COURT OF APPEALS, DIVISION II; AND SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

JOSEPH MICHAEL DONNETTE-SHERMAN, Appellant Pro Se

PETITION FOR REVIEW BY SUPREME COURT OF WASHINTON

Appeal's Court Case No. 47602-9-II

DATED DECEMBER 23, 2016

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Brief of Appellant and Assignment of Errors

1.0 Ambiguous Charging Document :

1.1 Three (3) ways of Assault not mentioned in Charging Document. "unlawful touching (is this about sexual assault)"? Plaintiff's fear of an intentional threat? (he certainly did not act intimidated on the night of the event)

1.2 Is Defendant's life to be ruined because Plaintiff was supposedly scared by a peaceful, retired, arthritic, disabled next door neighbor of 23 years? While Plaintiff was taking the time to add to his photography collection? And crying about it 18 months later on the witness stand?

1.3 Reading the charging document sounds more like a violent attack – which it was not, and this was the crux of the defense prepared for trial. We were not prepared for illusions of this otherwise aggressive Plaintiff suddenly being sensitive to his emotional damages which is the basis of his civil suit against Defendant. Plaintiff's Original Complaint does not allege these issues.

2.0 Deadly Weapon Sentence Enhancement :

2.1. Defining deadly weapons in two different ways and asking the (weapon's unqualified) jury to make such determination is fundamentally flawed. "Circumstances" and "manner" are conflagrated. Circumstances is: the being on his property kind of thing; whereas "manner" refers to some kind of wicked heart.

2.2.

It is only the "manner" "For the purposes of this RCW Section 9.94A.825" (sentence enhancement - SRA 1991) that is relevant. The definition of "Deadly Weapon" from RCW 9.41.270 / 9a.04.110(6) that refers to the "circumstances"is not reference in RCW Section 9.94A.825). So "circumstances" should not be part of sentence enhancements. And Defendant's "manner" was not proved – there is no corroborating evidence for this issue. There was no 'wicked heart' on Defendant's part in this case.

2.3. The Jury was faced with conflicting instructions and misstatements by both Prosecutor and Defense attorney.

3.0 Lawyerly Misconduct :

3.1 "It is the State's INTENTION that Defendant INTENDED to do more than he did" (VRP pg160 ln22) sounds like the State is verbally assaulting Defendant. And for a jury composed of people dependent/subservient on government hierarchies in the local cultural-norm/economy of Olympia and Thurston County, it is psychological manipulation. There is no evidence for Defendant's "intention" to harm Plaintiff. Defendant's requested character witnesses would have made his peaceful character point manifest in the trial record but Defense Attorney refused to call them.

3.2. Photo Analysis is the only evidence:

a) Phone and knuckle damages were recorded by Deputy hours after the event and could have manifested any time within that time period.

b) Action shots misinterpreted; arms in the air for balance is not the same as 'brandishing'. Holding the yard tool out-of-the-way of (while Plaintiff refused to let go of Defendant's left hand) of aggressive Plaintiff is not the same as intimidation.

c) Plaintiff's blurred camera shots show Plaintiff was moving aggressively toward Defendant with camera at waist level; as would be with taser attack.

d) Defense Attorney is mute on all this despite Defendant's communications about these points prior to trial, which was 18 months later and would only be remembered if

practiced, since humans rewrite memory to fit their personal bias.

3.3. False arrest – the Prosecution began with the arrest of self-defense Defendant who was then branded the perpetrator, and the Plaintiff as the victim. These conditions were reinforced repeatedly at trial. Whereas the opposite is more true; Defendant communicated these points repeatedly. Why was this done? To further the State's case? Or Plaintiff's? RE: closed conferences (behind the scene) issues of Superior Court's do not address issues of circumstances of false arrest in Defendant's SAG, The prosecution began on the night of Defendant's arrest under false and hidden circumstances. Unfair (unlawful) arrest and holding Defendant incommunicado in jail as if already deemed guilty.

3.4. Plaintiff's security camera video tape should have been taken as evidence on the night of arrest as it would have exonerated Defendant. One can only wonder why it was not taken into evidence that night; lack of competent investigators or misconduct?. Defense Attorney should have called to question as to why, if this case would be a felony conviction, the evidence could be so mishandled. Meanwhile we have the Prosecutor re-writing the Arrest Reports "for clarity". Plaintiff's phone should have been taken as well for forensic evaluation of damage and handling.

