NO. 47377-I

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JEREMY ROSE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 14-1-00059-8

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Where defendant did not object to the challenged instructions below on the basis that they were legally incorrect, should he now be permitted to raise that objection?

2. Where the judge instructed the jury on the proper defense of property law to avoid juror speculation and confusion on whether defendant could claim such a defense, did the trial court abuse its discretion in giving those instructions?

B. STATEMENT OF THE CASE.

1. Procedure

On January 6, 2014, Jeremy Trenton Rose (hereinafter "defendant") was charged with two counts of first degree assault and one count of resisting arrest. CP 7–8. Defendant asserted the affirmative defense of self-defense. CP 18; 2RP 20.[1] Defendant moved to sever the resisting arrest charge (Count III), 2RP 53, but the motion was denied. 2RP 57.

After the State rested its case-in-chief, 6RP 608, defendant chose to testify. *See* 7RP 637–700. The State proposed instructions relating to

[1] The verbatim report of proceedings will be referred to by volume number, RP, and page number (#RP #).

self-defense and defense of property. 6RP 623–625. After much discussion, the court ultimately gave the instructions. 7RP 709–716.

On Count I, the jury found defendant guilty of the lesser-included second degree assault. CP 131; 8RP 803. By special verdict, the jury found defendant was armed with a deadly weapon. CP 132; 8RP 804. The jury found defendant not guilty on Counts II and III. 8RP 803. Defendant moved under CrR 7.5 and CrR 7.8 to set aside the verdict and for a new trial. 9RP 815–819; CP 138–141. The motion was denied. 9RP 820. Defendant was sentenced to a standard range sentence of 13 months, plus 12 months for the deadly weapon enhancement. CP 150; 9RP 828–829. Defendant appealed timely. CP 166–178.

2. Facts

On January 1, 2014, Stephen and Susan Ortloff—both of whom were homeless—returned to the vacant apartment building where they had been living without permission or "squatting" for at least a month. 5RP 252. The Ortloffs were initially unable to gain access to the building because the entrances were barricaded. 5RP 252. After gaining access, the Ortloffs went up to the unit they had been staying in and found the door was locked. 5RP 258.

The Ortloffs and defendant had been staying in the same unit. 5RP 246. The Ortloffs had moved into that unit while defendant was out of town for a couple of weeks. 5RP 245. When defendant returned, he and the Ortloffs shared the unit. 5RP 246. Michael Runyon, another person

squatting in the building at the time, verified that the Ortloffs and defendant shared the unit for a couple of weeks. 6RP 469.

After finding the door to the unit locked, the Ortloffs yelled through the door trying to convince defendant to let them in, but defendant refused. 5RP 258–259. The Ortloffs wanted to get inside because all of their personal belongings were in the back bedroom. 5RP 258. Stephen Ortloff went downstairs, got a pick ax, knocked the lock off the door, and was able to push the door open. 5RP 260.

It is unclear whether Stephen or Susan Ortloff went through the door first. 5RP 264, 5RP 352. After gaining access, however, defendant stabbed Susan Ortloff in the neck. 5RP 357. Susan Ortloff exclaimed, "I got stabbed," and Stephen Ortloff attacked defendant. 5RP 267. Stephen Ortloff and defendant wrestled briefly before defendant stabbed Stephen Ortloff in the arms. 5RP 265. The Ortloffs ran outside and another man squatting in the building at the time—Jason Sulzer—called 911. 5RP 277.

Tacoma Police Officer James Lang responded to the 911 call and found a bloody, distraught Susan Ortloff. 3RP 107. Medical aid arrived immediately to assist. 3RP 106. Dr. Thomas Ferrer treated Susan Ortloff's injuries. 5RP 364. Susan Ortloff's stab wound track was six or seven centimeters from her neck down to her lung, and there was injury to her lung. 5RP 377–379. Air escaped from the top of the lung. 5RP 379. Susan Ortloff still has a scar from the knife wound. 5RP 394. Although Susan Ortloff recovered, she described her fear at the time as, "I was thinking

like when you get stabbed in the neck, you're going to die . . . it was like my life was flashing before my eyes. I was terrified and I couldn't breathe suddenly." 5RP 392.

