the predicate felony of assault, use WPIC 17.02 because the defendant can argue he used reasonable force to prevent injury), rev. denied, 164 Wn.2d 1033 (2008)) and State v. Kyllo, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (a person is entitled to act in self-defense when he reasonably believes he is about to be injured and when the force used is not more than necessary)).

Although the instructions given are a correct statement of the law, the defendant asserts that his counsel was constitutionally deficient for not timely proposing that the court give another instruction, specifically, WPIC 16.02, the self-defense instruction generally used where intentional murder is charged.

RCW 9A.16.050 codifies when homicide is justified. In pertinent part the statute provides that:

> Homicide is also justifiable when committed ... [i]n the lawful defense of the slayer ... when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony ***or to do some great personal injury*** to the slayer or to any such person, and there is imminent danger of such design being accomplished.

RCW 9A.16.050(1).

As pertinent here, WPIC 16.02 provides that:

> It is a defense to a charge of murder that the homicide was justifiable as defined in this instruction. Homicide is justifiable when committed in the lawful defense of the slayer when: (1) the slayer reasonably believed that the person slain intended to inflict death or great personal injury; (2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and (3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

Here, the following scenario played out: During closing argument, defense counsel discussed how the defendant feared for his life and that is why he killed Smith. Counsel then misstated the law and asserted that one could use deadly force to repel a simple assault. The prosecutor objected, although the objection was overruled. Defense counsel then continued with his argument.

After the jury had been fully instructed, closing arguments completed, and the jury had begun deliberations, defense counsel decided

that he wanted the jury instructed on justifiable homicide, WPIC 16.02. The court denied the request, noting that the jury was properly instructed and that further instruct would require that the parties give new closing arguments. 15RP 82-83.

While a trial judge may further instruct a jury after deliberations have started, the decision to do so is discretionary. State v. Ng, 110 Wn.2d 32, 42-44, 750 P.2d 632 (1988). If instruction is given, such supplemental instructions should not go beyond matters that either had been, or could have been, argued to the jury. State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).[19]

Here, the jury was properly instructed. WPIC 17.02 is an accurate statement of the law. Could the judge have also given WPIC 16.02? The answer is yes, but that does not answer the question here. First, there is no requirement that WPIC 16.02 be given where felony murder is charged. While, in hindsight, defense counsel decided that he wanted another instruction based on what had occurred during closing argument, the trial court was not required to give it – either before closing began or after

[19] In Ng, the defendant argued that the trial court erred by not answering "yes" to a question posed by the jury as to whether duress applied to the lesser included offenses charged. Ng was correct that answering "yes" would have been an accurate statement of the law. The trial court believed the instructions already given adequately answered this question and thus answered, "Please refer to the instructions. The court cannot provide any additional instructions or explanations." The Supreme Court noted that the trial court had the discretion to further instruct the jury but where there was no evidence that the instructions given did not accurately state the law, the trial court did not abuse its discretion in declining to instruct the jury further. Ng, 110 Wn.2d at 42-44.

deliberations had started. It was discretionary. The instructions given accurately conveyed the law on self-defense and did not prevent defense counsel from arguing his theory of the case.

WPIC 17.02 provides the baseline for self-defense to assault, essentially that one can use force to prevent injury but the force cannot be more than is necessary. If the potential injury feared is death then this would be a reasonable necessary use of force under this instruction. WPIC 16.02 simply provides what amounts to a specific example, essentially that the use of deadly force can be used only where the injury feared is death or great bodily injury.

As applied to the defendant's ineffective assistance of counsel claim, the defendant suffers from two problems.

First, he cannot show deficient performance. The jury was properly instructed. He cannot show that counsel's failure to ask the court to provide a discretionary instruction was representation that fell below an objective standard of reasonableness.

Second, he cannot show prejudice. Here, he fails in two regards. He asserts that counsel was constitutionally ineffective for failing to ask prior to closing and deliberations that the court give WPIC 16.02.

However, axiomatic to a successful claim is a showing that the trial court would have given the instruction if timely requested. But as the trial court noted, and the defendant does not dispute, the jury was properly instructed. In addition, since the defendant could fully argue his theory of the case under the instructions given, he cannot show that but for the jury not being provided WPIC 16.02, there is a reasonable probability that the result of trial would have been different.

4. THE DEFENDANT'S CUMULATIVE ERROR CLAIM IS WITHOUT MERIT

The defendant contends that the cumulative effect of the errors alleged warrants a new trial, even if they do not justify a reversal individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It is axiomatic, however, that to seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Reversals due to cumulative error are justified only

in rather extraordinary circumstances.[20] Here, as explained in the sections above, no error occurred.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 14 day of April, 2015.

Respectfully submitted,

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King County Prosecuting Attorney

By: _____
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[20] See, e.g., State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426 (police officer's comment on defendant's post-arrest silence, testimony regarding prior confiscations of defendant's guns, and trial court's exclusion of key witness's conviction for crime of dishonesty cumulatively warranted a new trial), rev. denied, 133 Wn.2d 1019 (1997); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor's remarks regarding personal belief in defendant's guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, David Koch at Nielsen, Broman & Koch, containing a copy of the Brief of Respondent, in STATE V. STEIN, Cause No. 71531-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

04-15-15

Date

Done in Seattle, Washington