3.5. Ineffective counsel issues are enumerated in Defendant's Statement of Additional Grounds (SAG) including the Document requesting a reconsidering of the absence of Appeal Bond dated July 12, 2015. Appeals Court's characterization of Defendant's ineffective counsel issues is not complete because they do not address said issues raised In Defendant's SAG.

3.6. Jury instructions flaws that confused the Jury's deputized mission are enumerated in Defendant's SAG and associated Documents.

4.0 Problems with Court of Appeals Determinations

4.1 Appellant "did more than display" (Court of Appeals Unpublished Opinion dated October 25th 2016) - There is no evidence of such, the "more" is all based on Plaintiff's ranting and lawyerly misstatements . The point here is that the photo of Defendant/Appellant with arms in air holding yard tool menacingly is an invalid assumption that should have been addressed by Defense Attorney. Careful analysis of the photo reveals that the gesture is about balancing while tripping on the concrete step, not an intention to assault. The blurred photo illustrates Defendant was leaning back words with arms spread wide and descending but not directed at Plaintiff. And that Plaintiff has lunged forward at Defendant, thus instigating the situation.

4.2 Footnote pg 9 of Unpublished Opinion by Appeals Court said attachments were not considered because they were not properly submitted. However they are important to the circumstances of the case and they elucidate my points. That they were written during Defendant's incarceration should be considered. Time and cost constraints of incarceration prevented a more proper presentation. Further, Defendant is disabled and is not always able to function mentally, particularly under stressful circumstances . Some countenance of this should be taken by way of ADA Reasonable Accommodation.

4.3 Appellant is entitled to present his case in his own manner of speaking, and his sincere points made should be considered despite a lack of proper form. Appellant is now available for clarification should his writing be confusing. Just call or email him.

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondant	MOTION FOR CONTINUANCE
JOSEPH MICHAEL DONNETTE-SHERMAN Appellant	Case No. 47602-9-II

1. Joseph M Donnette-Sherman (Appellant) asks for the relief designated in Part 2 below.
2. Relief sought: Persuant to the Court's Unpublished Opinion dated October 25, 2016 Appellant seeks a continuance for additional time of 30 days to work on a Petition for Review pursuant to RAP Rule 13-4. In addition, due to Appellant's indigency, a waver of Statutory Filing Fees. Further, since Appellant's Court Appointed Attorney – Thomas Doyle – has indicated he will not be working on my case anymore Appellants asks for phone interviews with the Case Manager to review the circumstances of this case.
3. Relevant facts: The Courts Unpublished Opinion was not delivered to Appellant until November 16, leaving insufficient time for his response. Appellant has been living on the street since being released from prison and needs more time to acquire writing materials, record legal papers, and internet access at the Public Library. While Appellant was incarcerated his house was foreclosed and purchased by his neighbor (Bruce Boyles [Plaintiff from Superior Court of Thurston County Case No. 13-1-01173-9]) at a highly discounted price, which he then turned and sold for a $100,000.00 profit. All Appellant's belongings were lost to him in this process. Please bear in mind that the consequence of all this prosecution and sentencing is that Defendant is now shamed as a Felon, his professional license is revoked, and his home has been taken, including all his life savings. That is pretty severe for an incident that resulted in no injuries. Indeed, Appellant has never hurt anybody in his life, has always disavowed weapons, and has devoted his life to improving the plight of humanity. Also, the statements of the case were written by attorneys who did not communicate with Appellant and do not reflect reality, yet they are presented in the Case Record as though factual. They are not. Appellant is offended by the Attorney for the State of Washington who wrote: "The State accepts Donnette-Sherman's statement of the substantive and procedural facts of the case" (Brief of Respondent Section B page 1 – undated). Which statements are those?