On January 3, 2014, officers were advised that defendant had a bed at the King Center shelter. 6RP 492. When defendant saw the officers, he faced them standing with an aggressive "bladed stance"—a pre-attack indicator, according to Officer Steven Shank—and his hands in his pockets. 6RP 495. The officers commanded defendant to take his hands out of his pockets, but defendant did not cooperate. 6RP 496. Due to defendant's aggressive stance and noncompliance, Officer Shank deployed his Taser. 6RP 496. After having to physically take defendant to the ground, the officers were able to get him into custody. 6RP 498. Defendant had a black eye but no other noticeable injuries—such as injuries from an edged weapon on his hands. 3RP 115.

During his testimony, defendant denied that the Ortloffs were sharing the unit with him. 7RP 650. According to defendant, he often locked the door while in the apartment. 7RP 651. In defendant's version of events, Susan Ortloff was the first aggressor; Susan Ortloff lunged at defendant, they struggled over the knife, and defendant ended up stabbing her. 7RP 657–658. Then, Stephen Ortloff attacked defendant. 7RP 659. Defendant claimed he was concerned about his own safety when the Ortloffs came through the door. 7RP 667.

C. ARGUMENT.

1. DEFENDANT FAILED TO PRESERVE THE ISSUE BELOW. REGARDLESS, THE JURY INSTRUCTIONS GIVEN IN THIS CASE ON DEFENSE OF PROPERTY WERE LEGALLY CORRECT AND PROPERLY GIVEN TO AVOID JUROR SPECULATION. FURTHER, ANY ERROR WAS HARMLESS BECAUSE DEFENDANT CLAIMED ONLY SELF-DEFENSE.

a. Defendant did not preserve the issue he now challenges because he failed to object on the basis that the instructions were improper law.

Defendant did not properly preserve the issue he now raises on appeal. RAP 2.5(a) states, "The appellate court may refuse to review any claim of error which was not raised in the trial court." A defendant may appeal a non-constitutional issue only on the same grounds stated below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987). In dealing with objections to jury instructions made on different grounds below, this court explained in ***State v. McDaniel***:

> [A]bsent a claim of constitutional magnitude, we may refuse to address on appeal any specific claim of error that a party did not raise in the trial court. RAP 2.5(a). A party objecting to a jury instruction must 'state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused.' CrR 6.15(c). Where objection to 'a proposed instruction fail[ed] to advise the trial court of any particular point of law involved,' we will not consider those arguments on appeal. ***State v. Sherer***, 77 Wn.2d 345, 352, 462 P.2d 549 (1969).

State v. McDaniel, 155 Wn. App. 829, 856, 230 P.3d 245 (2010) (alteration in original). The defendant in ***McDaniel*** had taken exception to the challenged instructions below; however, the objection was vague and did not propose an alternative instruction. *Id.* This court ruled that McDaniel had waived his right to appeal the legality of the instructions because he had not objected on that basis below. *Id.*

In the present case, defendant did object to the instructions now challenged on appeal. *See* 7RP 717. The basis for the objection, however, was that the defendant was not asking for the instruction. 7RP 710. Defendant further objected to the instructions as "confusing and misleading and unnecessary." 7RP 717. Defendant did not, however, object to the instructions as legally incorrect; defendant did not claim below, as he does now, that the instructions contained improper law. *See* 7RP 706–718. Therefore, as in ***McDaniel***, defendant has not properly preserved his objection to instructions 21 and 22, and this court should refuse to review this claim of error raised for the first time on appeal.

b. The instructions on defense of property were legally correct and properly given.

Even if the issue were properly preserved below, the instructions were legally correct and properly given. Where a defendant alleges an error of law in the jury instructions, the instructions are reviewed de novo. ***State v. Willis***, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Whether to give a particular jury instruction, however, is reviewed for an abuse of

discretion. ***State v. Hathaway***, 161 Wn. App. 634, 647, 251 P.3d 253 (2011) (citing ***State v. Douglas***, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005)).

"Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform they jury of the applicable law." ***Hathaway***, 161 Wn. App. at 647 (citing ***State v. Clausing***, 147 Wn.2d 620, 626, 56 P.3d 550 (2002)). Jury instructions on self-defense and defense of property must—rather than merely adequately convey the law—make the relevant legal standard "manifestly apparent to the average juror." ***State v. McCreven***, 170 Wn. App. 444, 284 P.3d 793 (2012) (quoting ***State v. Allery***, 101 Wn.2d 591, 595, 682 P.2d 312 (1984)); ***State v. Bland***, 128 Wn. App. 511, 515, 116 P.3d 428 (2005). In the present case, defendant challenges the instructions given on defense of property. *See* Br. of App. p. 1.

The challenged instructions are numbers 21 and 22. Instruction 21 stated:

> An individual's use of force upon or toward another person is not lawful when it is used in preventing or attempting to prevent a malicious trespass or other malicious interference with real property or personal property that is not lawfully in the individual's possession. Real property means the land itself and all buildings, structures, or improvements thereon.
>
> An individual is not lawfully in possession of real or personal property when he is not licensed, invited, or otherwise privileged to possess the property.

CP 114. Instruction 22 stated:

> The use of deadly force or a deadly weapon is not lawful when it is used in preventing or attempting to prevent a malicious trespass or other malicious interference with real property or personal property.
>
> Deadly force is the intentional application of force through any means reasonably likely to cause death or serious physical injury.

CP 115.

i. The instructions on defense of property are legally correct.

Instructions 21 and 22 instructed the jury on the proper defense of property law. A general rule is that a person *owning, or lawfully in possession of*, property may use such force as reasonably necessary under the circumstances in order to protect that property. ***Peasley v. Puget Sound Tug & Barge Co.***, 13 Wn.2d 485, 506, 125 P.2d 681 (1942). The inverse of this would be that a person *not lawfully* in possession of the property may *not use* such force. For example, in ***State v. Mierz***, the defendant was not in lawful possession of coyotes he contended he was protecting. 127 Wn.2d 460, 470, 091 P.2d 286 (1995). The Court stated that because he was not in lawful possession of the property, he had no right to invoke a defense of property. *Id.* at 470–471.

RCW 9A.16.020 states:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases . . .
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or

> a malicious trespass, or other malicious interference with real or personal property *lawfully in his or her possession* . . .

RCW 9A.16.020(3) (emphasis added). RCW 9A.52.010 states: "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(5). The inverse of which is that a person is lawfully on the premises when licensed, invited, or otherwise privileged.

Whether the force used in defense of property is greater than justified by the circumstances is a question of fact for the jury to determine under proper instructions. ***State v. Murphy***, 7 Wn. App. 505, 514, 500 P.2d 1276 (1972). The use of a deadly weapon to eject a non-violent, non-boisterous trespasser is, as a matter of law, not a justifiable use of force. ***Murphy***, 7 Wn. App. at 514. "Deadly force" is defined as the intentional application of force through the use of firearms or any other means reasonably likely to cause death or serious physical injury. RCW 9A.16.010(2).

The defense of property instructions given in this case are therefore legally correct. Instruction 21 is consistent with the above language from ***Peasley***, 13 Wn.2d at 506, ***Mierz***, 127 Wn.2d at 470, RCW 9A.16.020, and RCW 9A.52.010(5). Instruction 22 is consistent with the above language from ***Murphy***, 7 Wn. App. at 514, and RCW 9A.16.010(2). Simply because the instructions were, in some instances, worded inversely

from the original rule does not mean they are no longer supported by such rule. The instructions are legally proper.

On appeal, defendant seems to argue that he was lawfully in the building, therefore the instruction was inappropriate as a matter of law. Br. of App. p. 9. This is contrary to defendant's testimony at trial. Defendant said he was "squatting" in the building. 7RP 643. He had signed no lease and made no agreement with the property owner to be there. 7RP 643. In fact, a couple of weeks prior to the stabbing incident, police raided the building and told defendant to stay out of the building. 7RP 644. After the raid, defendant was afraid of the police would return and get him "caught up on trespassing." 7RP 644. Defendant admitted that he knew he could not stay in the building, it was not his, and he had no right to be there. 7RP 672. Defendant cannot now contend, contrary to his testimony at trial, that he had some right to be in the building.[2] Defendant was not lawfully in possession of the property—by his own admission at trial—therefore the instructions on defense of property were proper.

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[2] Defendant also contends that the building was "abandoned," therefore as a matter of law he was not unlawfully present. Br. of App. p. 11. That the building was legally "abandoned," however, is not in the record before this court. Defendant also mistakenly relies on a claim of adverse possession. Br. of App. p. 13. Because defendant testified he had only been squatting in the building about two months, he comes nowhere near the ten-year period required for adverse possession. ***ITT Rayonier, Inc. v. Bell,*** 112 Wn.2d 754, 757, 774 P.2d 6 (1989).

ii. The trial court did not abuse its discretion by instructing the jury on defense of property because the instructions helped inform the jury of the law and avoid jury speculation.