4. Grounds for Relief and Argument: See RAP13-4. See also previous letters to the court by Appellant, his statement of the events at issue, and Statement of Additional Grounds (SAG). This case is a travesty of justice. Perpetrated by one man's (Bruce Boyles - Plaintiff) false testimony in conjunction with Jurisdictional errors of Jury Instruction law. Aside from Plaintiff's testimony, there is NO corroborating evidence. There is only assumptions and misdirected enforcement s. There is no mention of the so called three ways of committing assault in the Charging Documents. The ambiguities concerning the charges meant that Appellant was not able to prepare a defense due to head trauma suffered only weeks before trial. His Thurston County Office of Assigned Counsel Larry Jefferson refused to call Appellant's character witnesses and requested experts. Mr Jefferson also made false and misleading statements to the jury. There are significant problems with how the laws are being interpreted and executed in this case. There is no common sense to what has been done to Appellant. The public has a substantial interest in this case being reviewed by the Supreme Court of Washington.

Respectfully,

Joseph M Donnette-Sherman

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Filed
Washington State
Court of Appeals
Division Two

October 25, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSEPH MICHAEL DONNETTE-SHERMAN, Appellant.	No. 47602-9-II UNPUBLISHED OPINION

JOHANSON, J. — Joseph Michael Donnette-Sherman appeals his jury trial conviction for second degree assault and his deadly weapon sentencing enhancement. He argues that (1) he received ineffective assistance of counsel when his trial counsel failed to object to the prosecutor's improper closing argument and (2) the trial court violated his right to a public trial when it considered for-cause challenges in a sidebar during jury selection. He also raises several additional claims in a pro se statement of additional grounds for review[1] (SAG). Because Donnette-Sherman does not establish ineffective assistance of counsel based on defense counsel's failure to object to the State's closing argument and does not show that the courtroom was closed, and because his SAG claims either fail or cannot be addressed, we affirm.

[1] RAP 10.10.

FACTS

I. BACKGROUND

On the evening of August 4, 2013, Bruce Boyles went outside to check on his barking dog. The dog was leashed to a 20-foot steel cable in Boyles's front yard.

As he approached the dog, Boyles saw his neighbor, Donnette-Sherman, approaching the dog with a machete in his hand. According to Boyles, Donnette-Sherman grabbed the dog's cable and "was reeling back with the machete." 1 Report of Proceedings (RP) at 82.

Boyles told Donnette-Sherman to get away from the dog and said he (Boyles) was calling the police and taking pictures. Donnette-Sherman stopped, looked up at Boyles, let go of the cable, approached Boyles, and swung the machete at him. Boyles moved his hand to block the machete, and the machete hit the phone and Boyles's thumb. The machete made a "deep cut in the phone" and made a small cut to Boyles's thumb. 1 RP at 92. Before dropping the phone, Boyles was able to take photographs of Donnette-Sherman with the machete.

According to Boyles, after the first strike, Donnette-Sherman "reeled back with the machete again like he was going to swing it at [Boyles's] throat." 1 RP at 85. Donnette-Sherman did not, however, strike again. Instead, he turned around and went home. Both Donnette-Sherman and Boyles called 911.

When a deputy questioned Donnette-Sherman at home, he told the deputy that he had gone over to Boyles's house to free the dog, who was chained and constantly barking. Donnette-Sherman stated that he was tired of the dog's barking, thought the dog was being abused, and was attempting to cut the dog's tether. He further stated that he thought Boyles had a weapon in his hand and that he (Donnette-Sherman) had approached and swung the machete at Boyles to disarm

him. When describing what Boyles had done, Donnette-Sherman gestured with his hands in a manner the deputy later described as being similar to someone "holding a camera, taking pictures." 1 RP at 57. Donnette-Sherman gave the machete to the deputy, and the deputy photographed it and took it into evidence.

II. PROCEDURE

The State charged Donnette-Sherman with second degree assault with a deadly weapon[2] with a deadly weapon sentencing enhancement. The case was tried by a jury.

A. JURY SELECTION

During voir dire, after counsel finished questioning the venire, the trial court considered the parties' motions to exclude jurors for cause in a sidebar. The venire remained in the courtroom, and there is nothing in the record suggesting that the courtroom was closed to the public at this time.

Following the sidebar, the trial court selected the jurors. The trial court and counsel then described the sidebar in detail for the record, noting which jurors had been challenged for cause, which had been excused for cause, which party had moved to excuse the juror for cause, the other party's response, and the reason each juror was excused.

B. EVIDENCE

Boyles and a deputy who responded to the 911 calls testified for the State. Their testimony was consistent with the facts set out above. Donnette-Sherman did not present any evidence.

[2] RCW 9A.36.021(1)(c).

During the trial, the trial court admitted several photographs of the machete taken by the deputy, the photographs of Donnette-Sherman with the machete that Boyles took with his cell phone, and the machete that Donnette-Sherman gave the deputy. Defense counsel did not object to any of these exhibits. The machete's blade was 22 inches long; the entire machete was 27 inches long.

C. Closing Argument

During closing argument, the prosecutor argued,

> Now I want to talk a little bit about self-defense, because that's what I believe the defense will be in this case, and you have been instructed on self-defense, and *I submit to you that there is no, none whatsoever, evidence that the force that [Donnette-Sherman] used on this date was justified or lawful.*
>
> Instruction No. 13, I have only got part of it up here. I will go through some parts of it. These are excerpts from Instruction No. 13, "The use of the force upon or towards a person is lawful when used by a person that reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against a person and when the force is no more than necessary."
>
> So in this case, you might want to ask yourself in deliberation, what evidence is there that would create in [Donnette-Sherman] the idea that he was about to be injured, that his injury was imminent?
>
> *The only evidence you have is what [Donnette-Sherman] told the officer when the officer went to talk to him about this incident, and he said he thought Mr. Boyles was holding a weapon, and he demonstrated how Mr. Boyles was holding the weapon, and he held his hands out like this, like somebody holding a camera, not like somebody holding a weapon.*
>
> And Dep. Brooks didn't know any kind of weapon that would be held in the way a camera was held, and this is accurate as far as how Mr. Boyles testified he was holding the camera. He held out the camera or the phone, which was taking pictures, and that can in no way be construed as threatening or in no way can that be construed as justifying the force that [Donnette-Sherman] then used. That force can be no more than is necessarily [sic].
>
> If you are going to go down that road to explore self-defense, ask yourselves, what would be necessary in those circumstances to [Donnette-Sherman], in the circumstances known to him at that time, what force was necessary?
>
> And I submit to you that absolutely no force was necessary or justified. He didn't have to continue towards Mr. Boyles. He was on Mr. Boyles' property. He had no legitimate business being there. He was told, I am recording this, I'm getting

> all of this. He wasn't threatened. He was told -- unless he is being threatened with accountability by being photographed -- but he is told, I'm getting all of this. To construe that as some sort of a threat where force was necessary to defend himself, there just isn't any -- there just isn't any evidence of that.
>
> What avenues did he have? Even if you do go down that road and think, well, maybe he did think -- maybe he thought this phone was some sort of a weapon, what were his options at that point?
>
> He could have gone -- according to the testimony of both the officer and Mr. Boyles, there was nothing to prevent him from turning and walking away, turning and running away, from going in any other direction. But he chose to go straight in the direction of Mr. Boyles with the machete and struck towards Mr. Boyles.
>
> So I would ask you to find that the defense was there was no situation where [Donnette-Sherman] would be prudent or reasonable in using that force. Again, Mr. Boyles was on his own property. He was holding an object as if someone would be holding a phone, not a weapon, not a knife, nothing like that.
>
> He was stating -- and he didn't yell -- he stated he was taking pictures, and [Donnette-Sherman] responded when he said that. It was clear to Mr. Boyles that [Donnette-Sherman] heard him. He had many other avenues. He could leave the scene. He did not have to go towards Mr. Boyles with that machete.
>
> Given that evidence, there was no reasonable belief, no reasonable person would have the belief that they were about to be injured, and the force was much more than necessary to attack him with a machete when he had other options.

1 RP at 167-70.

The jury found Donnette-Sherman guilty of second degree assault with a deadly weapon and found by special verdict that he had been armed with a deadly weapon at the time of the crime. Donnette-Sherman appeals.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Donnette-Sherman first argues that defense counsel provided ineffective assistance of counsel when he failed to object to alleged prosecutorial misconduct in closing argument. Specifically, Donnette-Sherman asserts that defense counsel should have objected when the prosecutor "impl[ied] during argument that the jury need not consider the issue of self-defense if

it excludes Donnette-Sherman's statements to Deputy Brooks." Br. of Appellant at 7. We disagree with Donnette-Sherman's characterization of the prosecutor's argument, and we conclude that his counsel was not ineffective when he failed to object to the prosecutor's closing argument.