Whether to give a particular jury instruction is reviewed for an abuse of discretion. ***Hathaway***, 161 Wn. App. at 647 (citing ***Douglas***, 128 Wn. App. at 561). A trial court abuses its discretion if its decision is manifestly unreasonable or rests on untenable grounds. ***State v. Griffin***, 173 Wn.2d 467, 473, 268 P.3d 924 (2012) (citing ***State v. Dixon***, 159 Wn.2d 65, 75–76, 147 P.3d 991 (2006)). In the present case, the trial court did not abuse its discretion by instructing the jury on defense of property because the instruction was supported by the evidence presented and was designed to avoid jury speculation and confusion.

The State proposed the instructions on defense of property to avoid jury speculation as to whether defendant had a lawful right to use force. 7RP 711. Although defendant was not pursuing a defense of property, 7RP 709, many of the State's witnesses testified that defendant was upset that the Ortloffs moved into the unit he claimed for himself. 7RP 711. For example, Stephen Ortloff testified that when he and Susan Ortloff tried to get into the unit, defendant yelled at them, "You ain't coming in." 5RP 258. Susan Ortloff testified that defendant yelled at them, "get out of here, you don't live here no more . . . . go away." 5RP 349. Michal Runyon—another man staying in the building at the time—testified that defendant

"didn't like anybody staying on his floor." 6RP 484. The State's witnesses presented a situation from which a jury might speculate whether defendant was lawfully defending what he saw as his property. Therefore, the State sought the defense of property instruction so the jury would be fully informed of the law.

The court agreed with the State about the importance "that the jury be instructed that this is not a protecting his castle type of case." 7RP 715. The court explained, "I'm going to give both 21 and 22 since it further defines what force is lawful or not lawful." 7RP 716. Defendant has failed to show how the court's decision to avoid juror speculation and give the relevant instructions amounts to an abuse of discretion. Further, the court discussed—and heard arguments about—the instructions at three separate points. *See* 6RP 622–626, 7RP 706–718, 8RP 816–820. This is evidence that the trial court took time to actually consider the proposed instructions and to hear defendant's arguments against them.

c. Any error in the instructions would be harmless beyond a reasonable doubt.

"Whether a flawed jury instruction is harmless error depends on the facts of a particular case." ***Bland***, 128 Wn. App. at 515 (quoting ***State v. Carter***, 154 Wn.2d 71, 81, 109 P.3d 823 (2005)). If, based on the evidence, it appears beyond a reasonable doubt that the flawed jury instruction did not contribute to the verdict, it is harmless. *Id.* In the present case, any error is harmless because defendant did not assert a

defense of property, the instruction was only given to avoid juror confusion.

Defendant made clear in closing argument that he was not asserting defense of property; instead, defendant was asserting defense of self. Defense counsel argued:

> [Defendant] didn't testify that my intention was to defend, quote, unquote, my apartment. Now, he was clear. He wanted to keep them out. He wanted them out of the building and he didn't want them in his room, but that doesn't mean that the force that was being used was being used to protect property.

7RP 767. Defense counsel further said, "[Defendant] did not stab [Susan Ortloff] to keep her out of the apartment, and he didn't stab Stephen Ortloff to keep him out of the apartment. He did that to protect himself, and he has that right." 7RP 767. Defendant made abundantly clear to the jury he was not trying to assert a defense of property. Therefore, even assuming arguendo the instructions on defense of property were erroneous, the error was harmless because defendant asked the jury to only consider self-defense, and defendant does not challenge those instructions.

D. CONCLUSION.

Defendant failed to properly preserve this issue at the trial level; therefore, this court should decline to review the challenged instructions. Regardless, the court's instructions to the jury on defense of property—

instructions 21 and 22—were proper statements on defense of property law. It was not an abuse of discretion to give them when the judge sought to avoid juror speculation and confusion given the testimony of the State's witnesses. Further, any alleged error is harmless beyond a reasonable doubt because defendant made clear he was only pursuing a defense of self, the instructions for which he does not challenge.

The State respectfully requests this court affirm defendant's conviction.

DATED: August 6, 2015.

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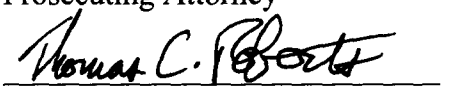

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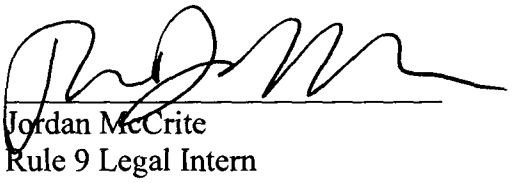

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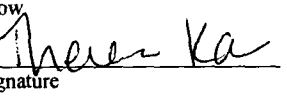
8.7.15 
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