A. LEGAL PRINCIPLES

To prevail on his ineffective assistance of counsel claim, Donnette-Sherman must show both deficient performance and resulting prejudice; failure to show either prong defeats this claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To establish deficient performance, Donnette-Sherman must show that defense counsel's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362 (citing *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We review an ineffective assistance claim de novo, beginning with a strong presumption that defense counsel's performance was adequate and reasonable and giving exceptional deference when evaluating counsel's strategic decisions. *McNeal*, 145 Wn.2d at 362.

B. NO DEFICIENT PERFORMANCE

Donnette-Sherman challenges the following portions of the prosecutor's closing argument:

> Now I want to talk a little bit about self-defense, because that's what I believe the defense will be in this case, and you have been instructed on self-defense, and *I submit to you that there is no, none whatsoever, evidence that the force that [Donnette-Sherman] used on this date was justified or lawful.*
>
> . . . .
>
> *The only evidence you have is what [Donnette-Sherman] told the officer when the officer went to talk to him about this incident, and he said he thought Mr. Boyles was holding a weapon, and he demonstrated how Mr. Boyles was holding the weapon, and he held his hands out like this, like somebody holding a camera, not like somebody holding a weapon.*

1 RP at 167-68 (emphasis added). Read in context, this argument does not support Donnette-Sherman's ineffective assistance of counsel claim.

Although a prosecutor may not comment on the lack of defense evidence when a defendant asserts self-defense because the defendant has no duty to present evidence, merely mentioning that there is not sufficient evidence to support the defense is not improper. *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43 (2011); *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009). And the prosecutor is entitled to point out lack of evidentiary support for the defendant's theory of the case. *State v. Killingsworth*, 166 Wn. App. 283, 291-92, 269 P.3d 1064 (2012). Taken in context, this is what the prosecutor did—he argued that the evidence did not support the defense. Therefore, the prosecutor's comments were not improper. And defense counsel's failure to object to comments that are not improper does not fall below an objective standard of reasonableness. Accordingly, Donnette-Sherman fails to establish ineffective assistance of defense counsel for failing to object to this argument.

II. PUBLIC TRIAL

Donnette-Sherman next argues that the trial court violated his public trial right by addressing for-cause challenges to potential jurors in a sidebar without first considering the factors set forth in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). Following our Supreme Court's decision in *State v. Love*, 183 Wn.2d 598, 354 P.3d 841 (2015), *cert. denied*, 136 S. Ct. 1524 (2016), we disagree that a closure took place here and hold that the trial court did not violate Donnette-Sherman's public trial right.

In *Love*, our Supreme Court held that the defendant's public trial right was not violated by the exercise of for-cause challenges at the bench because no courtroom closure had occurred. 183 Wn.2d at 606. In so holding, our Supreme Court reasoned,

> [T]he public had ample opportunity to oversee the selection of Love's jury because no portion of the process was concealed from the public; no juror was questioned

> in chambers. To the contrary, observers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury section.

Love, 183 Wn.2d at 607.

Here, as in *Love*, the public was able to (1) observe the questioning of jurors, (2) listen to the jurors' answers, (3) visually observe counsel exercise their for-cause challenges at the bench, and (4) evaluate the composition of the empaneled jury. 183 Wn.2d at 607. Although it does not appear that the sidebar was transcribed by a court reporter, the trial court summarized the sidebar in detail on the record and allowed both parties the opportunity to comment on and add to this summary, unlike *State v. Effinger*, 194 Wn. App. 554, 562, 375 P.3d 701 (2016). The trial court's summary described which jurors had been excused for cause, which party had moved to excuse the juror for cause, the other party's response, and the detailed reasons each juror was excused. This summary permitted the public to scrutinize the process in much the same manner as a verbatim transcription of the arguments would have allowed. *See State v. Anderson*, 194 Wn. App. 547, 552-53, 377 P.3d 278 (2016) (holding that there was no closure when the proceedings were held in open court and the trial court described the results of the sidebar on the record). Accordingly, we hold that no closure occurred here and, thus, Donnette-Sherman's public trial right was not violated.

III. SAG Issues

Donnette-Sherman has also filed a pro se SAG raising several additional issues.[3] These issues either fail or we do not reach them.

A. Charging Document Claims

Donnette-Sherman contends that the information was "ambiguous and does not accurately depict the law" because Washington law does not define a machete as a deadly weapon. SAG at 2. We disagree.

A charging document must allege each essential element of the crime to notify the accused of the nature of the allegation so that he can properly prepare a defense. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). But a charging document need only allege "'[a]ll essential elements of a crime'" so as to give the defendant notice of the charges and allow the defendant to prepare a defense; it is not required to allege facts beyond those sufficient to support the elements of the crime charged or to state the facts with particularity. *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141 (2005) (quoting *State v. Tresenriter*, 101 Wn. App. 486, 491, 4 P.3d 145, 14 P.3d 788 (2000)).

Here, the information stated,

> In that the defendant, JOSEPH MICHAEL DONNETTE-SHERMAN, in the State of Washington, on or about August 4, 2013, did intentionally assault Bruce Alan

[3] Donnette-Sherman appears to have attached to his SAG a variety of materials, but he fails to make reasoned argument based on these materials. Therefore, we do not consider them. He has also attached what appears to be two motions—a motion requesting discovery and a motion to supplement the record—directed to this court. But these motions are not properly before us. We do not address motions that are filed in briefs unless they comply with RAP 17.4(d). These motions do not comply with RAP 17.4(d) because these motions would not preclude hearing the case on the merits if granted. Thus, they are not properly before us and we do not consider them. RAP 17.4(d).

> Boyles with a deadly weapon. It is further alleged that during the commission of this offense, the defendant or an accomplice was armed with a deadly weapon, to-wit: *a machete.*

Clerk's Papers (CP) at 2 (emphasis added). This information contains all of the essential elements of the crime; the precise nature of the weapon used is not an element of the offense. *See Winings*, 126 Wn. App. at 86 (information alleging defendant assaulted another with a deadly weapon was sufficient even though it did not specify the weapon used or the manner in which the defendant used the weapon). Accordingly, Donnette-Sherman has not shown that the charging document was inadequate.

Donnette-Sherman may also be asserting that by mentioning the machete, an object that may be classified as a deadly weapon only under certain circumstances,[4] the information was vague. We distinguish between charging documents that are constitutionally deficient (those that fail to allege sufficient facts supporting each element of the crime charged) and those that are merely vague. *State v. Leach*, 113 Wn.2d 679, 686-87, 782 P.2d 552 (1989). A charging document that states each statutory element of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars. *Leach*, 113 Wn.2d at 687. A defendant may not challenge a charging document for "vagueness" on appeal if he or she failed to request a bill of particulars at trial. *Leach*, 113 Wn.2d at 687. There is nothing in the record suggesting that Donnette-Sherman requested a bill of particulars. Thus, this claim fails.

[4] *See* RCW 9A.04.110(6).

B. JURY INSTRUCTION CLAIMS

Donnette-Sherman next challenges several jury instructions.[5] We review de novo alleged errors of law in jury instructions. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

Donnette-Sherman first claims that jury instructions 6 and 11 were improper because they omitted the term "intentional," which is an element of second degree assault. Jury instruction 6 states, "A person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon." CP at 54. Jury instruction 6 merely defines second degree assault and is an accurate statement of the offense. *See* RCW 9A.36.021(1)(c). Jury instruction 11 is the to-convict instruction, which requires that the jury find that Donnette-Sherman "assaulted" Boyles with a deadly weapon. Our Supreme Court has held that the term assault "adequately conveys the notion of intent" and need not be included as a separate and distinct element in the to-convict instruction. *State v. Davis*, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992); *see also State v. Hall*, 104 Wn. App. 56, 62, 14 P.3d 884 (2000). Thus, the omission of the term "intentional" from these instructions was not error.

Donnette-Sherman also claims that the omission of any reference to intent in jury instruction 6 could lead the jury to "conclude[ ] that assault and intent are separate under the law." SAG at 4. We do not, however, review jury instructions in isolation; we review the jury instructions as a whole. *State v. Prado*, 144 Wn. App. 227, 240, 181 P.3d 901 (2008). Here, jury

[5] Although Donnette-Sherman did not object to each of these alleged errors, we exercise our discretion to examine these arguments because they arguably raise constitutional issues and are easily resolved on the merits. *See* RAP 2.5(a).

instruction 10, which defines assault, clearly instructs the jury that assault requires an intentional act. Thus, the lack of reference to intent in jury instruction 6 is not error.

Donnette-Sherman appears to contend that defining intent in a separate instruction, jury instruction 7, is confusing. But again, the jury must consider the jury instructions as a whole and providing a separate definitional instruction is not likely to confuse the jury.

Donnette-Sherman asserts that jury instruction 10 omits the phrase "'with unlawful force,'" which he appears to suggest impairs his self-defense claim. SAG at 4. Again, we do not read this instruction in isolation. *Prado*, 144 Wn. App. at 240. Jury instruction 13 clearly advised the jury that lawful use of force is a defense to a second degree assault charge. Thus, the omission of the phrase "with unlawful force" in instruction 10 was not error.

Donnette-Sherman next asserts that jury instruction 8 defines deadly weapon as it is defined in RCW 9.41.270, which he asserts was not cited in the charges or the verdict. Jury instruction 8 states, "Deadly weapon means any weapon, device, instrument, substance, or article, 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." CP at 56. This definition was drawn from RCW 9A.04.110(6), which provides definitions under Title 9A RCW, the title under which Donnette-Sherman was charged, not chapter 9.41 RCW. Thus, Donnette-Sherman's claim that jury instruction 8 was based on RCW 9.41.270 has no merit.

Donnette-Sherman further asserts that jury instruction 15 misstates the law, apparently because of how it defines a deadly weapon. He suggests that it is an improper attempt to "define the term 'machete' as a knife with a blade longer than three inches," when "'[m]achete' is not explicitly defined in this way under the Laws of Washington State." SAG at 4. Jury instruction 15 provides, in part,

> A knife having a blade longer than three inches is a deadly weapon. A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.

CP at 64. This instruction properly defines a deadly weapon for purposes of the sentencing enhancement. RCW 9.94A.825. Whether a machete falls under this definition is a question for the jury, regardless of whether the definition expressly includes machetes. Thus, this claim fails.

Donnette-Sherman appears to assert that the use of two definitions of deadly weapon in jury instruction 15 could potentially confuse the jury. Again, we disagree. The jury instruction merely provides alternative definitions of what a deadly weapon is to allow the jury to determine if the machete fit any of these definitions. We hold that this is unlikely to have confused the jury.

Donnette-Sherman further asserts that jury instruction 13 is confusing because it is about "self-defense" but does not use that term.[6] Jury instruction 13 properly states the lawful use of

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[6] Jury instruction 13 stated,

> It is a defense to a charge of Assault in the Second Degree with a Deadly Weapon 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 in preventing or attempting to prevent an offense against the person, 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

force defense. *Prado*, 144 Wn. App. at 238, 247 (identical instruction made the self-defense standard "manifestly apparent" to the average juror). Thus, this claim fails.

Donnette-Sherman also contends that jury instruction 13 did not allow the jury to evaluate his self-defense claim based on his subjective perception of the events. The self-defense standard "incorporates both objective and subjective elements." *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). "Evidence of self-defense is evaluated 'from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.'" *Walden*, 131 Wn.2d at 474 (quoting *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). Jury instruction 13 was based on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 17.02, at 253 (3d ed. 2008), which the courts have determined adequately conveys this standard. *See Prado*, 144 Wn. App. at 248. Thus, this claim fails.

C. SUFFICIENCY CLAIMS

Donnette-Sherman next claims that the evidence was insufficient to establish that the machete was a deadly weapon because it was not used in a manner likely to produce death. We disagree.

We view a claim of insufficient evidence by viewing the evidence and all reasonable inferences from that evidence in the light most favorable to the State and determining whether any

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> appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP at 61.

rational trier of fact could find beyond a reasonable doubt all the elements of the crime. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Donnette-Sherman does not specify whether he is arguing that the evidence was insufficient to prove that the machete was a deadly weapon for purposes of the sentencing enhancement or for the second degree assault conviction.[7] So we will address both.

For a deadly weapon sentencing enhancement, there must be sufficient evidence that the defendant was armed with an actual deadly weapon. *State v. Tongate*, 93 Wn.2d 751, 754-55, 613 P.2d 121 (1980). RCW 9.94A.825 defines a deadly weapon in this context:

> [A] deadly weapon is an implement or instrument which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are included in the term deadly weapon: . . . any knife having a blade longer than three inches.

Here, the machete had a blade well over three inches. Furthermore, even if the jury did not find that the machete was a knife with a blade of more than three inches, a rational trier of fact could have easily concluded beyond a reasonable doubt that swinging a machete at another person with a force sufficient to cut into a cell phone was using the machete in a manner that could easily and readily produce death.

For the second degree assault with a deadly weapon charge, RCW 9A.04.110(6) defines deadly weapon as "any . . . weapon, device, instrument, article, or substance, . . . 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." Again, a rational trier of fact could have easily

[7] The trial court instructed the jury on the definition of a deadly weapon for the purposes of the second degree assault charge and, in a separate instruction specific to the sentencing enhancement, for purposes of the enhancement.

concluded beyond a reasonable doubt that swinging a machete at another person with a force sufficient to cut into a cell phone was using the machete under circumstances that rendered it capable of causing death or substantial bodily harm.

Donnette-Sherman further comments that a jury cannot infer intent from the mere display of a dangerous weapon. Even presuming this statement is correct, the evidence showed more than a display of a weapon—it showed that Donnette-Sherman actually struck at Boyles. Thus, this claim fails.

D. "FALSE EVIDENCE" CLAIM

Donnette-Sherman further claims that the machete admitted at trial was not the one portrayed in the photographic exhibits 8, 9, and 10. Donnette-Sherman did not object to the admission of the machete or to the admission of exhibits 8, 9, and 10. Thus, he has not preserved this claim for review, and we decline to address it. RAP 2.5(a).

E. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Donnette-Sherman next claims that he received ineffective assistance of counsel because he had requested that defense counsel have an expert review the video and photographic evidence. Whether Donnette-Sherman requested his counsel to obtain an expert is outside this record. Accordingly, we cannot address this issue. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Donnette-Sherman appears to contend that defense counsel failed to develop the self-defense claim because he failed to adequately cross-examine Boyles about the incident and his (Boyles's) "mental instability" or "competence" and noting that Boyles was apparently tearful when recounting the incident during his testimony. SAG at 12. The record shows that defense

counsel adequately cross-examined Boyles. Furthermore, Donnette-Sherman does not show that Boyles had any mental health or competency issues that defense counsel should have investigated—a witness becoming emotional when recounting an assault is not unusual and does not necessarily suggest any mental health or competency issues.

F. Improperly Presented Claims

Donnette-Sherman briefly mentions CrR 3.3, the time for trial rule. This brief mention is not sufficient for this court to determine what he is arguing. Accordingly, we do not address this issue further. RAP 10.10(c) (this court will not consider a SAG issue if the appellant's argument "does not inform the court of the nature and occurrence of the alleged errors" and will not search the record to support an appellant's claims).

Donnette-Sherman asserts that the prosecutor's closing argument was "repleat [sic] with false or incorrect leading assumptions the citation of which is onerous to the extent to which it might be easier to list any truth at all." SAG at 14. Because Donnette-Sherman fails to identify the specific statements to which he objects, we do not address this issue. RAP 10.10(c)

G. Cumulative Error

Finally, Donnette-Sherman claims that cumulative error deprived him of a fair trial. Because Donnette-Sherman has failed to establish any error, he cannot establish cumulative error. *State v. Lewis*, 156 Wn. App. 230, 245, 233 P.3d 891 (2010).

Because Donnette-Sherman does not establish ineffective assistance of counsel based on defense counsel's failure to object to the State's closing argument and does not show that the courtroom was closed, and because his SAG issues either fail or cannot be addressed, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.
JOHANSON, J.

We concur:

Bjorgen, C.J.
BJORGEN, C.J.

J.
LEE, J.